International Capital Market Association

ICMA

EUROPEAN COMMISSION REVIEW OF THE PROSPECTUS DIRECTIVE

CONSULTATION DOCUMENT RESPONSES

This document reflects ICMA's response to the European Commission's consultation on the Prospectus Directive review dated 18 February 2015, which was submitted via the European Commission's survey webpage on 1 May 2015.

I. INTRODUCTION

1. Is the principle, whereby a prospectus is required whenever securities are admitted to trading on a regulated market or offered to the public, still valid? In principle, should a prospectus be necessary for:

✓	(i)	Admission to trading on a regulated market
✓	(ii)	An offer of securities to the public
	(iii)	Should a different treatment should be granted to the two purposes (i.e. different types of prospectus for an admission to trading and an offer to the public)
	(iv)	Other
	(v)	Don't know / no opinion

[If third option is selected] **Please describe which different treatment should be granted to the two purposes:** 1,000 character(s) maximum

N/A

[If fourth option is selected] **Please describe what other possible reasons why a prospectus is necessary:** 1,000 character(s) maximum

N/A

Additional comments on the principle whereby a prospectus is required whenever securities are admitted to trading on a regulated market or offered to the public: 1,000 character(s) maximum

Q. 1. ICMA: The PD review has been identified as a priority for early action in the Capital Markets Union (**CMU**) project. The objectives of CMU (once fully identified) will likely require a consideration of the various FSAP Directives in a holistic manner. It would nevertheless be possible to make changes to the PD regime now in order to ensure greater certainty and reduce burdens. We discuss

this further in Annex 1 of the ICMA letter submitted with this survey response, and generally in our responses to this consultation. Suitable "grandfathering" is encouraged, to allow adjustment to any changes.

The general principle of requiring a prospectus for the first non-exempt offer of securities to the public or admission to trading on a regulated market is sensible. However, changes could be made to the definition of "offer of securities to the public" to ensure a prospectus is not required for non-exempt offers in the secondary market. We discuss this further in our response to Q. 48.

2. In order to better understand the costs implied by the prospectus regime for issuers:

(a) Please estimate the cost of producing a prospectus (between how many euros and how many euros for a total consideration of how many euros):

	Minimum cost (in €)	Maximum cost (in €)	For a total consideration of (in €)
Equity prospectus			
Non-equity prospectus	10,000	800,000	
Base prospectus	10,000	800,000	
Initial public offer (IPO) prospectus			
Don't know (add an X in the next three fields)			

Additional comments on the cost of producing a prospectus: 1,000 character(s) maximum

Q. 2.(a). ICMA: Costs vary considerably, depending on the type of issuer, whether the prospectus is "wholesale" or "retail", the complexity and variety of structures contained in the prospectus and whether securities are to be sold in the United States. Figures could increase or decrease, depending on the circumstances. Two points to highlight in particular: (i) the cost of producing a "retail" prospectus, with a summary, is higher than producing a wholesale prospectus and (ii) regulatory changes and pro forma summary requirements introduced in July 2012 significantly increased costs for issuers that year.

(b) What is the share, in per cent, of the following in the total costs of a prospectus:

	Share in the total costs (in %)
Issuer's internal costs	
Audit costs	
Legal fees	
Competent authorities' fees	
Other costs (please specify which)	
Don't know (add an X in the next three fields)	

Additional comments on the share in the total costs of a prospectus: 1,000 character(s) maximum

Q. 2(b). ICMA: Costs vary considerably, depending on the type of issuer, whether the prospectus is "wholesale" or "retail" and the complexity and variety of structures contained in the prospectus.

(c) What fraction of the costs indicated above would be incurred by an issuer anyway, when offering securities to the public or having them admitted to trading on a regulated market, even if there were no prospectus requirements, under both EU and national law? Please estimate this fraction.

✓	(i)	Yes, a percentage of the costs above would be incurred anyway
	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **Please specify which fraction of the costs above would be incurred anyway (in %):**

	%

Additional comments on the fraction of the costs indicated above that would be incurred by an issuer anyway: 1,000 character(s) maximum

Q. 2(c). ICMA: In the absence of a requirement for a prospectus, remaining costs would include, for example, experts' fees (e.g., accountants' fees), fees of parties in the transaction (e.g., agents or trustees), listing or filing fees (e.g., stock exchange fees, listing agent fees or filing fees) and lawyers' fees. It is not possible to estimate the fraction of costs that would be incurred without PD requirements, as this will depend entirely on the circumstances. Different levels of disclosure will vary for different issuers and different products.

3. Bearing in mind that the prospectus, once approved by the home competent authority, enables an issuer to raise financing across all EU capital markets simultaneously, are the additional costs of preparing a prospectus in conformity with EU rules and getting it approved by the competent authority outweighed by the benefit of the passport attached to it?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

Additional comments on the possibility that additional costs are outweighed by the benefit of the passport attached to the prospectus: 1,000 character(s) maximum

Q. 3. ICMA: The majority of issuers who issue vanilla bonds cross-border tend to issue in high denominations and/or to qualified investors only (i.e. on an exempt basis) and do not generally passport wholesale prospectuses for the purpose of admission to trading.

For issuers who sell debt securities to retail investors, this tends, currently, to be on a national, rather than cross-border, basis. As such, the passport for the purposes of public offers only has value to a small proportion of issuers in the debt space.

As mentioned in Q. 2(a), retail prospectuses are more expensive to produce and, additionally, the summary translation requirements for passporting can add significant costs to the overall prospectus costs. However, if retail prospectuses were to become more prevalent (and cheaper and easier to produce), then passporting would be an essential tool.

II. ISSUES FOR DISCUSSION

A. When a prospectus is needed

A1. Adjusting the current exemption thresholds

4. The exemption thresholds in Articles 1(2)(h) and (j), 3(2)(b), (c) and (d), respectively, were initially designed to strike an appropriate balance between investor protection and alleviating the administrative burden on small issuers and small offers. Should these thresholds be adjusted again so that a larger number of offers can be carried out without a prospectus? If yes, to which levels? Please provide reasoning for your answer.

(a) the EUR 5 000 000 threshold of Article 1(2)(h):

	(i)	Yes, from EUR 5 000 000 to more
	(ii)	No
✓	(iii)	Don't know / no opinion

[If first option is selected] **Please specify from EUR 5 000 000 up to how many euros:**

N/A	€

Please justify your answer on the EUR 5 000 000 threshold: 1,000 character(s) maximum

Q. 4(a). ICMA: ICMA's lead manager constituency tends to focus on Eurobonds with a consideration of more than €5,000,000 and so we express no opinion on this point.

(b) the EUR 75 000 000 threshold of Article 1(2)(j):

	(i)	Yes, from EUR 75 000 000 to more
	(ii)	No
✓	(iii)	Don't know / no opinion

[If first option is selected] **Please specify from EUR 75 000 000 up to how many euros:**

N/A	€

Please justify your answer on the EUR 75 000 000 threshold: 1,000 character(s) maximum

Q. 4(b). ICMA: This is not an area of focus for ICMA's lead manager constituency.

(c) the 150 persons threshold of Article 3(2)(b):

	(i)	Yes, from 150 persons to more
✓	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **Please specify from 150 persons up to how many persons:**

N/A	persons

Please justify your answer on the 150 persons threshold: 1,000 character(s) maximum

Q. 4(c). ICMA: The 150 person exemption is rarely used or relied upon by ICMA members because it is difficult to monitor compliance in practice. Having said that, it is difficult to see how raising this threshold alone could significantly reduce burdens for issuers without impacting investor protection. As such, there does not appear to be any reason to change it.

(d) the EUR 100 000 threshold of Article 3(2)(c) & (d):

	(i)	Yes, from EUR 100 000 to more
✓	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **Please specify from EUR 100 000 up to how many euros:]**

N/A	€

Please justify your answer on the EUR 100 000 threshold: 1,000 character(s) maximum

Q. 4(d). ICMA: There is no need to increase the threshold. First, no evidence suggests that retail investors buy high denomination securities. Secondly, higher denominations might reduce the ability of fund managers to allocate bonds between funds (to alleviate concentration risk) and of institutional investors (e.g. insurance companies or pension funds) to match assets and liabilities. This is because some issuers cannot, for legal reasons, issue in multiple denominations above the threshold (such as, €100,000 or higher integral multiples of €1,000). Thirdly, any threshold increase would restrict an issuer's ability to tap existing issues to create larger, more liquid bonds.

Q. 4(d) seems to solicit views on an increase only. For other comments on the threshold (namely, removing it for disclosure purposes), please see ICMA's responses to Section A6 and suggestions for a simplified prospectus disclosure regime in paragraphs 6 – 8 of Annex 1 to the ICMA letter submitted with this survey response.

5. Would more harmonisation be beneficial in areas currently left to Member States' discretion, such as the flexibility given to Member States to require a prospectus for offers of securities with a total consideration below EUR 5 000 000?

	(i)	Yes
	(ii)	No
	(iii)	Other areas
✓	(iv)	Don't know / no opinion

[If third option is selected] **Please specify what other area:** 1,000 character(s) maximum]

N/A

Please justify your answer on whether more harmonisation be beneficial: 1,000 character(s) maximum

Q. 5. ICMA: Offers of securities with a total consideration below €5,000,000 is not an area of focus for ICMA's lead manager constituency. However, allowing Member States to have discretion in

particular areas is not harmful per se. Indeed, it can allow the development of local retail markets. See further Q. 7 below.

6. Do you see a need for including a wider range of securities in the scope of the Directive than transferable securities as defined in Article 2(1)(a)?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

Please justify your answer on the possibility of including a wider range of securities in the scope of the Directive: 1,000 character(s) maximum

Q. 6. ICMA: The definition of transferable securities currently excludes money market instruments (**MMIs**) with a maturity of less than 12 months. This should be maintained. The investor base for MMIs is institutional investors who generally buy and hold. Accordingly, there is no retail investment in such instruments and the professional investors who do invest are not in need of regulatory protection under the PD.

More importantly, introducing PD requirements for MMIs could make issuance uneconomical for issuers. The time to prepare a prospectus might be longer than the instrument's term (potentially, as short as 1 day). Furthermore, documentation in the ECP market is already largely standardised. Extending the Prospectus Directive obligations into the MMI space would therefore jeopardise the functioning of a market which is a crucial funding tool for Europe's banks and corporates, with little or no benefit for investors in that market.

7. Can you identify any other area where the scope of the Directive should be revised and if so how? Could other types of offers and admissions to trading be carried out without a prospectus without reducing consumer protection?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **Please specify what other area:** 1,000 character(s) maximum]

Q. 7. ICMA: In conjunction with the pan-European regime under the PD, one possibility would be to give Member States the scope to introduce a new "parallel" domestic regime, with an exemption for purely domestic offers of securities.

Please justify your answer on possible other area: 1,000 character(s) maximum

Q. 7. ICMA: The concept of an exemption for purely domestic offers would mean that those offers would be outside the scope of the PD and subject to national law only. The exemption would be optional for Member States to implement and would be intended to give national regulators an alternative route/opportunity to develop domestic retail markets under their own laws.

As an aside, on the question of prospectuses, consumer protection and disclosure, Annex 1 to the ICMA letter which accompanies this survey response proposes removal of the arbitrary distinction between denominations below and above €100,000 for prospectus disclosure purposes (see paragraphs 6 - 8 of Annex 1).

A2. Creating an exemption for "secondary issuances" under certain conditions

8. Do you agree that while an initial public offer of securities requires a full-blown prospectus, the obligation to draw up a prospectus could be mitigated or lifted for any subsequent secondary issuances of the same securities, provided that relevant information updates are made available by the issuer?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

Please justify your answer on the possible mitigation of the obligation to draw up a prospectus: 1,000 character(s) maximum

Q. 8. ICMA: There is a distinction between "secondary" offers, where someone other than the issuer is offering existing securities (see our response to Q. 48(a) below), and secondary issuances, where an issuer is raising "new money" through an additional issue of new debt to be fungible with the original issue (a "tap issue").

A prospectus should be required for "taps". Not only is the issuer capable of preparing a prospectus, but, also, there can be a significant time lapse between the original and subsequent issue and other differences which need to be disclosed, such as, use of proceeds.

Removing barriers to "secondary issuance" could help to increase secondary market liquidity because debt issues of larger sizes are generally less illiquid than smaller ones. However, this could be done by simplifying prospectus disclosure overall, as described in Annex 1 to the ICMA letter which accompanies this survey response (such as, allowing incorporation of future specified information by reference).

9. How should Article 4(2)(a) be amended in order to achieve this objective?

	(i)	The 10% threshold should be raised
	(ii)	The exemption should apply to all secondary issuances of fungible securities, regardless of their proportion with respect to those already issued
✓	(iii)	No amendment
	(iv)	Don't know / no opinion

[If first option is selected] **Please specify to what extent the 10% threshold should be raised:**

	%

Please justify your answer on the amendment of Article 4(2): 1,000 character(s) maximum

Q. 9. ICMA: Please see the response to Q. 8, above, and Annex 1 to the ICMA letter accompanying this survey response (for example, see paragraphs 18-25).

10. If the exemption for secondary issuances were to be made conditional to a full-blown prospectus having been approved within a certain period of time, which timeframe would be appropriate?

	(i)	One or several years
	(ii)	There should be no timeframe (i.e. the exemption should still apply if a prospectus was approved ten years ago)
✓	(iii)	Don't know / no opinion

Please specify the length of the ideal timeframe (in years):

	years

Please justify your answer on the convenience of having a timeframe for the exemption: 1,000 character(s) maximum

Q. 10. ICMA: Please see the response to Q.8, above, and Annex 1 to the ICMA letter which accompanies this survey (for example, see paragraphs 18-25).

A3. Extending the prospectus to admission to trading on an MTF

11. Do you think that a prospectus should be required when securities are admitted to trading on an MTF?

	(i)	Yes, on all MTFs
	(ii)	Yes, but only on those MTFs registered as SME growth markets
✓	(iii)	No
	(iv)	Don't know / no opinion

Please justify your answer on whether a prospectus should be required when securities are admitted to trading on an MTF: 1,000 character(s) maximum

Q. 11. ICMA: Extending the scope of the PD to MTFs is contrary to the principles of CMU. It would increase barriers to issuance by removing flexibility and may result in transactions being executed outside the EEA.

MTF listing is a valuable alternative option for EEA and non-EEA issuers desiring a more flexible regime, either from a practical or procedural perspective. For example, an issuer of securities guaranteed by various guarantors may find it easier to list on an MTF due to the more flexible approach taken to accounting standards.

MTFs exist in various forms and issuers are not restricted to using one MTF, so the lack of a "level playing field" for MTF rules does not appear to present a problem for issuers.

In addition, bonds listed on the most commonly used MTFs for bonds are generally not targeted at retail investors and retail investors typically do not use those markets. It is therefore not inappropriate for there to be more flexible rules in this space.

12. Were the scope of the Directive extended to the admission of securities to trading on MTFs, do you think that the proportionate disclosure regime (either amended or unamended) should apply?

	(i)	Yes, the amended regime should apply to all MTFs
	(ii)	Yes, the unamended regime should apply to all MTFs
	(iii)	Yes, the amended regime should apply but not to those MTFs registered as SME growth markets
	(iv)	Yes, the unamended regime should apply but not to those MTFs registered as SME growth markets
	(v)	Yes, the amended regime should apply but only to those MTFs registered as SME growth markets
	(vi)	Yes, the unamended regime should apply but only to those MTFs registered as SME growth markets
✓	(vii)	No
	(viii)	Don't know / no opinion

Please justify your answer on the possible application of the proportionate disclosure regime: 1,000 character(s) maximum

Q. 12. ICMA: The lighter prospectus framework introduced by the proportionate disclosure regime has not had its intended effect and is not widely used in practice. The main reason given for such ineffectiveness and disuse is that the regime is still perceived as too burdensome. Therefore, it is our view that the application of the proportionate disclosure regime to securities admitted to trading on MTFs would entail many of the same burdens and negative impacts described above with respect to full application of the Directive to MTFs. For this reason, and the reasons stated under Q. 11, above, we do not believe that the PD should be extended to securities admitted to trading on MTFs, whether under the proportionate disclosure regime or not.

A4. Exemption of prospectus for certain types of closed-ended alternative investment funds (AIFs)

13. Should future European long term investment funds (ELTIF), as well as certain European social entrepreneurship funds (EuSEF) and European venture capital funds (EuVECA) of the closed-ended type and marketed to non-professional investors be exempted from the obligation to prepare a prospectus under the Directive, while remaining subject to the bespoke disclosure requirements under their sectorial legislation and to the PRIIPS key information document?

	(i)	Yes, such an exemption would not affect investor/consumer protection in a significant way
	(ii)	No, such an exemption would affect investor/consumer protection
✓	(iii)	Don't know / no opinion

Please state your reasoning, if necessary by drawing comparisons between the different sets of disclosure requirements which cumulate for these funds: 1,000 character(s) maximum

Q. 13. ICMA: This is not an area of focus for ICMA's lead manager constituency and as such we express no opinion.

A5. Extending the exemption for employee share schemes

14. Is there a need to extend the scope of the exemption provided to employee shares schemes in Article 4(1)(e) to non-EU, private companies?

	(i)	Yes
	(ii)	No
✓	(iii)	Don't know / no opinion

Please explain your answer on the possible extension of the scope of the exemption provided to employee shares schemes in Article 4(1)(e) to non-EU, private companies and provide supporting evidence: 1,000 character(s) maximum

Q. 14. ICMA: This is not an area of focus for ICMA's lead manager constituency and as such we express no opinion.

A6. Balancing the favourable treatment of issuers of debt securities with a high denomination per unit with liquidity on the debt markets

15. Do you consider that the system of exemptions granted to issuers of debt securities above a denomination per unit of EUR 100 000 under the Prospectus and Transparency Directives may be detrimental to liquidity in corporate bond markets?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

[If first option selected] **If so, what targeted changes could be made to address this without reducing investor protection?** 1,000 character(s) maximum

Q. 15. ICMA: Please see our responses to Q. 15(a), (b) and (c), and paragraphs 6 - 8 of Annex 1 to the ICMA letter submitted with this response, which suggests a simplification of the disclosure regime and removal of the €100,000 threshold for disclosure purposes.

As an aside, if €100,000 denomination disclosure thresholds are maintained in the PD Regulation, then it would be helpful if consideration could be given to referring to a minimum consideration amount of €100,000 (in addition to denominations of €100,000) in the PD Regulation and the Transparency Directive. This would give more flexibility to issuers who (for reasons such as national contract or company law specificities) are unable to offer securities in multiple denominations such as €100,000 or higher integral multiples of €1000. The legislation would also need to be clear as to whether such minimum consideration amount would need to apply on the primary issuance only or throughout the life of the security.

Please justify your answer on whether the system of exemptions may be detrimental to liquidity in corporate bond markets: 1,000 character(s) maximum

Q. 15. ICMA: It is difficult to obtain data in relation to secondary bond market liquidity. Anecdotal evidence suggests that, in the wholesale market where trades are executed in large sizes, minimum denominations of €100,000 and higher integral multiples of €1,000 might not have a large impact on secondary market liquidity. However, some issuers, for legal reasons, are unable to issue in multiple denominations (such as €100,000 or higher integral multiples of €1,000). For such issuers, it seems reasonable to conclude that bonds with large minimum denominations may be more illiquid than those with low denominations. Small minimum denominations might allow more flexibility in trading those bonds, which may increase the levels of trading and, additionally, are likely to result in fewer fails in the secondary market where "partial delivery" is a possibility, because partial delivery is likely to be easier if the bond has smaller denominations.

(a) Do you then think that the EUR 100 000 threshold should be lowered?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **Please specify to which amount (in euro) the EUR 100 000 threshold should be lowered:**

0	€

Please justify your answer on whether the EUR 100 000 threshold should be lowered: 1,000 character(s) maximum

Q. 15(a). ICMA: The €100,000 threshold is used in different contexts, including to determine the prospectus disclosure. For prospectus disclosure purposes (that is, which PD Regulation Annexes to use and whether a summary is required), the €100,000 threshold should be removed. This will encourage issuers to issue debt securities with lower minimum denominations, which could assist secondary market liquidity, allow fund managers to allocate bonds across various funds more easily (reducing concentration risk) and assist institutional investors in matching assets and liabilities. This approach should not damage retail investor protection as evidence shows that retail investors do not read or understand prospectuses. Retail investor protection should be achieved through means other than direct disclosure, such as, through intermediation for certain retail investors. See paragraphs 6 - 13 of Annex 1 to the ICMA letter submitted with this survey response, which discuss simplified disclosure.

(b) Do you then think that some or all of the favourable treatments granted to the above issuers should be removed?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **Please indicate to what extent the favourable treatments granted to the above issuers should be removed:** 1,000 character(s) maximum

N/A

Please justify your answer on whether the favourable treatments granted to the above issuers should be removed: 1,000 character(s) maximum

Q. 15(b). ICMA: Removing the favourable treatment currently given to issuers of securities with a denomination of at least €100,000 would increase the PD burdens for a significant proportion of issuers who currently issue those securities. It would therefore increase costs for those issuers and be counter to the aims of the CMU initiative. It may even result in a reduction of issuance levels in Europe, with some large issuers choosing to access capital markets in other parts of the world. In addition, it would not result in any greater level of meaningful investor protection. Institutional investors do not need the increased levels of disclosure currently required for securities with a denomination below €100,000 (indeed they may find it unhelpful to have prospectuses cluttered with information they do not require). Evidence shows that most retail investors do not read or understand prospectuses in any event. See further paragraph 8 of Annex 1 to the ICMA letter submitted with this survey response.

(c) Do you then think that the EUR 100 000 threshold should be removed altogether and the current exemptions should be granted to all debt issuers, regardless of the denomination per unit of their debt securities?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please justify your answer on whether the EUR 100 000 threshold should be removed altogether and the current exemptions should be granted to all debt issuers, regardless of the denomination per unit of their debt securities: 1,000 character(s) maximum

Q. 15(c). ICMA: As per answer to Q. 15(a) above. See further paragraphs 6 – 13 in Annex 1 of the ICMA letter submitted with this survey response and the discussions about a simplified disclosure for securities, irrespective of denomination. If, however, the European Commission is not inclined to adopt this suggested simplified approach across the board, we would argue strongly that the current simplified disclosure regime for prospectuses for securities above the €100,000 denomination threshold should be retained, in order to avoid issuers incurring the increased costs of preparing "retail" disclosure for "wholesale" offers.

B. The information a prospectus should contain

B1. Proportionate disclosure regime

16. In your view, has the proportionate disclosure regime (Article 7(2)(e) and (g)) met its original purpose to improve efficiency and to take account of the size of issuers? If not, why?

	(i)	Yes
	(ii)	No
✓	(iii)	Don't know / no opinion

Please justify your answer on whether the proportionate disclosure regime has met its original purpose: 1,000 character(s) maximum

Q. 16. ICMA: This is not an area of focus for ICMA's lead manager constituency and as such we express no opinion.

17. Is the proportionate disclosure regime (Article 7(2)(e) and (g)) used in practice, and if not what are the reasons? Please specify your answers according to the type of disclosure regime.

(a) Proportionate regime for rights issues

	(i)	Yes
	(ii)	No
✓	(iii)	Don't know / no opinion

Please justify your answer on the proportionate regime for rights issues: 1,000 character(s) maximum

Q. 17(a). ICMA: This is not an area of focus for ICMA's lead manager constituency and as such we express no opinion.

(b) Proportionate regime for small and medium-sized enterprises and companies with reduced market capitalisation

	(i)	Yes
	(ii)	No
✓	(iii)	Don't know / no opinion

Please justify your answer on the proportionate regime for small and medium-sized enterprises and companies with reduced market capitalisation: 1,000 character(s) maximum

Q. 17(b). ICMA: This is not an area of focus for ICMA's lead manager constituency and as such we express no opinion.

(c) Proportionate regime for issues by credit institutions referred to in Article 1(2)(j) of Directive 2003/71/EC

	(i)	Yes
	(ii)	No
✓	(iii)	Don't know / no opinion

Please justify your answer on the proportionate regime for issues by credit institutions referred to in Article 1(2)(j) of Directive 2003/71/EC: 1,000 character(s) maximum

Q. 17(c). ICMA: This is not an area of focus for ICMA's lead manager constituency and as such we express no opinion.

18. Should the proportionate disclosure regime be modified to improve its efficiency, and how? Please specify your answers according to the type of disclosure regime.

(a) Proportionate regime for rights issues: 1,000 character(s) maximum

(b) Proportionate regime for small and medium-sized enterprises and companies with reduced market capitalisation: 1,000 character(s) maximum

(c) Proportionate regime for issues by credit institutions referred to in Article 1(2)(j) of Directive 2003/71/EC: 1,000 character(s) maximum

Q. 18. ICMA: This is not an area of focus for ICMA's lead manager constituency and as such we express no opinion.

19. If the proportionate disclosure regime were to be extended, to whom should it be extended?

	(i)	To types of issuers or issues not yet covered
	(ii)	To admissions of securities to trading on an MTF, supposing those are brought into the scope of the Directive
	(iii)	Other
✓	(iv)	Don't know / no opinion

[If first option is selected] **Please specify which types of issuers or issues not yet covered:** 1,000 character(s) maximum

N/A

[If second option is selected] **Please specify which admissions of securities to trading on an MTF:** 1,000 character(s) maximum

N/A

[If third option is selected] **Please specify which other possibilities:** 1,000 character(s) maximum

N/A

Please justify your answer on to whom the proportionate disclosure regime should be extended: 1,000 character(s) maximum

Q. 19. ICMA: This is not an area of focus for ICMA's lead manager constituency and as such we express no opinion.

B2. Creating a bespoke regime for companies admitted to trading on SME growth markets

20. Should the definition of "company with reduced market capitalisation" (Article 2(1)(t)) be aligned with the definition of SME under Article 4(1)(13) of Directive 2014/65/EU by raising the capitalisation limit to EUR 200 000 000?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please justify your answer on the possible alignment of "company with reduced market capitalisation" (Article 2(1)(t)) with the definition of SME under Article 4(1)(13) of Directive 2014/65/EU by raising the capitalisation limit to EUR 200 000 000: 1,000 character(s) maximum

Q. 20. ICMA: SME finance is not a traditional area of focus for ICMA's primary market constituency, but some high level thoughts on SMEs are set out in paragraph 4(iii) of Annex 1 to the ICMA letter submitted with this response.

21. Would you support the creation of a simplified prospectus for SMEs and companies with reduced market capitalisation admitted to trading on an SME growth market, in order to facilitate their access to capital market financing?

	(i)	Yes
✓	(ii)	No, the higher risk profile of SMEs and companies with reduced market capitalisation justifies disclosure standards that are as high as for issuers listed on regulated markets
	(iii)	Don't know / no opinion

Please justify your answer on the possible creation of a simplified prospectus for SMEs and companies with reduced market capitalisation admitted to trading on an SME growth market: 1,000 character(s) maximum

Q. 21. ICMA: SME finance is not a traditional area of focus for ICMA's primary market constituency, but some high level thoughts on SMEs are set out in paragraph 4(iii) of Annex 1 to the ICMA letter submitted with this survey response.

22. Please describe the minimum elements needed of the simplified prospectus for SMEs and companies with reduced market capitalisation admitted to trading on an SME growth market: 2,000 character(s) maximum

Q. 22. ICMA: Some high level thoughts on SMEs are set out in paragraph 4(iii) of Annex 1 to the ICMA letter submitted with this survey response.
As a general principle, though, the fact that standard prospectus disclosure is costly for an issuer should not override the need for investor protection. If, as suggested in paragraphs 14 – 17 of Annex 1 to the ICMA letter submitted with this response, a revised test is adopted in relation to Article 5 of the Prospectus Directive (under which, for debt securities, disclosure requirements would be more

closely aligned to the issuer's credit risk / ability to repay), this should help to alleviate the disclosure burden on issuers of all types, including SMEs.

B3. Making the "incorporation by reference" mechanism more flexible and assessing the need for supplements in case of parallel disclosure of inside information

23. Should the provision of Article 11 (incorporation by reference) be recalibrated in order to achieve more flexibility?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **Please indicate how this could be achieved (in particular, indicate which documents should be allowed to be incorporated by reference):** 1,000 character(s) maximum

Q. 23. ICMA: Please see ICMA's response to ESMA's Omnibus II consultation paper, available here: http://www.icmagroup.org/assets/documents/Events/ESMA-CP-Omnibus-II---FINAL-ICMA-response.pdf. In summary, Article 11 should be amended to clarify that issuers should be able to incorporate by reference any and all regulatory filings made, voluntarily or otherwise, in accordance with the PD or the TD (and Member States' relevant implementing measures). In addition, Article 11 should be amended to allow incorporation by reference of any document filed with the competent authority contemporaneously, during the approval process for the draft prospectus. This should also be available to first-time issuers.

See separately paragraphs 18 – 21 of Annex 1 of the ICMA letter accompanying this survey response for suggestions regarding possible incorporation by reference of future specified information.

Please justify your answer on the possible recalibration of the provision of Article 11 (incorporation by reference) in order to achieve more flexibility: 1,000 character(s) maximum

Q. 23. ICMA: Please see ICMA's response to ESMA's Omnibus II consultation paper, available here: http://www.icmagroup.org/assets/documents/Events/ESMA-CP-Omnibus-II---FINAL-ICMA-response.pdf. In summary, incorporation by reference is a valuable tool that greatly reduces cost and administrative burdens on issuers without impacting investor protection, because investors are still able to access the information incorporated by reference.

24. (a) Should documents which were already published/filed under the Transparency Directive no longer need to be subject to incorporation by reference in the prospectus (i.e. neither a substantial repetition of substance nor a reference to the document would need to be included in the prospectus as it would be assumed that potential investors have anyhow access and thus knowledge of the content of these documents)?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

Please justify your answer on whether documents which were already published/filed under the Transparency Directive should no longer need to be subject to incorporation by reference in the prospectus: 1,000 character(s) maximum

Q. 24(a). ICMA: See paragraphs 18 – 21 of Annex 1 in the ICMA letter submitted with this survey response in which we outline the potential problems with not incorporating "regulated information" disclosed under the TD and MAD by reference and suggest instead that incorporation of certain specific future information would be helpful to issuers and investors alike.

(b) Do you see any other possibilities to better streamline the disclosure requirements of the Prospectus Directive and the Transparency Directive?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please justify your whether you see any other possibilities to better streamline the disclosure requirements of the Prospectus Directive and the Transparency Directive: 1,000 character(s) maximum

Q. 24(b). ICMA: See paragraphs 18 – 21 contained in Annex 1 of the ICMA letter submitted with this survey response about permitting incorporation by reference of certain specified future information and how a supplement and "withdrawal right" regime could work in that context.

25. Article 6(1) Market Abuse Directive obliges issuers of financial instruments to inform the public as soon as possible of inside information which directly concerns the said issuers; the inside information has to be made public by the issuer in a manner which enables fast access and complete, correct and timely assessment of the information by the public. Could this obligation substitute the requirement in the Prospectus Directive to publish a supplement according to Article 17 without jeopardising investor protection in order to streamline the disclosure requirements between Market Abuse Directive and Prospectus Directive?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

Please justify your whether the above-mentioned obligation could substitute the requirement in the Prospectus Directive to publish a supplement according to Article 17 without jeopardising investor protection in order to streamline the disclosure requirements between Market Abuse Directive and Prospectus Directive: 1,000 character(s) maximum

Q. 25. ICMA: See further paragraphs 18 – 21 contained in Annex 1 of the ICMA letter submitted with this survey response which propose incorporation by reference of certain specified future information.

In relation to the interaction of the PD with disclosures under Article 6(1) of MAD, consideration needs to be given to how this might change when MAR comes into force in July 2016. Given that

MAR Level 2 has not yet been published, it is not clear what the precise implications might be, so we are responding to this consultation question with the principle and broad type of a disclosure made under the current MAD Article 6(1) in mind.

26. Do you see any other possibility to better streamline the disclosure requirements of the Market Abuse Directive and the Prospectus Directive?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please justify whether you see any other possibility to better streamline the disclosure requirements of the Market Abuse Directive and the Prospectus Directive: 1,000 character(s) maximum

Q. 26. ICMA: See paragraphs 18 – 21 contained in Annex 1 of the ICMA letter submitted with this survey response about permitting incorporation by reference of certain specified future information.

B4. Reassessing the objectives of the prospectus summary and addressing possible overlaps with the key information document required under the PRIIPs Regulation

27. Is there a need to reassess the rules regarding the summary of the prospectus?

✓	(i)	Yes, regarding the concept of key information and its usefulness for retail investors
✓	(ii)	Yes, regarding the comparability of the summaries of similar securities
✓	(iii)	Yes, regarding the interaction with final terms in base prospectuses
	(iv)	No
	(v)	Don't know / no opinion

[If first option is selected] **Please provide suggestions for re-assessment of the concept of key information and its usefulness for retail investors:** 1,000 character(s) maximum

Q. 27. ICMA: In the letter submitted with this survey response, ICMA suggests simplifying prospectus disclosure, including removing prescribed summaries (paragraph 8). Generally, summaries could be retained (to help intermediaries advise retail clients), unless the prospectus relates to an exempt offer.

We suggest reverting to a more flexible regime for summaries (removing Annex XXII and Art. 24 in the PD Regulation). The prospectus is a marketing tool, as well as being an investor protection tool, so issuers benefit from giving appropriate information clearly. The general concepts underpinning a summary are that it should be clear and contain information on the important commercial terms of the securities. The PD should give a clear indication of what those terms are (e.g. affecting the amount or timing of payments).

There is also a fundamental question surrounding the information to be included in a prospectus itself. This would impact the summary. See further Q. 29.

[If second option is selected] **Please provide suggestions for re-assessment of the comparability of the summaries of similar securities:** 1,000 character(s) maximum

Q. 27. (second option). ICMA: We understand the goal of the prescribed format summary was to increase comparability of different securities. However, as stated above, the prescribed format summary is very difficult to understand (particularly in a base prospectus context with a combined base prospectus and issue-specific summary) and so has not achieved the goal of allowing comparability.

The fundamental questions relating to summaries noted in our response to Q. 27(i) apply equally to the question of comparability of summaries. Those questions aside, the suggestion made in our response to Q. 27(i) regarding a return to a more flexible regime would mean that summaries were easier to understand and therefore more easy to compare.

[If third option is selected] **Please provide suggestions for re-assessment of the interaction with final terms in base prospectuses:** 1,000 character(s) maximum

Q. 27. (third option). ICMA: To the extent a prescribed format summary requirement is maintained, please see paragraphs 32 - 43 contained in Annex 2 of the ICMA letter submitted with this survey response which discusses issue-specific summaries.

Please justify your answer on the possibility to reassess the rules regarding the summary of the prospectus: 1,000 character(s) maximum

Q. 27. ICMA: The detailed summary requirements in Annex XXII introduced following the last review of the PD made retail prospectuses more expensive for issuers to produce yet have not resulted in summaries that are easy to understand for retail investors because the format is difficult to understand (particularly in the base prospectus context) and the Annex XXII requirements mean that summaries arguably contain information that is not strictly necessary for investors.

28. For those securities falling under the scope of both the packaged retail and insurance-based investment products (PRIIPS) Regulation, how should the overlap of information required to be disclosed in the key investor document (KID) and in the prospectus summary, be addressed?

	(i)	By providing that information already featured in the KID need not be duplicated in the prospectus summary
✓	(ii)	By eliminating the prospectus summary for those securities
	(iii)	By aligning the format and content of the prospectus summary with those of the KID required under the PRIIPS Regulation, in order to minimise costs and promote comparability of products
	(iv)	Other
	(v)	Don't know / no opinion

[If first option is selected] **Please indicate which redundant information would be concerned:** 1,000 character(s) maximum]

N/A

[If fourth option is selected] **Please specify which other ways you would consider to addressing the overlap of information required to be disclosed:** 1,000 character(s) maximum

N/A

Please justify your answer on the possible ways to address the overlap of information required to be disclosed: 1,000 character(s) maximum

Q. 28. ICMA: For the reasons mentioned above, the summary is currently not a document that can be easily understood by retail investors. Even if the regime were to be amended to give flexibility to issuers to prepare a comprehensible summary, it is difficult to see how retail investor protection would be significantly increased (or indeed increased at all) by a summary being available as well as a KID – in fact, to the contrary, it may prove to be more confusing. Requiring both documents would therefore be a cost for issuers without benefit, which is contrary to the principles of CMU. In addition, for securities issued under a base prospectus, the programme summary will be available in any event.

B5. Imposing a length limit to prospectuses

29. Would you support introducing a maximum length to the prospectus? If so, how should such a limit be defined?

	(i)	Yes, it should be defined by a maximum number of pages
	(ii)	Yes, it should be defined using other criteria
✓	(iii)	No
	(iv)	Don't know / no opinion

[If first option is selected] **What should be the maximum number of pages?**

N/A	pages

[If second option is selected] **What other criteria could be used to set the maximum length of the prospectus:** 1,000 character(s) maximum

N/A

Please justify your answer on the possible introduction of a maximum length to the prospectus: 1,000 character(s) maximum

Q. 29. ICMA: We note the concern that investors may not read long documents, however simply limiting the length seems too blunt a solution.

PD Art. 5 requires prospectuses to include all information necessary to enable investors to make an informed investment decision, whilst the PR Annexes set out detailed content requirements. It may be possible to amend PD Art 5 and the PR Annexes to encourage issuers to prepare shorter prospectuses (see further paragraphs 14 – 17 of Annex 1 contained in the ICMA letter submitted with this survey response), but the length should not be subject to a strict limit because the issuer is liable for the prospectus. Limiting the length could therefore cause significant liability risk for issuers if they are unable to include all information that they consider relevant for investors. A length limit may therefore impact issuers' ability/appetite to issue securities.

30. Alternatively, are there specific sections of the prospectus which could be made subject to rules limiting excessive lengths? How should such limitations be spelled out? 1,000 character(s) maximum

Q. 30. ICMA: For the reasons outlined above, the PD should not set length limits on the whole or any part of the prospectus.

B6. Liability and sanctions

31. Do you believe the liability and sanctions regimes the Directive provides for are adequate?

	Yes	No	No opinion
The overall civil liability regime of Article 6	✓		
The specific civil liability regime for prospectus summaries of Article 5(2)(d) and Article 6(2)	✓		
The sanctions regime of Article 25	✓		

[If any box ticked "No"] **If not, how could they be improved?** 1,000 character(s) maximum

N/A

Please justify your answer on the adequacy of the liability and sanctions regimes the Directive provides for: 1,000 character(s) maximum

Q. 31. ICMA: The current liability regime in the PD, under Articles 5, 6 and 25 of the PD and the obligation for an issuer to compensate an investor are adequate.

32. Have you identified problems relating to multi-jurisdiction (cross-border) liability with regards to the Directive?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **If you have identified problems relating to multi-jurisdiction (cross-border) liability, please give details:** 1,000 character(s) maximum

Q. 32. ICMA: Cross-border liability and conflicts of laws is an area of concern. Streamlining and simplifying the regime would provide greater certainty to an issuer about the jurisdictions in which it might potentially face legal action. There are a number of possible options available (including, for example, providing that the applicable law and jurisdiction would be determined by reference to the governing law of the securities or the jurisdiction in which the prospectus is approved and which could either be determined by issuer choice or by operation of law). However, this is an area for further detailed debate and consultation, with no immediate consensus.

Please justify your answer on possible problems relating to multi-jurisdiction (cross-border) liability: 1,000 character(s) maximum

Q. 32. ICMA: See paragraphs 26 – 27 contained in Annex 1 of the ICMA letter submitted with this response survey which discuss cross-border liability issues.

C. How prospectuses are approved

C1. Streamlining further the scrutiny and approval process of prospectuses by national competent authorities (NCAs)

33. Are you aware of material differences in the way national competent authorities assess the completeness, consistency and comprehensibility of the draft prospectuses that are submitted to them for approval?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **If you aware of material differences, please provide examples/evidence:** 1,000 character(s) maximum

Q. 33. ICMA: Please see the ESMA Consultation Paper dated 25 September 2014 (ESMA/2014/1186) Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive which considers approvals by competent authorities: http://www.esma.europa.eu/system/files/2014-1186_consultation_paper_on_omnibus_ii_rts.pdf.

Please justify your answer on possible material differences in the way national competent authorities assess the completeness, consistency and comprehensibility of the draft prospectuses: 1,000 character(s) maximum

Q. 33. ICMA: Please see the ESMA Consultation Paper dated 25 September 2014 (ESMA/2014/1186) Draft Regulatory Technical Standards on prospectus related issues under the Omnibus II Directive which considers approvals by competent authorities: http://www.esma.europa.eu/system/files/2014-1186_consultation_paper_on_omnibus_ii_rts.pdf

34. Do you see a need for further streamlining of the scrutiny and approval procedures of prospectuses by NCAs?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **If you think there is a need for further streamlining of the scrutiny and approval procedures of prospectuses by NCAs, please specify in which regard:** 1,000 character(s) maximum

N/A

Please justify your answer on the possible need for further streamlining of the scrutiny and approval procedures of prospectuses by NCAs: 1,000 character(s) maximum

Q. 34. ICMA: While additional and/or varying requirements and procedures imposed by certain NCAs can impact on the costs to issuers to prepare prospectuses and does not reflect the fact that the PD is intended to be a maximum harmonisation regime, further streamlining of approval procedures is not something that should be dealt with via legislation. Harmonising practice in this area would be more appropriately dealt with through the auspices of ESMA, rather than amending legislation.

35. Should the scrutiny and approval procedure be made more transparent to the public?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **If you think the scrutiny and approval procedure should be made more transparent to the public, please indicate how this should be achieved:** 1,000 character(s) maximum

N/A

Please justify your answer on the opportunity to make the scrutiny and approval procedure more transparent to the public: 1,000 character(s) maximum

Q. 35. ICMA: We suggest that the current process is maintained.
Issuers are already able to undertake marketing activities before the prospectus is approved, within the PD advertising regime and financial promotion regimes. Making draft prospectuses public would not be beneficial to investors who would need to review multiple drafts of the prospectus and would raise liability concerns for issuers, if investors seek to rely on superseded drafts. Separately, there might be reputational issues for any parties associated with the transaction, should it not proceed.

36. Would it be conceivable to allow marketing activities by the issuer in the period between the first submission of a draft prospectus and the approval of its final version, under the premise that no legally binding purchase or subscription would take place until the prospectus is approved?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

[If first option is selected] **If you think it is conceivable to allow marketing activities by the issuer in the period between the first submission of a draft prospectus and the approval of its final version, please provide details on how this could be achieved:** 1,000 character(s) maximum

N/A

Please justify your answer on the possibility to allow marketing activities by the issuer in the period between the first submission of a draft prospectus and the approval of its final version: 1,000 character(s) maximum

Q. 36. ICMA: Issuers are already able to undertake marketing activities before the prospectus is approved, within the PD advertising regime and national financial promotion regimes. As such, we do not believe there is a need for any amendment of the PD regime on this topic.

It is also worth noting that, when a base prospectus is available (which will be the case for many issues of Eurobonds), the issuer is able to undertake marketing activities with the approved base prospectus.

Separately, please see paragraph 53 in Annex 2 of the ICMA letter submitted with this response, regarding amending the "public offer" definition to capture "contractual" communications only.

37. What should be the involvement of national competent authorities (NCA) in relation to prospectuses? Should NCA:

✓	(i)	review all prospectuses ex ante (i.e. before the offer or the admission to trading takes place)
	(ii)	review only a sample of prospectuses ex ante (risk-based approach)
	(iii)	review all prospectuses ex post (i.e. after the offer or the admission to trading has commenced)
	(iv)	review only a sample of prospectuses ex post (risk-based approach)
	(v)	Other
	(vi)	Don't know / no opinion

Please describe the possible consequences of your favoured approach, in particular in terms of market efficiency and invest protection: 1,000 character(s) maximum

Q. 37. ICMA: The review of all prospectuses *ex ante* (before the offer or admission to trading takes place) is important. It benefits issuers and investors alike by providing certainty. It is also helpful in permitting efficient passporting.

38. Should the decision to admit securities to trading on a regulated market (including, where applicable, to the official listing as currently provided under the Listing Directive), be more closely aligned with the approval of the prospectus and the right to passport?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

Please explain your reasoning and the benefits (if any) this could bring to issuers: 1,000 character(s) maximum

Q. 38. ICMA: There is a distinction between a decision to admit to trading and producing the required PD disclosure. The former decision involves a, broader, more qualitative assessment of the

issuer and its securities, compared with the more mechanical assessment of whether the PD disclosure requirements have been met.

39. Is the EU passporting mechanism of prospectuses functioning in an efficient way?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

[If second option is selected] **What improvements could be made to the EU passporting mechanism of prospectuses?** 1,000 character(s) maximum

Q. 39. ICMA: Member States should not be able to layer additional requirements on the PD requirements, such as requiring additional filings. Separately, it can be unclear when a prospectus has actually been passported, leading to uncertainty over when an offer can actually commence, which can be problematic when timing is tight.

Please justify your answer on whether the EU passporting mechanism of prospectuses is functioning in an efficient way: 1,000 character(s) maximum

Q. 39. ICMA: The passporting mechanism is functioning - see for example, the latest passporting figures from ESMA from January – June 2014, which reports a total of 505 prospectus passported during that period: http://www.esma.europa.eu/system/files/2014-1277_report_prospectuses_jan-jun_2014.pdf. However, whilst issuers are able to passport, the procedure could be more efficient.

(a) Could the notification procedure between NCAs of home and host Member States set out in Article 18 be simplified (e.g. limited to the issuer merely stipulating in which Member States the offer should be valid, without any involvement from NCAs) without compromising investor protection?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please justify your answer on whether the notification procedure set out in Article 18 between NCAs of home and host Member States could be simplified: 1,000 character(s) maximum

Q. 39. ICMA: The notification procedure could be simplified but the concept of allowing issuers to select the jurisdictions into which their prospectus will be passported should be kept, given the liability concerns that could arise otherwise. However, the notification step could be removed and replaced by the issuer setting out in the prospectus a list of countries to which the prospectus is passported.

C2. Extending the base prospectus facility

40. Please indicate if you would support the following changes or clarifications to the base prospectus facility. Please explain your reasoning and provide supporting arguments:

(a) The use of the base prospectus facility should be allowed for all types of issuers and issues and the limitations of Article 5(4)(a) and (b) should be removed:

	(i)	I support
	(ii)	I do not support

Please justify your answer on whether or not you support the possibility for the use of the base prospectus facility to be allowed for all types of issuers and issues, and for the limitations of Article 5(4)(a) and (b) to be removed: 1,000 character(s) maximum

Q. 40(a). ICMA: A base prospectus can be used for non-equity securities issued under an offering programme already and, as such, ICMA expresses no view on this point.

(b) The validity of the base prospectus should be extended beyond one year:

	(i)	I support
✓	(ii)	I do not support

Please indicate the appropriate validity length:

	months

Please justify your answer on whether or not you support the possibility for the validity of the base prospectus to be extended beyond one year: 1,000 character(s) maximum

Q. 40(b). ICMA: 12 month validity is logical because it allows issuers to update their base prospectus to coincide with the publication of annual financial statements. An annual update is also likely to mean that base prospectuses are easier to understand, because they can only be supplemented to consolidate new information during the course of a limited period of time.

Market practice has also, typically, been to require an annual update of a prospectus, either under stock exchange rules (under the pre-PD regime) and as a recommendation from industry bodies (such as Recommendation 1.14 for debt programmes which is contained in the ICMA Primary Market Handbook).

For some offers of structured products, we understand a mechanism to allow a limited period of "straddling" would be useful. Such offers can remain open for a long period (e.g. two months), so cannot currently begin in the final weeks of a base prospectus's validity without the need for additional documentation.

(c) The Directive should clarify that issuers are allowed to draw up a base prospectus as separate documents (i.e. as a tripartite prospectus), in cases where a registration document has already been filed and approved by the NCA:

✓	(i)	I support
	(ii)	I do not support

Please justify your answer on whether or not you support the possibility for the Directive to clarify that issuers are allowed to draw up a base prospectus as separate documents (i.e. as a tripartite prospectus), in cases where a registration document has already been filed and approved by the NCA: 1,000 character(s) maximum

Q. 40(c). ICMA: The tripartite approach gives issuers a greater degree of flexibility for how they structure their documentation, which is in line with the fundamental principles of CMU. It could be used to allow issuers to prepare one central registration document, which could be incorporated by reference into the issuer's various prospectuses. Ideally, such incorporation by reference would be "dynamic". Please see further Q. 40(e).

(d) Assuming that a base prospectus may be drawn up as separate documents (i.e. as a tripartite prospectus), it should be possible for its components to be approved by different NCAs:

✓	(i)	I support
	(ii)	I do not support

Please justify your answer on whether it should be possible for the components of a tripartite prospectus to be approved by different NCAs: 1,000 character(s) maximum

Q. 40(d). ICMA: Different parts of a tripartite prospectus could be approved by different NCAs.

This would seem to make sense in a base prospectus context as well: as long as the relevant parts of the prospectus are available to investors, it should be possible for different NCAs to approve different parts of the prospectus because the PD is a maximum harmonisation directive and so it should not matter which NCA approves which part of the document.

Consideration may need to be given to how this would work if the applicable law and jurisdiction for PD liability is linked to the NCA that approved the prospectus.

(e) The base prospectus facility should remain unchanged:

✓	(i)	I support
	(ii)	I do not support

Please justify your answer on whether the base prospectus facility should remain unchanged: 1,000 character(s) maximum

Q. 40(e). ICMA: Market participants are generally familiar with the base prospectus concept and, subject to the extension of the tripartite regime (see Q. 40(c)) and the minor changes noted in response to Q. 40(f) below, the general structure should remain unchanged in order to avoid

unnecessary costs for issuers through needing to re-structure their debt issuance programmes. It could, though, be helpful to allow incorporation by reference of future specified information, such as financial information – see paragraphs 18 - 21 in Annex 1 to the ICMA letter which accompanies this response. In addition, if a central registration document can be incorporated by reference into a prospectus (see Q. 40.(c)), it would be helpful if this were to be on a "dynamic" basis. In other words, the central registration document would be deemed to be incorporated as amended or supplemented from time to time.

(f) Other possible changes or clarifications to the base prospectus facility (please specify): 1,000 character(s) maximum

Q.40(f). ICMA: Please see paragraphs 44 - 48 of Annex 2 of the ICMA letter submitted with this survey, relating to, among other things, the ability to use supplements to include additional, or amend existing, securities note information in base prospectuses.

C3. The separate approval of the registration document, the securities note and the summary note ("tripartite regime")

41. How is the "tripartite regime" (Articles 5 (3) and 12) used in practice and how could it be improved to offer more flexibility to issuers? 1,000 character(s) maximum

Q. 41. ICMA: Although not frequently used for vanilla debt securities, the "tripartite regime" is useful and should be capable of being used in the base prospectus context (see 40(c) above) and ideally should be as flexible as possible.

C4. Reviewing the determination of the home Member State for issues of non-equity securities

42. Should the dual regime for the determination of the home Member State for non-equity securities featured in Article 2(1)(m)(ii) be amended?

	(i)	No, status quo should be maintained
✓	(ii)	Yes, issuers should be allowed to choose their home Member State even for non-equity securities with a denomination per unit below EUR 1 000
	(iii)	Yes, the freedom to choose the home Member State for non-equity securities with a denomination per unit above EUR 1 000 (and for certain non-equity hybrid securities) should be revoked

[If second or third options are selected?] **Please explain how this dual regime should be amended:** 1,000 character(s) maximum

Q. 42. ICMA: ICMA's constituency generally focuses on non-equity securities with a denomination of at least €1,000 and as such we do not have a strong view on the application of the limitation on the determination of the home Member State for issues of non-equity securities with a denomination below €1,000.

However, in relation to whether the limitation on the determination of the home Member State or issues of non-equity securities with a denomination below €1,000 should be maintained or revoked generally, we suggest the limitation be revoked.

It would also be helpful to have more clarity on the situation for securities which do not have a "denomination", such as warrants and certificates. In the context of these securities, it would be appropriate to rely on the issue price or on another "acquisition amount" as being equivalent to the denomination of securities.

Please justify your answer on the possibility for the dual regime for the determination of the home Member State for non-equity securities to be amended: 1,000 character(s) maximum

Q. 42. ICMA: We suggest the limitation on the determination of the home Member State or issues of non-equity securities with a denomination below €1,000 should be revoked because it adds unnecessary complexity to the Prospectus Directive regime for issuers and can result in there being different home Member States for an issuer's various products. Moreover, its purpose is not clear: with ESMA now in place and with the move towards a single rulebook, it should make no difference which Member State is the home Member State.

C5. Moving to an all-electronic system for the filing and publication of prospectuses

43. Should the options to publish a prospectus in a printed form and by insertion in a newspaper be suppressed (deletion of Article 14(2)(a) and (b), while retaining Article 14(7), i.e. a paper version could still be obtained upon request and free of charge)?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please justify your answer on the possible suppression of the options to publish a prospectus in a printed form and to be inserted in a newspaper: 1,000 character(s) maximum

Q. 43. ICMA: Electronic publication is mandatory under the PD. In practice, issuers rarely ever use the printed form / newspaper options in Article 14(2)(a) and Article 14(2)(b).

44. Should a single, integrated EU filing system for all prospectuses produced in the EU be created?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please give your views on the main benefits (added value for issuers and investors) and drawbacks (costs) of the creation of a single, integrated EU filing system for all prospectuses produced in the EU? 1,000 character(s) maximum

Q. 44. ICMA: ICMA has previously supported the creation of a pan-EU filing system (a "European EDGAR") for all securities subject to the PD, TD and MAR, which would alleviate many of the issues that arise in relation to prospectus publication (including those raised in the recent ESMA Consultation Paper on Omnibus II) from the currently fragmented approach by creating a more level playing field in respect of access to information for investors. Please see, for example, ICMA's response to the 2010 CESR Consultation on Pan-European Access to Financial Information: http://www.icmagroup.org/assets/documents/Maket-Practice/Regulatory-Policy/Other-projects-related-docs/CESR%20Consultation%20-%20European%20EDGAR%20-%20Sept%202010.pdf.

45. What should be the essential features of such a filing system to ensure its success? 1,000 character(s) maximum

Q. 45. ICMA: Please see ICMA's response to the 2010 CESR Consultation on Pan-European Access to Financial Information: http://www.icmagroup.org/assets/documents/Maket-Practice/Regulatory-Policy/Other-projects-related-docs/CESR%20Consultation%20-%20European%20EDGAR%20-%20Sept%202010.pdf.

C6. Equivalence of third-country prospectus regimes

46. Would you support the creation of an equivalence regime in the Union for third country prospectus regimes?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please describe on which essential principles the creation of an equivalence regime in the Union for third country prospectus regimes should be based: 1,000 character(s) maximum

Q. 46. ICMA: Equivalence should be determined at an EEA level, using a principles-based approach, without requiring any further steps to determine equivalence at a national level. No reciprocity should be required and the determination of equivalence should only need to be "refreshed" in the event of a subsequent regime change, rather than being a temporary measure.

47. Assuming the prospectus regime of a third country is declared equivalent to the EU regime, how should a prospectus prepared by a third country issuer in accordance with its legislation be handled by the competent authority of the Home Member State defined in Article 2(1)(m)(iii)?

✓	(i)	Such a prospectus should not need approval and the involvement of the Home Member State should be limited to the processing of notifications to host Member States under Article 18
	(ii)	Such a prospectus should be approved by the Home Member State under Article 13
	(iii)	Other
	(iv)	Don't know / no opinion

[If third option is selected] **Please specify in which other way should a prospectus prepared by a third country issuer in accordance with its legislation be handled by the competent authority of the Home Member State defined in Article 2(1)(m)(iii):** 1,000 character(s) maximum
N/A

Please justify your answer on how a prospectus prepared by a third country issuer in accordance with its legislation should be handled by the competent authority of the Home Member State: 1,000 character(s) maximum

Q. 47. ICMA: Other than publication in accordance with the PD regime (and, possibly, a requirement of a "wrap" to the prospectus to cover, e.g., disclosure relating to the admission process in the Home Member State), there should be no additional requirements for a prospectus prepared by a third country issuer if the third country's legislation has been deemed equivalent. In addition, consideration would need to be given as to how Article 17 would need to be amended to ensure the passporting regime continued to work.

III. Final questions

48. Is there a need for the following terms to be (better) defined, and if so, how:

(a) "Offer of securities to the public"?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please justify your answer on the need for "offer of securities to the public" to be better defined: 1,000 character(s) maximum

Q. 48(a). ICMA: Please see paragraphs 49 – 53 in Annex 2 of the ICMA letter submitted with the response to this survey which suggest how the definition could be revised.

(b) "primary market" and "secondary market"?

	(i)	Yes
✓	(ii)	No
	(iii)	Don't know / no opinion

Please justify your answer on the need for "offer of securities to the public" to be defined: 1,000 character(s) maximum

Q. 48(b). ICMA: We believe this question is intended to read "Please justify your answer on the need for "primary market" and "secondary market" to be defined". In determining any legislative definitions of the terms 'primary market' and 'secondary market', it would be important to first identify the purpose for which those terms would be used.

We do not believe that a definition of 'primary market' is required in the Prospectus Directive because the situations in which the disclosure requirements apply (i.e. in connection with public offers and applications for admission to trading) are already clear. However, if it is nevertheless considered desirable to have definitions of 'primary market' and 'secondary market', it would be worth bearing in mind the points set out in paragraphs 54 – 58 of Annex 2 of the ICMA letter submitted with the response to this survey and the U.S. exemption in Section 4(1)(a) of the Securities Act 1933.

49. Are there other areas or concepts in the Directive that would benefit from further clarification?

	(i)	No, legal certainty is ensured
✓	(ii)	Yes, the following should be clarified:
	(iii)	Don't know / no opinion

[If second option selected] **What according to you should still be clarified:** 1,000 character(s) maximum

Q. 49. ICMA: Please see Annexes 1 and 2 of the ICMA letter accompanying this response.

Please justify your answer on whether there are other areas or concepts in the Directive that would benefit from further clarification?: 1,000 character(s) maximum

Q. 49. ICMA: Please see Annexes 1 and 2 to the ICMA letter submitted with this survey response.

50. Can you identify any modification to the Directive, apart from those addressed above, which could add flexibility to the prospectus framework and facilitate the raising of equity or debt by companies on capital markets, whilst maintaining effective investor protection?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please explain your reasoning and provide supporting arguments for other possible modification to the Directive which could add flexibility to the prospectus framework: 1,000 character(s) maximum

Q. 50. ICMA: Clarity on whether withdrawal rights in Article 16(2) of the PD are intended to apply both to exempt and non-exempt offers would be helpful.

In addition, please see Annexes 1 and 2 of the ICMA letter submitted with this survey response for comments about:

- the ability for an issuer to include a new product within a base prospectus via a prospectus supplement and to prepare a supplement to include additional information, voluntarily, which is not "significant" under Article 16; and
- a request for more clarity on offering and/or admitting securities under a base prospectus for which a prospectus is not required under the PD).

51. Can you identify any incoherence in the current Directive's provisions which may cause the prospectus framework to insufficiently protect investors?

✓	(i)	Yes
	(ii)	No
	(iii)	Don't know / no opinion

Please explain your reasoning and provide supporting arguments for identifying incoherence(s) in the current Directive's provisions: 1,000 character(s) maximum

Q. 51. ICMA: Investor protection through disclosure was a fundamental principle of the PD regime. Arguably, though, disclosure is not always the best solution – for example, evidence suggests that retail investors do not read or understand prospectuses. In addition, summaries in their currently

prescribed format can be confusing for retail investors. Investor protection should now be considered in the context of the various regulatory tools that are available, to make sure that they work together in a coherent manner and provide the most appropriate protection to different classes of investors. This is discussed more fully in paragraphs 6 - 13 of the ICMA letter submitted with this survey response.

ADDITIONAL INFORMATION

International
Capital
Market
Association

ICMA

[Text of ICMA Letter uploaded with survey form]

European Commission
Directorate General Financial Stability, Financial Services and Capital Markets Union
SPA2 03/079
1049 Brussels
Belgium
(Submitted online at http://ec.europa.eu/)

1 May 2015

Dear Sirs,

Consultation Document – Review of the Prospectus Directive

The International Capital Market Association (ICMA) is responding to the above.

Setting standards internationally, ICMA is a unique organisation and an influential voice for the global capital market. It represents a broad range of capital market interests including global investment banks and smaller regional banks, as well as asset managers, exchanges, central banks, law firms and other professional advisers. ICMA's market conventions and standards have been the pillars of the international debt market for over 40 years. See: www.icmagroup.org.

ICMA is responding in relation to its primary market constituency that lead-manages syndicated, vanilla debt securities issues throughout Europe on behalf of corporate borrowers. This constituency deliberates principally through ICMA's Primary Market Practices Committee[1], which gathers the heads and senior members of the syndicate desks of 48 ICMA member banks, and ICMA's Legal and Documentation Committee[2], which gathers the heads and senior members of the legal transaction management teams of 21 ICMA member banks, in each case active in lead-managing syndicated debt securities issues in Europe.

This letter is submitted in addition to ICMA's responses to the Prospectus Directive review questions on the European Commission's website. We set out in Annex 1 some general remarks on the review of the Prospectus Directive and its context within the related Capital Markets Union project. We set

[1] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Primary-Market-Practices-Sub-committee/.

[2] http://www.icmagroup.org/About-ICMA/icma-councils-and-committees/Legal-and-Documentation-Sub-committee/.

out in Annex 2 additional explanation or detail for the answers submitted to the Prospectus Directive review questions on the European Commission's website.

Additionally, ICMA is aware of two points that are relevant to the structured product market, and has included these points in its response to Q. 40 (in relation to an offer period which "straddles" the end of the 12 month validity of the prospectus) and Q. 42 (in relation to securities without a denomination, such as warrants).

ICMA welcomes the opportunity to engage with the Commission in relation to the next review of the Prospectus Directive, and is supportive of the objective of making it easier for companies to raise capital throughout the EU and to lower the associated costs, while maintaining effective levels of consumer and investor protection.

We would be happy to discuss any aspect of our response in due course.

Yours faithfully,

Charlotte Bellamy
Director - Primary Markets
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+44 20 7213 0340

ANNEX 1

THE PROSPECTUS DIRECTIVE REVIEW IN THE CONTEXT OF CAPITAL MARKETS UNION

Introduction

1. A review of the Prospectus Directive has been identified as a priority for early action in the Commission's Capital Markets Union (**CMU**) Green Paper. It is therefore important that changes to the Prospectus Directive (**PD**) are made with the overarching objectives of CMU in mind.

2. Some of the main objectives of CMU appear to be the promotion of growth in economies, the creation of employment and adjustment of the balance of funding of the real economy away from bank lending towards capital markets.

3. The means to achieve these purposes include:

   (a) **reducing costs of capital market issuance** for issuers, both to make capital markets more competitive with bank lending and to provide issuers with cheaper funds; and

   (b) **increasing demand**, by expanding the investor base in corporate bonds to include (for example) retail investors.

4. Progress towards these objectives could be made through a number of changes to the PD. These are summarised below in paragraph 5 and discussed in more detail in the remainder of the paper.

   Some suggested changes are discrete "quick wins" which could be made to the PD in isolation. These changes (namely, those paragraphs 6-8 and 14-25 below) could be enacted immediately, in order to ensure greater certainty and to reduce burdens under the PD regime. As an example, a simple change to permit issuers to incorporate by reference future specified information would significantly reduce the current burden on issuers to update prospectuses via supplements to include routine financial information.

   Other suggested changes would, ideally, be complemented by accompanying changes to other European legislation and Directives (primarily, MiFID). However, the objectives of CMU (once fully identified) will likely require consideration of all FSAP Directives, in a holistic manner. Accordingly, such changes (such as those involving MiFID intermediaries, outlined in paragraphs 9, 10 and 12 and conflicts of laws, in paragraphs 26 and 27) could be addressed in parallel with the revisions to other Directives, as part of the overall CMU initiative.

   Before outlining suggested changes, six general and over-arching points to emphasise are:

   (i) **Wholesale markets:** When considering any changes, it is important not to overlook the significance of the existing efficient, large and liquid wholesale

debt market in Europe. Applying any changes in a way which would have an adverse effect on the functioning of the wholesale market should be avoided.

(ii) **A simpler regime:** Under the PD regime, there is an inherent tension between the cost / ease of access to capital markets (for frequent issuers and first time issuers, alike) and investor protection through disclosure. Some current PD disclosure requirements are commendable. Others, though, merely seem cumbersome and offer little obvious investor benefit. We propose that a simpler regime would be beneficial both to issuers and investors. This might include features permitted under earlier regimes (such as, incorporation by reference of future financial statements, removing the unwieldy prescribed prospectus summary / issue-specific summary requirements, recognising the significance of financial intermediaries and taking account of any mandated market disclosure under EU measures other than the PD).

(iii) **SMEs:** Facilitating fund-raising by SMEs is clearly a priority. It is interesting that, to date, few issuers have taken advantage of the PD proportionate disclosure regime introduced in 2012. This may be because larger SMEs who might be more likely to wish to approach the capital markets might fall outside the scope of the proportionate regime, by virtue of their size. In addition, SMEs, as first time issuers, are prejudiced by the fact that they will not have produced "regulated information" able to be incorporated by reference under Article 11 of the PD and will therefore have to set out information in full in the prospectus. At the same time, investors are more likely to want fuller disclosure on lesser known (or unknown) entities such as SMEs. The answer for SMEs, therefore, may be to improve indirect access to the EEA capital markets through, for example, efforts to develop an SME securitisation market (with appropriate diversification of underlying loans across tranches) or the introduction of specialised UCITs. Alternatively (or additionally) if direct access for SMEs to capital markets is deemed desirable, the introduction of a regulated rating regime (e.g. FICO in the US) might help.

(iv) **Avoiding disincentives:** Any costly disincentives to retail issuance, such as an additional requirement to produce short form disclosure for which the issuer has unmanageable liability, should be avoided. This can be achieved by clearly calibrating the purpose and associated liability of any short form disclosure regime so that issuers are not deterred from accessing the debt capital markets. For example, under our proposal for a simplified PD disclosure regime, short-form disclosure (such as key information documents or summaries) could serve as a helpful "quick sorter" for retail investors to decide what products to pursue further with their intermediaries[3]. A clear purpose along these lines would also avoid retail

[3] As recommended by the Commission's 2009 UCITS Disclosure Testing Research Report, #9.26.

investors being misled into thinking that the short form disclosure includes everything they need to make an informed investment decision.

(v) **Grandfathering:** No mention is made of grandfathering in the consultation, to give adequate time for issuers to adjust to any new requirements. Experience in relation to PD changes introduced on 1 July 2012 (particularly changes to Level II which were brought in very close to the 1 July 2012 deadline) suggests that catering for a suitable time for adaptation and analysis can help to avoid excessive costs should be built in. Many of the PD changes in July 2012, for example, added to issuer costs not only because they were more onerous but, also, because of the lack of a period of adjustment.

(vi) **Interdependence of proposals:** The suggestions we make in our response are, in many cases, interdependent. Each individual suggestion could be affected by how other elements of the regime might be amended – and, indeed, if certain of the proposals are not adopted, there might be an argument to retain the "status quo" in other areas.

5. This Annex 1 focuses on the following areas for change:

- removing the retail prospectus requirements (paragraphs 6-13);
- re-interpreting the Article 5 test to ensure that prospectuses only contain the information bond investors need (paragraphs 14-17);
- facilitating the use of "regulated information" disclosed under MAD/TD (paragraphs 18-21);
- removing the need for a prospectus for secondary market non-exempt offers of bonds (paragraphs 22-25); and
- conflicts of laws (paragraphs 26 and 27).

Removing the retail prospectus requirements

6. **The current situation:** At the moment, there is a dual approach to "vanilla" debt disclosure. An arbitrary distinction is drawn based purely on the denomination of securities: those with a denomination of less than €100,000 (often referred to as "retail" debt securities) must comply with certain disclosure Annexes; those with a denomination of €100,000 or more (often referred to as "wholesale" debt securities) must comply with different Annexes.

7. **Proposal – a simplified approach:** We propose a simplified approach which we feel would be beneficial to the capital markets but without impacting retail investor protection: the removal of the arbitrary €100,000 threshold[4] in determining which disclosure Annexes of the PD Regulation to follow and the removal of the ensuing dual disclosure regime. This would apply not only in relation to the differentiation in prospectus disclosure requirements for listed[5] deals but, also, to prospectuses for unlisted non-exempt offers. Instead, a disclosure

[4] The €100,000 threshold is relevant to determining whether to comply with various disclosure Annexes of the PD Regulation (Annexes IV / V for "retail" or Annexes IX / XIII for "wholesale").

[5] The PD refers to "admission to trading".

regime suitable for MiFID intermediaries should apply to all prospectuses for debt securities within the scope of the PD, thus providing the MiFID intermediaries who will be advising retail investors with the requisite understanding of the product. Under this proposal, protection for retail investors would be achieved through reliance on expertise of MiFID financial intermediaries, and only indirect reliance on the prospectus.

8. **Rationale for the proposal for simplified disclosure:**

(i) One of the basic tenets of the PD regime was investor protection through disclosure (including disclosure of risks), but evidence[6] shows that retail investors do not read or understand prospectuses. It follows that preparing a prospectus for a retail investor, which contains more lengthy disclosure than for a professional investor, does not help to protect those investors. The disclosure requirements in the "retail" and "wholesale" PD Regulation Annexes have a very substantial overlap, but with a few differences. However, even though the difference between the disclosure requirements are, on paper, relatively minimal, the notion of a "retail" prospectus has introduced additional costs thanks to the (perhaps understandable) attempt by competent authorities (given current drafting of the PD) to ensure that "retail" prospectuses are structured and written in way that is very different from a wholesale prospectus, so as to be comprehensible by retail readers. This has led some issuers to avoid preparing "retail" prospectuses. For those that do prepare a "retail" prospectus, such efforts result in cost without any obvious investor protection benefit. We therefore propose that "wholesale" disclosure should be used for all debt securities which are within the scope of the PD.

(ii) Our proposal would involve the abolition of the prescribed format prospectus summaries currently required under the "retail" disclosure regime. This would not be problematic. Instead of being helpful, prescribed format summaries can prove confusing. This is particularly true for programmes, where issue-specific summaries (to be annexed to drawdowns off debt programmes) are required to be combined with the base prospectus summary. In addition, the requirement to state in a prospectus whether a particular item in a prospectus summary "template" in the PD Regulation is "not applicable", by including a negative statement in the prospectus, can seem puzzling. And, in any event, prescribed format

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6 For example, a report produced by the Organization for Economic Cooperation and Development in 2009 states "Low literacy levels can constitute a significant barrier to communication. Recent research indicates that, while literacy levels vary between countries, a significant proportion of adults have serious problems absorbing the information contained in printed materials, e.g. are only able to tackle simple reading tasks. In addition, financial disclosure documents will include a mixture of numerical and non-numerical information that may exacerbate barriers to communication." For this purpose, literacy is not defined in terms of a raw ability to read, but rather as '… the ability to understand and employ printed information in daily activities, at home, at work and in the community—to achieve one's goals, and to develop one's knowledge and potential'. In addition, a 2009 UCITS Disclosure Testing Research Report prepared for the European Commission reports a circa 30% misunderstanding rate (see, for example, paragraph 4.7). Finally, the KIID under the PRIIPS regime is limited to three sides of A4 precisely because this is deemed to be the maximum length that retail investors will read.

summaries are longer than the three sides of A4 that retail investors can read and therefore are unlikely to be read[7].

(iii) The €100,000 threshold is also relevant in the public offer exemption contained in Article 3(2)(d) of the PD - that is, "*an offer of securities whose denomination per unit amounts to at least EUR 100 000*". The public offer exemptions in Articles 3(2)(c) and (d) should be retained on the basis that they would still allow unlisted/non-regulated market offers to be made on an exempt basis. (Our view is that retaining such a €100,000 threshold as an exemption in Articles 3(2)(c) and (d) for unlisted/non-regulated market offers would not discourage issuers from issuing in smaller denominations in the case of offers of securities which are admitted to a regulated market if the simplified "wholesale" prospectus disclosure regime were to apply to all denominations.)

9. **MiFID intermediaries:** If retail investors are not protected by disclosure (because they do not read it and/or cannot understand it), other regulatory tools should be considered to ensure a sufficient level of protection.[8] Improved implementation of the MiFID **intermediation regime** (that is, requiring retail investors to purchase through financial intermediaries) would be a more beneficial step towards investor protection. This step would acknowledge that prospectuses should be drawn up for review by financial intermediaries. (It would require, in parallel, enforcement of the intermediation regime under MiFID.)

10. **Some implications of placing greater reliance on MiFID intermediaries:**

(i) *Lack of a homogenous retail "class":* In proposing greater reliance on MiFID, it is important to emphasise that there is unlikely to be a "*one size fits all*" answer to retail investor protection. That is because retail investors are not a homogenous class. At one end of the "spectrum" of retail investor, there are those with only a small amount of savings. For those people, directing them to pooled investment only (such as, UCITs) might be the most appropriate form of protection. This could be achieved by relying on MiFID intermediaries to appropriately advise those retail investors. At the other end of the spectrum, there might be retail investors who have a high net worth and/or are sophisticated enough (or the person employed by them and acting on their behalf is sophisticated enough) to be able to invest directly in bonds without the need for intermediation. Between those two ends of the spectrum is a class of retail investor who could be protected when investing directly in securities by advice from a financial intermediary and/or through product intervention (see sub-paragraph (iii) below). The

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7 See previous footnote.

8 The need for this protection will become more relevant as the EU's demographic changes are likely to result in an increase in private savings as citizens are encouraged to save for their retirement and old age provision in order to reduce the burden on the state. See, for example, the OECD Pensions Outlook 2014 at pages 20-22.

important conclusion to draw, though, is that MiFID can be used to provide protection, in different ways, in all parts of the spectrum.

(ii) *Costs / Supervision:* Of course intermediation has costs, and so there may be a need to regulate the costs that financial intermediaries charge retail investors. In addition, such financial intermediaries would need to be properly supervised. This could be achieved by having a "super" group of highly trained, highly supervised intermediaries who are authorised to advise retail investors on an investment in corporate bonds. (The U.S. "Series 7" model might be a useful example.)

(iii) *Product intervention:* This response is focusing on "vanilla" securities. For a limited class of certain, complex products, another method of ensuring retail investor protection which could be used (possibly even in conjunction with intermediation) would be product intervention by regulators. For example, where certain categories of bonds may be deemed unsuitable for certain types of retail investor, rules could be introduced to prohibit the sale of such instruments to those retail investors. The first illustration of this type of regulation in Europe was the introduction by the UK Financial Conduct Authority of restrictions relating to the promotion of contingent convertible instruments to ordinary retail investors. However, product intervention rules should ideally focus on restricting sales to retail investors, rather than promotion, in order to reflect their intended purpose and ensure certainty for market participants. The use of intermediation in all cases might assist in controlling whether or not certain "complex" products are sold to retail investors. Again, MiFID is the core EU measure that will facilitate such product intervention.

11. **Consequential change – PD:** As well as changes to the specific exemptions and to the PD Regulation Annexes, a consequential change to Article 3(2) of the PD would be required. Currently Article 3(2) requires a "look-through" to the ultimate end-investor. There should be no concern that issuers might seek to place securities with retail investors, because only MiFID authorised intermediaries should be dealing with such investors in the EEA, thanks to the operation of the MiFID regime, so the "anti-avoidance" regime under Article 3(2) is redundant.

12. **Consequential changes - timing:** Although the above suggestions for retail investor protection would require changes to legislation other than the PD, this does not necessarily mean that the removal of the retail disclosure regime under the current review of the Prospectus Directive needs to be delayed, because it is arguably not serving as an effective tool for retail investor protection currently. As such, the implementation of such additional investor protection tools could be considered in due course under the CMU initiative.

13. **In summary**

- **Evidence suggests that retail investors do not read or understand disclosure, which means that the retail disclosure regime is unlikely to be an effective tool for retail investor protection and simply introduces cost without benefit.**
- **Removing the retail disclosure regime will therefore have limited impact on retail investor protection, which should be addressed instead under the MiFID regime by ensuring that sales are made through appropriate financial intermediaries.**
- **This will result in a reduction in costs for issuers and the removal of a disincentive that has deterred some issuers from making retail issues. It should also result in more bonds being issued with low denominations, which will benefit both institutional and retail investors.**
- **Some changes to Article 3(2) and placement would also be required – however, there would be no need to wait for changes to other, non-PD legislation.**

Re-interpreting the Article 5 test to ensure that prospectuses only contain the information bond investors need

14. **Article 5 disclosure test:**

(i) Currently, Article 5 of the PD requires the prospectus to contain "all information … necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses and prospects of the issuer and of any guarantor, and of the rights attaching to such securities". The PD Regulation sets out detailed requirements as to what prospectuses for different types of securities need to contain.

(ii) These requirements, coupled with the issuer's liability for the prospectus, have resulted in a trend for lengthy disclosure documents. Lengthy disclosure is not a problem per se, but a regime which requires issuers to include information in their prospectus that investors do not need represents a cost to issuers with no corresponding benefit to investors. It also means that prospectuses may be harder for investors to understand, because they are cluttered with information that investors do not need for their investment decision. In addition, there is a risk, currently, with the disclosure regime being broadly set, that a prospectus might be treated as an "insurance policy" by investors, to be read only when prices drop in the secondary market with a view to finding missing information and seeking compensation. The PD should not expose issuers to jeopardy in this way. To do so not only prejudices issuers unfairly but also prejudices investors, who receive longer prospectuses thanks to the efforts of issuers and their advisors to pre-empt litigation by including marginal or insignificant information in their prospectuses.

15. **Proposal – amending the Article 5 disclosure test:** Our view is that an amendment to the PD Article 5 test, coupled with amendments to the PD Regulation Annexes would be beneficial. A variable test, applicable to different securities may be appropriate. For "vanilla" debt, the Article 5 test could be amended (or interpreted) to require only information on the borrower's business relevant to the borrower's ability to honour its payment obligations under the bond. An example of a test which might be used for bonds is as contained in Annex IX, item 3 in the PD Regulation, which requires "prominent disclosure of risk factors that may affect the issuer's ability to fulfil its obligations under the securities to investors". This would help both issuers, who would benefit from the reduction in costs, and investors, who would benefit from prospectuses that are easier to read and understand and contain only the information they actually need.

16. **Consequential changes – PD and PD Regulation:** As a consequential change, the Annexes to the PD Regulation would need to be revised, either by deleting the extraneous requirements or by including a general provision stating that the disclosure items in the Annexes are needed only to the extent they are necessary to meet the Article 5 disclosure standard.

17. **In summary**

- **The PD Regulation Annexes currently require issuers to include information in their prospectuses that investors do not necessarily need, which represents a cost to issuers with little or no benefit for investors.**
- **Re-interpreting Article 5 and amending the PD Regulation Annexes in a manner which allows issuers to include only relevant information would reduce costs for issuers and would benefit investors, because the prospectus would not be cluttered with information they do not need.**

Facilitating the use of "regulated information" disclosed under MAD/TD

18. **Proposal – place more reliance on "regulated information":** Issuers who have securities admitted to a regulated market are required to file and disclose information on both a periodic basis (under the Transparency Directive (**TD**)) and an ad hoc basis (under the Market Abuse Directive (**MAD**)). As a basic premise, we believe that more reliance can be placed on regulated information disclosed under MAD and TD.

19. **All existing "regulated information"?:** One option would be to take account of all existing "regulated information". Arguably, provided that information has been prepared and disclosed in a manner consistent with EU law, then, it would not need to be included in a prospectus. Accordingly, an issuer that is already required by law (e.g. under TD or MAD) to make the relevant disclosure would only have to produce a very short prospectus containing the terms of the issue and the use of proceeds, without incorporating anything else into the prospectus by reference. This would, however, be a radical step. All of the "regulated information" would already be available to investors and would be regulated by those EU laws, but there would be significant ramifications for issuers (and underwriters) and investors alike. As an example, investors would need to have compensation rights comparable to those available under the PD regime if the TD or MAD information is

misleading. This would require significant changes to the liability regimes in the domestic laws implementing those directives and may be difficult to achieve in practice.

20. **Expanding incorporation by reference rules:** A preferable option which we would support (which would also be less radical and more practically achievable) would be to make a small amendment to the "incorporation by reference" rules. Currently, an issuer is permitted to incorporate by reference past regulated information only.

Incorporation of certain specified future "regulated information": A useful (and simple) amendment would be to permit, additionally, future specified information to be incorporated by reference. The issuer should indicate which information will be included and should limit it to "regulated information" (such as, quarterly/semi-annual/annual financial statements and, also, possibly, other "regulated information" disclosed under MAD or the TD).

There is precedent for this approach of allowing an issuer to incorporate future specific information, as many jurisdictions in Europe permitted this approach under the pre-PD regime. It is also permitted in the United States[9]. An additional advantage is the fact that all parties (issuers, underwriters and investors) will be able clearly to identify the prospectus disclosure on which the securities are being marketed and for which the issuer may be liable. Additionally, where only segments of the information are to be incorporated into the prospectus, that can be clearly indicated.

In order to ensure that the information incorporated into a prospectus does not become too difficult to track, this should not be "open-ended" and should not replace the need for a base prospectus to be updated annually. It could, though, be used to limit the need for base prospectuses to be supplemented during the year, thus avoiding additional costs for issuers.

Requirement for supplements for any other information: The concept of prospectus supplements should be retained and an issuer should be able to prepare a supplement for: (i) any future “regulated information” which an issuer has not specified will be included in the prospectus; (ii) "non-regulated" information (that is, not disclosed under MAD or TD) that the issuer wishes to incorporate by reference; (iii) changes to securities note information (see for example paragraph 46 in Annex 2 to this letter); and/or (iv) changes to other aspects of the prospectus (including ‘non-significant’ aspects such as a change to the paying agent).

Withdrawal rights and "future" incorporation by reference: This would need to be considered carefully. Currently, under Article 16(2), whenever a prospectus supplement is published during the relevant period a statutory 2 day "walk-away" right or "withdrawal right" is triggered. This is the case irrespective of whether such information is "significant" to an investor. Article 16(2) is a little ambiguous. The general view is that the intention was for the withdrawal right only to catch non-exempt offers, although not all Member States have interpreted Article 16(2) in this way.

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[9] In the United States, the phrase used to describe incorporation by reference of future information is "forward incorporation by reference". This is governed by Rule 411 under the Securities Act of 1933, as amended and Rule 12b-23 under the Securities Exchange Act of 1934, as amended.

How would the current concept of investor withdrawal rights under Article 16 of the PD sit with "automatic" incorporation of certain specified future information, without the need to produce a prospectus supplement each time?

It is worth the considering the following questions:

(i) *Should the investor withdrawal right be retained?* The "statutory" investor withdrawal right was a new concept introduced under the PD. Some might argue that it is unnecessary and that investors should, instead, rely on the terms of the individual contract to purchase securities, as was the case prior to the PD. On balance, our view is that it is useful to retain such an investor right in the limited circumstances below.

(ii) *When should it apply?* It should be limited to non-exempt offers only and to "significant" events only (that is, circumstances where the issuer's ability to repay or its creditworthiness might be impacted by the new development). This is because, in the past, there has been a concern that issuers might become a "hostage to fortune", if a supplement for non-significant matters is produced, with investors seeking to rely on the withdrawal right simply because of a change of heart or market conditions, rather than something specifically related to the issuer.

(iii) *Should it be available to all investors (that is, to qualified investors as well as retail investors)?* Provided that the right is only triggered for "significant" events arising in the context of non-exempt offers, our view is that the withdrawal right should be available to <u>all</u> investors.

(iv) *Should it still be for a period of 2 days?* For qualified investors, it could, perhaps, usefully be shortened to 1 day, only, reflecting the fact that dealers / managers will generally check immediately with such clients as to whether or not they are proposing to exercise their statutory withdrawal right.

(v) *If no prospectus supplement is produced, how would investors know that such an event has happened – and the date from which the withdrawal period will run?* One suggestion is to provide that, if any of the future information (such as financial statements) contains information which is relevant to the issuer's ability to repay (under the suggested "re-calibrated" Article 5 test), then, if there is an outstanding non-exempt offer, the issuer must issue an announcement. The announcement would alert the market that a withdrawal right has been triggered in respect of such non-exempt offer(s). Such announcement might be called something like a "withdrawal notice" or might even take the form of a special "withdrawal prospectus supplement", which would not need to be approved by a competent authority. Under the "re-calibrated" Article 5 test, such announcements would only need to be made in very limited circumstances (that is, only when the information in question affects the ability of the issuer to fulfil its obligations under the bond).

21. **In summary**

- **A simple change to enable incorporation by reference of specified future information would limit the need for so many base prospectus supplements to be produced to incorporate interim financial information, thereby improving market efficiency and reducing costs.**
- **There are various ways in which the current statutory "withdrawal right", if retained for non-exempt offers, could be addressed under such a new regime, including via a market announcement or special supplement.**

Removing the need for a prospectus for secondary market non-exempt offers of bonds

22. **Current regime:** Currently the Prospectus Directive requires anyone who makes an offer of securities to the public that is not exempt under Article 3(2) to produce a prospectus before doing so, due to the broad definition of "offer of securities to the public".

23. **Proposal – remove the need for a prospectus for secondary market offers:** We do not think that there should be a requirement to produce a prospectus for secondary market offers of securities listed on a regulated market or an exchange-regulated market. There was no such requirement under the Public Offers Directive (Directive 89/298/EEC), because it applied to the first public offer of securities only and did not apply at all to listed securities.[10] It also reflects the position in practice in relation to secondary market activity via screen-based trading in securities that are admitted to trading on a regulated market, an exchange regulated market or other MTF, which does not require a prospectus under the PD.[11]

24. **Rationale for removing the need for a prospectus for secondary market offers:**

(i) Offerors who have no contact with the issuer, and therefore no source of information about the issuer other than that which is in the public domain, can only produce a prospectus by using public information. If there is information that is not yet public, but is material for an investment decision, they will inevitably omit it from the prospectus. Not only will they be liable as a result; but investors will be misled. This is therefore an unfair obligation to impose on non-issuer offerors. As a result, it restricts non-exempt offers in the secondary market. It may also result in incomplete or misleading information being provided to the market.

(ii) Another aspect of this is there is no need for an on-going prospectus regime for secondary market offers, because, once the securities are admitted to the regulated market, the on-going disclosure regimes under MAD and the

[10] See Article 1.1: "*This Directive shall apply to transferable securities which are offered to the public for the first time in a Member State provided that these securities are not already listed on a stock exchange situated or operating in that Member State*."

[11] This was the view expressed by the Commission Services in a letter to the London Stock Exchange in 2005.

TD provide the necessary information for secondary market purchasers. The position is similar for securities listed on an exchange-regulated market, because in general those markets also impose ongoing disclosure requirements on issuers.

(iii) Finally, removing the need for a prospectus for secondary market offers might also help to improve liquidity in the corporate bond market, as potential sellers face one less (significant) burden.

25. **In summary**

- **Requiring a prospectus for non-exempt offers of securities in the secondary market is unnecessary because, once the securities are admitted to the regulated market, the on-going disclosure regimes under MAD and the TD provide the necessary information for secondary market purchasers.**

Conflicts of laws

26. (i) At present, if a prospectus is alleged to be materially misleading, the issuer and possibly its advisers may face litigation in multiple jurisdictions and under different laws. This could deter some issuers from making cross-border offerings of securities, for fear of the cost of fighting multiple cases under different laws and the loss of management time in doing so. It also represents a potential threat to shareholders and other investors, who will suffer from the cost and diversion of management resources. And it may result in unfairness in the treatment of investors, some of whom may be able to recover compensation thanks to the operation of the courts or laws in the place where they sue, while others cannot. Multiple jurisdictions and applicable laws therefore operate as a brake on the development of a true cross-border market.

(ii) The liability and sanctions regimes under the PD (including in relation to the summary) are generally well known and understood by issuers, investors and other market participants. Developing any harmonised, pan-European liability regime would be extremely complex: there are entire legal textbooks dedicated to the subject under English law alone. Furthermore, we query whether agreeing a harmonised EU compensation regime would be practical given the level of detail that would be required on various issues (including assessment of quantum of damages and proximity of loss) to achieve a workable regime with consistency and clarity for investors on available remedies. The attempt to find an alternative liability regime in the PRIIPs context illustrates this.

(iii) Perhaps more importantly, creating a consistent liability regime across Member States is not achievable by amendments to the PD, because differences in other grounds of liability in place in Member States (such as negligent misstatement under English law) would continue to result in investors in different Member States being treated differently.

(iv) Whilst developing any harmonised, pan-European liability regime or a harmonised EU compensation regime may not be practical, providing more clarity as to which laws apply, and giving issuer choice as to which law and jurisdiction to submit to, may be helpful. This might, for example, be by reference to the approving competent authority or the governing law of the securities.

27. **In summary**

- **It is important to consider introducing a provision that will override existing conflicts of laws arrangements.**

ANNEX 2

ADDITIONAL INFORMATION IN RESPONSE TO CERTAIN SURVEY QUESTIONS

This Annex 2 contains additional information in response to:

- Q. 27 on Summaries (paragraphs 28-43);
- Q. 40 on base prospectuses (paragraphs 44-48);
- Q. 48 on certain definitions (paragraphs 49-58).

ADDITIONAL INFORMATION IN RESPONSE TO QUESTION 27 ON SUMMARIES

Q: Please provide suggestions for re-assessment of the concept of key information and its usefulness for retail investors

28. In addition to the conceptual points noted in our response to the European Commission's survey, it is worth noting that the use of the terms "key" and "material" in different parts of the Prospectus Directive can cause uncertainty and confusion for issuers in practice.

29. For example, the requirement for summaries to contain "**key** information on the **key** risks" that are specific to the issuer and its securities in Annex XXII to the PD Regulation and the requirement for the prospectus to contain risks "which are specific to the situation of the issuer and/or the securities and which are **material** for taking investment decisions" in Article 2(3) of the PD Regulation use different terms "key" and "material", which might suggest a different standard of disclosure. It is not clear, as matter of legislative construction, the extent to which these standards differ or as a matter of policy why they should differ. Different competent authorities from time to time take different approaches in interpreting this.

30. An issuer that has concluded that certain risks are material and should be disclosed in the prospectus should be able to summarise all of these. Inability to do so because "key" is a different standard opens the issuer to potential liability as the summary could be inconsistent with the rest of the prospectus.

31. **To the extent Annex XXII of the PD Regulation is retained, it would be helpful if the references to "key risks" in Section D of Annex XXII to the PD Regulation were amended to "material risks" in order to align the requirements for risk factor disclosure in prospectuses and summaries.**

Q: Please provide suggestions for re-assessment of the interaction with final terms in base prospectuses

32. Two particular areas relating to the interaction of the summary and the final terms caused significant uncertainty for issuers when the PD changes in July 2012 were introduced.

33. *Base prospectus summaries and issue specific summaries in base prospectuses*

34. Article 24 of the PD Regulation refers to the summary of the base prospectus and the summary of the individual issue. The use of the term "may" in Article 24(2) of the PD Regulation (as opposed to the use of "shall" in Article 24(3) of the PD Regulation) means that the provisions could be interpreted to allow an issuer to include in its base prospectus a base prospectus summary and a separate pro forma summary for individual issues (which could be completed in the same way that pro forma final terms are completed for each issue).

35. That approach can have the advantage of making the base prospectus summary more clear and easy to read because it only summarises base prospectus information and does not include placeholders and drafting options, which can be confusing for the reader. This approach also means that the preparation of the summary for each individual relevant issue is easier, saving money and time for issuers on each issue of securities. In addition, it addresses another aspect of uncertainty that issuers face. Article 24(3) of the PD Regulation could be interpreted as requiring issuers to include all key information of the base prospectus summary or only the information which is relevant to the individual issue in summaries for individual issues, meaning those summaries could take inconsistent approaches. If issuers were to have the flexibility to include in their base prospectus a separate base prospectus summary and a pro forma summary for individual issues, the level of base prospectus summary information to be included in the summary for individual issues would be decided up-front and reviewed by the relevant competent authority, ensuring consistency across all issues of securities under the programme.

36. An alternative approach (insisted upon by some competent authorities and therefore the most common approach currently taken by issuers) is that an issuer includes in its base prospectus a summary that combines both a base prospectus summary and a pro forma summary for individual issues. This has the advantage of making a base prospectus shorter and more streamlined. However, there are concerns from market participants that this approach can make summaries very difficult to understand, particularly for retail investors.

37. It appears that both approaches are in line with Article 24 of the PD Regulation. The flexibility afforded by the Prospectus Regulation in this respect is sensible because it should mean that the base prospectus uses the approach that is most appropriate and clear for investors, depending on the circumstances of the issuance programme. However, the flexibility in the legislation is often lost in practice, as some competent authorities insist that issuers follow the second approach described above.

38. **To the extent that Article 24 of the PD Regulation is retained, then, in order to ensure flexibility is available in practice, it would be helpful if wording was added to Article 24(2) of the PD Regulation expressly stating that an issuer can choose to include the information in Article 24(2)(b) and (c) of the PD Regulation in a separate pro forma summary of the individual issue, as an alternative to including it in the summary of the base prospectus. Alternatively, the Commission could liaise with ESMA in relation to the ESMA Q&A on Prospectuses, which could reflect this position.**

39. *The need for an issue specific summary to be attached to final terms relating to exempt offers of securities issued using a base prospectus that also allows non-exempt offers of securities*

40. Some competent authorities currently require a summary to be annexed to final terms relating to an exempt offer of securities if those securities are issued using a base prospectus that also caters for non-exempt offers, but does not require this if the securities are issued using a base prospectus that only caters for exempt offers.

41. There are a number of reasons why this position is unsatisfactory. Not only does it result in an inconsistent and illogical position (with some final terms relating to exempt offers attaching a summary and others not), it also adds an additional layer of disclosure that is not needed by the institutional investors at whom most exempt offers will be targeted. This means issuers are unnecessarily facing a number of practical implications in having to prepare an issue-specific summary for these issues, including increased liability under Article 5 of PD, increased costs[12] and additional time to market that is caused by needing to draft the summary. Moreover, we are aware that some issuers who might have previously prepared a base prospectus with the flexibility to make non-exempt offers of securities might choose to prepare a base prospectus that only allows exempt offers to be made, in order to avoid the additional burden imposed by this position. This of course reduces the number of issuers able to offer securities to retail investors in Europe.

42. There is no clear provision in the PD or the PD Regulation requiring this approach, and for the reasons stated above there does not seem to be a policy reason for it.

43. **It would be helpful if the PD were clarified to ensure that the exemption from the obligation to provide a summary in relation to prospectuses relating to non-equity securities with a denomination of at least €100,000 in Article 5(2) of the PD applies regardless of the type of issuance programme under which those securities are issued and extends to any offer of securities that is not targeted at retail investors. This could be achieved by stating that there shall be no requirement to provide a summary in relation to an offer of securities to the public that is exempt from the obligation to publish a prospectus under Article 3.2(a), 3.2(c), 3.2(d) and/or 3.2(e) of the PD.**

ADDITIONAL INFORMATION IN RESPONSE TO QUESTION 40 ON BASE PROSPECTUSES

Q. Other possible changes or clarifications to the base prospectus facility

44. As stated in the ICMA response to ESMA consultation on RTS on supplements dated 28 June 2013 (Annex 3, paragraphs 7 -10), there is uncertainty over the extent to which supplements may be used to include additional, or amend existing, securities note information in a base prospectus (e.g. to add a change of control provision or provisions related to index-linked securities to a base prospectus that did not previously include these provisions). The competent authorities do not share a common position on this point. If an issuer is unable

[12] This is because external counsel will often be engaged to draft the summary for an individual issue, the cost of which is likely to start at an additional €2,500, plus taxes, for each issue of securities.

to use a supplement to amend its base prospectus to include a new change of control provision or new index-linked securities, its options are either to update the whole base prospectus or to publish a drawdown prospectus. These options are more time-consuming and more costly than the publication of a supplement and may therefore reduce the ability of an issuer to access the markets. From the perspective of an investor, it does not matter if the relevant disclosure is contained within a supplement or a drawdown prospectus or an updated base prospectus. In fact, a supplement may be the easiest for an investor to understand. As a matter of public policy therefore, it does not make sense to prohibit the use of supplements in these circumstances. The need to amend securities note information in the context of a standalone prospectus will only infrequently arise and will generally be limited to amendments to the offer period or the offer amount. There is no uncertainty on this point and the competent authorities allow this.

45. Additionally, it would be helpful for issuers to be able to include a specific ability for an issuer to prepare a supplement to include additional information, voluntarily, which is not "significant" within Article 16. This might include information which may, nevertheless, either be deemed to be important for investors (e.g. securities codes, ambiguities in certain terms) or simply be revisions which may not be "material" but which an issuer may wish to make.

46. Article 16 of the PD is not, on the face of it, limited to registration statement disclosure and does not appear to prohibit amendments relating to securities note information (e.g. the change of control provisions / new index-linked securities noted above). It does not appear that there was any legislative intent to limit the use of supplements in this way. Indeed, Recital 24 to the PD specifically notes the need for flexibility in relation to the content for a base prospectus. Similarly, the fact that Article 16 mandates a supplement in certain circumstances should not prevent the inclusion of additional non-significant information which an issuer would like to include via a supplement.

47. **We would therefore not suggest any amendment to Article 16 of the PD itself to address these points[13]. However it would be helpful if the Commission were to direct ESMA to amend the Regulatory Technical Standards on Supplements, or liaise with ESMA in relation to the ESMA's Q&A on Prospectuses, either of which could include a statement that a supplement may be used to amend securities note information in a base prospectus or to enable non-significant information to be included via a supplement. In addition, a new recital could be added to the PD, clarifying the legislative intent behind Article 16 and making it clear that a supplement may be used to amend securities note information in a base prospectus.**

48. Separately, clarity would be welcomed on offering and/or admitting securities under a base prospectus for which a prospectus is not required under the PD. The competent authorities do not share a common position on this point. For example, one competent authority will only permit "PD-exempt" notes to be issued from a document that includes a prospectus, so

[13] Although note the suggestion made in this response regarding incorporation by reference of future specified information (see paragraphs 18 – 21 of Annex 1 of the ICMA letter) and a wider range of contemporaneous information (see response to Q. 23).

long as it is clear that the PD-exempt notes are not issued from the "approved PD prospectus". This results in a combined document containing, in separate sections, a base prospectus (with final terms (for use with the base prospectus for "PD" notes)) and another document, such as an offering memorandum (with a pricing supplement (for use with the offering memorandum in relation to "PD-exempt" notes)). This is lengthy and burdensome for issuers.

ADDITIONAL INFORMATION IN RESPONSE TO QUESTION 48 ON CERTAIN DEFINITIONS

Q: Is there a need for the following terms to be (better) defined, and if so, how:

a) "Offer of securities to the public"?

49. Currently the term "offer of securities to the public" is defined as a "communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities…". The definition is also applicable to the placing of securities through financial intermediaries. While this definition is well known by market participants and there is a risk of creating confusion and uncertainty if it is amended, it does have shortcomings.

50. One of those shortcomings is that the definition requires anyone who makes an offer of securities to the public that is not exempt under Article 3(2) of the PD (a "non-exempt offer") to produce a prospectus before doing so. Offerors who have no contact with the issuer, and therefore no source of information about the issuer other than that which is in the public domain, can only do this by using public information. If there is information that is not yet public, but is material for an investment decision, they will inevitably omit it from the prospectus. Not only will they be liable as a result; but investors will be misled. This is therefore an unfair obligation to impose on non-issuer offerors. As a result, it restricts non-exempt offers in the secondary market. It may also result in incomplete or misleading information being provided to the market[14].

51. Another aspect of this is there is no need for an on-going prospectus regime for secondary market offers, because, once the securities are admitted to the regulated market, the on-going disclosure regimes under the Market Abuse Directive and the Transparency Directive provide the necessary information for secondary market purchasers. The position is similar for securities listed on an exchange-regulated market, because in general those markets also impose ongoing disclosure requirements on issuers.

52. For these reasons, we do not think that there should be a requirement to produce a prospectus for secondary market offers of securities listed on a regulated market or exchange-regulated market. This was the case under the Public Offers Directive (Directive 89/298/EEC), because it applied to the first public offer of securities only and did not apply

[14] See also paragraphs 22-25 in Annex 1.

at all to listed securities.[15] It also reflects the position in practice in relation to secondary market activity via screen-based trading in securities that are admitted to trading on a regulated market, an exchange regulated market or other MTF, which does not require a prospectus under the Prospectus Directive.[16]

53. Another point to note is that the current definition of public offer is also broad enough to capture communications that are not contractual. By its nature, a prospectus is a lengthy and detailed document which is suitable for the time that an offer of securities is being made by or for an issuer to a person who might accept that offer and form a contract in respect of those securities. If the public offer definition was restricted to communications that are capable of forming a contract, announcements at an earlier stage would still be regulated because the PD advertisement regime (which requires any announcement relating to an offer to the public to be not inaccurate or misleading and consistent with the information required to be in the prospectus) would be applicable to them. MiFID also contains investor protection provisions requiring all information, including marketing communications, addressed by an investment firm to clients or potential clients to be fair, clear and not misleading. Requiring an approved prospectus to be published in relation to pre-contractual communication is therefore unnecessary. The regime in place in the UK prior to the implementation of the Prospectus Directive did not have this issue. For example, under the UK Public Offers of Securities Regulations 1995 (SI 1995/1537), a person was regarded as offering securities if, as principal *"(a) he makes an offer which, if accepted, would give rise to a contract for the issue or sale of the securities by him or by another person with whom he has made arrangements for the issue or sale of the securities; or (b) he invites a person to make such an offer*"; but not otherwise.

b) "primary market" and "secondary market"?

54. We do not believe that a definition of 'primary market' is required in the Prospectus Directive because the situations in which the disclosure requirements apply (i.e. in connection with public offers and applications for admission to trading) are already clear. However, if it is nevertheless considered desirable to have definitions of 'primary market' and 'secondary market', it would be worth bearing in mind the points set out below.

55. We note the Commission is required to consider "*the need to define the terms 'primary market' and 'secondary market' and, in this respect, shall fully clarify the links between Directive 2003/71/EC and Directives 2003/6/EC and 2004/109/EC*".

56. It is not clear how it is envisaged that the definitions of 'primary market' and 'secondary market' would be used to clarify the links between the PD, Transparency Directive and Market Abuse Directive. Our expectation is that the intention would be for the Prospectus Directive to apply in the 'primary market' space, the Transparency Directive to apply in the 'secondary market' space and the Market Abuse regime to apply in both spaces.

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[15] See Article 1.1: "*This Directive shall apply to transferable securities which are offered to the public for the first time in a Member State provided that these securities are not already listed on a stock exchange situated or operating in that Member State*."

[16] We understand this was the view expressed by the Commission Services in a letter to the London Stock Exchange in 2005.

57. As noted above, the PD can only effectively apply to the first offer of securities (i.e. the only offer of securities which is made by or on behalf of the issuer) because the issuer is the only person competent to prepare an accurate and complete prospectus. Other persons would need to rely on publicly available information, such as regulatory filings which may be out of date or other public information (including news reports) which may be out of date and/or even incorrect from the time they were published. Also, the PD does not need to apply after the first offer or after an application for admission to trading on a regulated market because the continuing disclosure obligations of the Market Abuse regime and the Transparency Directive apply after those events (i.e. in the 'secondary market' space), meaning updated and accurate disclosure is available for investors in the secondary market. The position is similar for securities listed on an exchange regulated market, because in general those markets also impose ongoing disclosure requirements on issuers.

58. Primary market activity (being the space where the PD and Market Abuse regime would apply) could therefore be defined as the first public offer of securities or an application for admission to trading on a regulated market in respect of securities (which would be similar to the position under the Public Offers Directive (Directive 89/298/EEC)). The secondary market (being the space where the Market Abuse regime and Transparency Directive apply) could be defined by reference to the primary market, i.e. as being activity relating to the securities that is not primary market activity. One possibility might be to consider the concept used in the United States: the exemption from the requirement to produce a prospectus contained in Section 4(1)(a) of the U.S. Securities Act 1933, as amended, is for "*transactions by any person other than an issuer, underwriter, or dealer*".