International
Capital
Market
Association Ltd

29 January 2007

Mr Fabrice Demarigny
Secretary General
The Committee of European Securities Regulators
11-13 avenue de Friedland
75008 Paris
France

Dear Mr Demarigny

CESR`s Call for Evidence on the Supervisory Functioning of the Prospectus Directive and Regulation

Ref: CESR/06-515

The International Capital Market Association (**ICMA**) is pleased to respond to the CESR`s Call for Evidence on the Supervisory Functioning of the Prospectus Directive and Regulation (the **Call for Evidence**).

ICMA is the self-regulatory organisation and trade association representing investment banks and securities firms issuing and trading in the international capital markets worldwide. ICMA's members are located in some 50 countries across the globe, including all the world's main financial centres, and currently number over 400 firms.

We attach our response as **Annexes 1** and **2** to this letter and would be pleased to discuss it with you at your convenience.

Yours faithfully,

Ondrej Petr
Regulatory Policy – Primary Markets
+44 (0)207 538 5656
ondrej.petr@icma-group.co.uk

ANNEX 1
RESPONSE TO CALL FOR EVIDENCE

Background and Introduction

The IPMA (one of the predecessor associations of the ICMA) actively participated in the various consultations leading up to the adoption of the Prospectus Directive and Regulation. We fully supported its aim of facilitating the widest possible access to investment capital on an EEA-wide basis.

We welcome the CESR`s focus on the assessment of the way the prospectus regime actually works in practice and the degree to which its aims are being achieved. We believe that in respect of a number of topics, the announced supervisory convergence or guidance by CESR to the market would be very helpful.

Experience with the implementation, interpretation and application of the Prospectus Directive and Regulation across the EEA has been one of the most frequent topics of our on-going discussions with investment firms engaged in cross-border raising of capital (both as arrangers of the issues and as issuers) and their legal advisers as well as several country-specific seminars we have organised on the topic (see: http://www.icma-group.org/events/past_events.html). In addition, we have shared our experience and observations with other market participants and trade bodies. We have, for example, seen a response to the Call for Evidence by Shell International Limited and confirm it is an accurate summary of concerns shared by a number of other issuers.

We begin our response with an overall high-level evaluation of the impact of the Prospectus Directive and Regulation and only then comment on the four topics expressly mentioned in the Call for Evidence. We are aware that our observations make our response somewhat longer, but we thought it would be helpful to give CESR full background information on the market perception of the Prospectus Directive and Regulation and their impact.

Our response approaches the Call for Evidence from the perspective of cross-border offerings or (less frequently) admissions to trading of “international” debt securities, both “standard” debt securities issued, usually off offering programmes, by corporate or financial issuers and offered to institutional and/or retail investors and “complex” structured products issued by financial institutions and offered primarily to retail investors. Most of the comments made in our response, however, are equally applicable to other products offered within the prospectus regime. The impact of the Prospectus Directive and Regulation on purely domestic markets or products is not discussed in our response.

Summary of conclusions

The conclusions of our response may be summarised as follows:

- ***Only limited benefits have so far been brought about by the Prospectus Directive and Regulation. A true single EEA primary securities market (in particular for retail investors) has not materialised.***

- ***There are considerable differences in the way the Prospectus Directive and Regulation have been implemented and interpreted across the EEA and some of these differences inhibit the development of a true single market for securities.***

- ***The passporting mechanism has contributed considerably towards creating a single market for securities but a number of direct and indirect obstacles to its efficient functioning erected or retained by some Member States prevent it from providing its full benefits. Cross-border public offers and admissions to trading still involve unnecessary additional risks and costs compared to domestic ones.***

- ***The range of investment opportunities available to a pan-EEA investor has not changed substantially. Regulatory obstacles and legal risks have prevented the full opening of the international debt securities market to retail investors. The level of disclosure and protection has also not changed substantially.***

- ***The Q&As published by CESR have the potential to be a very useful tool but the procedure for their adoption could be improved in several important respects.***

Impact of the Prospectus Directive and Regulation

The industry has welcomed the opportunity offered by the Prospectus Directive and Regulation to further enhance the single EEA securities market by facilitating the widest possible access to investment capital on an EEA-wide basis. Harmonisation of statutory prospectus contents requirements and introduction of the passport are unquestionably major achievements for which the EEA and its Member States are to be commended.

To take advantage of this opportunity, market participants have spent a considerable amount of time and funds to adjust market practices and documentation to the new framework and educate all the parties involved.

The general feeling, however, is that the practical benefits so far brought by the Prospectus Directive and Regulation have been limited and it is not certain that they outweigh the compliance costs.

There are, of course, major benefits which have materialised and which the market appreciates. The most important is that the documentation used for cross-border public offers may in principle be made in one language and need not be adjusted to include country-specific disclosure. Another clear benefit has been the harmonisation of the exemptions from the prospectus regime (although the absence of a clear definition of a public offer is still acutely felt). Introduction of the passport has also been a tremendous improvement against the previous regime. Although the passport has been extensively used, its effectiveness is in practice hampered by a number of obstacles discussed below.

The fact that, so far, a true single EEA primary securities market (in particular for retail investors) has failed to materialise is due to a number of factors, some of which are unrelated to the Prospectus Directive and Regulation. It may in any event be too early to judge the long-term impact of legislation which was effectively implemented across the EEA only last year (although the slow implementation process in some Member States has in itself been regrettable). It is already clear, however, that the Prospectus Directive and Regulation are not working in the way they were intended.

In practice, the Prospectus Directive and Regulation have not fully harmonised the disclosure regimes and access to capital requirements generally across the EEA. These remain fragmented along national lines in a number of aspects, inhibiting the development of a true single market. The most prominent examples are discussed below. These are partly due to Member States adopting or retaining national legislation

or practices incompatible with or additional to the principles of the Prospectus Directive and Regulation and partly by diverging interpretations of unclear provisions of the Prospectus Directive and Regulation.

We believe that the situation may be improved by concerted efforts of EEA institutions, Member States and market participants. We support the need for harmonisation of practices of the individual competent authorities and welcome, therefore, the CESR initiative as well as other current initiatives in the area, namely by the European Commission and the ESME group. A number of issues will probably require changes to the Prospectus Directive and Regulation. These should be addressed once the comprehensive review, currently undertaken by ESME, is completed.

Obstacles to the fluid functioning of the passport and/or divergent practices in Member States that pose a risk for the proper functioning of the single market

The simple and efficient mechanism of passporting prospectuses introduced by the Prospectus Directive and Regulation is universally recognised as potentially their key benefit and the tool that is most likely to bring about the single market for securities. It has been extensively used and the number of public offers and cross-border admissions to trading utilising a passported prospectus has been considerable.

There is, however, a widespread experience that the efficiency of passporting is in practice hampered by a number of obstacles:

- Some Member States impose additional requirements and other formalities which, intentionally or not, make passporting *into* such Member States more difficult. Less frequent, but nevertheless important, are situations where Member States impose additional formalities on passporting *out*, e.g., by attempting to include various restrictions in the passporting certificate.

- In some Member States, the passporting procedure itself is not as efficient as it perhaps could be.

- There are diverging interpretations of unclear provisions of the Prospectus Directive and Regulation which give rise to additional risks that make cross-border public offers and admissions to trading less attractive.

In all cases, the effect is the same: complexities, risks and costs of cross-border public offers and admissions to trading are increased so that they become less attractive than domestic ones, sometimes to the point where particular Member States are avoided altogether. Such effects are detrimental to issuers and investors alike and clearly frustrate the objectives of the prospectus regime. On a higher level, they are also inconsistent with the established principles of the single market under the EC Treaty. The legality question aside, the costs and adverse market impact of the obstacles do not seem to be outweighed by any tangible benefits to host Member State investors.

Issuers who would like to raise capital on a pan-EEA basis, the investment firms arranging these issues and investors are becoming increasingly frustrated with these obstacles. However premature and biased such conclusions may seem, it is not uncommon to hear that, in this crucial respect, the prospectus regime has failed to deliver its intended benefits.

In view of the focus of the Call for Evidence, we do not discuss the various obstacles in detail in our response. In Annex 2, however, we provide a summary of the additional requirements and inefficiencies of the passporting procedure most frequently encountered in practice and describe the two areas where the lack of legal certainty and

clarity is felt most acutely by our membership – disclosure of the terms of the offer in the prospectus and permitted scope of final terms.

In some cases, we give examples of Member States where a particular obstacle exists. These examples are based on the discussions with our membership, not on a comprehensive analysis of the application of the Prospectus Directive and Regulation across the EEA, and are illustrative only.

The nature of the obstacles differs and so would their precise legal analysis and efficient remedies. In some cases, guidance to the market may be sufficient, while in others harmonisation of the practices of the competent authorities may be necessary. Still others may require legislative action by the Member States or at the EEA level. We therefore believe that CESR should act in close co-ordination with the European Commission with a view to removing all of these obstacles in a co-ordinated manner as soon as possible.

Range of investment opportunities and level of disclosure and protection that the prospectus regime is providing to investors

Range of investment opportunities

The impact of the Prospectus Directive and Regulation on investment opportunities is difficult to assess. Comprehensive statistical data would have to be collected and analysed in order to isolate the effects of their introduction from the effect of other legislative changes (of which there have been many, both in and outside of the EEA) and general market and economic developments. On the basis of anecdotal evidence and discussions with market participants, however, we can make the following observations.

There are several relevant factors which could have increased the range of investment opportunities on a pan-EEA basis, namely:

- The introduction of the passporting mechanism which has led to an increase in cross-border public offers and admissions to trading.

- The harmonisation of the exemptions from the prospectus regime which reduced the risks to issuers and distributing intermediaries of making cross-border "exempt" offers (in particular offers targeting qualified investors).

At the same time, there are several relevant factors which could have limited the increase or actually decreased the range of investment opportunities on a pan-EEA basis, namely:

- The obstacles to the efficient functioning of the passporting mechanism described above (and in detail in Annex 2 below), in particular the risks associated with the disclosure of terms of the offer.

- The continuing uncertainty about the equivalence of non-EEA accounting standards, which have led a number of non-EEA issuers to raise capital outside the scope of the Prospectus Directive, i.e., by making offers exempt from the prospectus regime and/or listing on non-EEA markets or EEA "exchange-regulated markets." By way of an illustration, our statistics show that while in 2004 non-EU issuers of international debt securities had 71.6% of their new issue volume and 41.5% of their new issues admitted to trading on key EU regulated markets for these products (those of Ireland, Luxembourg and the UK) and 61.8% of their new Euro-denominated issues had denominations below 50,000 Euro, in 2006 these percentages were only 42.6%,

25.7% and 27.5% respectively. Many believe that even if this problem is eventually resolved satisfactorily, these issuers will have developed a "habit" of issuing outside the scope of the Prospectus Directive which will be difficult to reverse. Uncertainty about the final details of the Transparency Directive and, more importantly, its implementation and interpretation across the EEA has further exacerbated this trend.

- The delay in the full implementation of the prospectus regime across the EU and uncertainty surrounding its proper interpretation and application in the period leading up to its full implementation and immediately afterwards.

On balance, we believe that the range of investment opportunities has not changed substantially and, in the case of retail investors, may actually have decreased.

The failure to create more investment opportunities for retail investors interested in debt securities is particularly disappointing in light of the growing demand for a pan-EEA retail debt securities market among both investors and issuers. The Prospectus Directive and Regulation on one hand opened up the market to wider retail involvement with the passporting mechanism but, at the same time, closed it by creating risks which most issuers and distributing intermediaries are unable or unwilling to bear. Most notably, the uncertainty about the equivalence of non-EEA accounting standards and the near impossibility to comply with the disclosure requirements regarding terms of the offer (described in Annex 2 below) have contributed to issuers often choosing to issue without conducting a public offer, in high denominations or outside the regulated markets, thus reducing retail access to their securities. There is a corresponding adverse impact on the issuers, in particular on their prestige and reputation, investor base and cost of funding. There have been a few large corporate issues with a pan-EEA name recognition who managed to passport into all (or almost all) Member States and effect retail offerings but these are seen as an exception.

Level of disclosure and protection

We believe that the Prospectus Directive and Regulation have not substantially affected the level of disclosure and protection. This is, however, not a criticism of the prospectus regime. The level of disclosure is determined mainly by a combination of disclosure standards, liability regime and conduct of business rules.

The disclosure standards have not changed substantially as the general standard in Article 5(1) of the Prospectus Directive already existed under the previous regime and the Prospectus Regulation requirements are also to a large degree similar to previous ones. Introduction of the Prospectus Regulation (together with the switch by EEA companies to IFRS) has, however improved comparability of prospectuses approved in different Member States. Within the Article 5(1) standard and the Prospectus Regulation requirements, the disclosure standard in international markets is driven by market practices and strongly influenced by strict U.S. disclosure standards. Both EEA and U.S. standards are, in turn, influenced by the internationally agreed IOSCO standards.

The liability regime has not been harmonised by the Prospectus Directive and Regulation and remains the responsibility of the Member States.

The conduct of business rules applicable to the distributing intermediaries supplement the prospectus disclosure requirements and are intended to ensure that an investor is sold a suitable investment product in knowledge of all relevant facts. This is particularly important in the case of retail investors who in practice are unlikely to read or fully understand complex prospectuses. It is vital to appreciate the parallel existence of conduct of business rules and their link with the prospectus regime. Excessive emphasis on the prospectus regime – whether by market participants themselves or competent

authorities – leads to extensive generic prospectus disclosure which is quite often not useful for a particular investor in his/her specific circumstances and which does not really meet investor protection objectives. On an EEA-basis, the conduct of business rules of most Member States will be substantially changed with the implementation of MiFID. We would strongly suggest that the Prospectus Directive and MiFID teams at competent authorities, CESR and European Commission work together to achieve, over time, efficient alignment of the two regimes to better enhance investor protection.

Finally, we would like to make three points related to this question:

- The Prospectus Directive and Regulation in our view properly strike a careful balance between the need for comprehensive disclosure and for recognition of the differences in nature and risk profile of various products, in particular debt and equity. It also correctly recognises the need for different disclosure standards for different kinds of investors. These distinctions should be kept in mind during the various forthcoming discussions. In particular, concepts which are based on the (fully justified) need for protection of retail investors cannot be automatically applied to all classes of investors.

- It is sometimes not fully appreciated that the technical Prospectus Regulation is only a tool for achieving the overall goal of disclosing, in a comprehensible form, all material information (Article 5(1) of the Prospectus Directive). Competent authorities should be aware that the totality of such information will differ on a case-by-case basis and that it is the responsibility of the issuer to identify and disclose all such information. This will in practice often require deviation from the Prospectus Regulation, either by including additional information not required by the Prospectus Regulation or modifying or waiving some of those requirements. Some competent authorities should be encouraged to be more flexible and accept additional disclosure more willingly.

- The access of retail investors to prospectuses and the awareness of all parties involved in cross-border distribution of which prospectuses may legally be used in the EEA would be greatly enhanced if there was a centralised, publicly accessible electronic database containing all the prospectuses approved in the EEA, together with information on where they were approved and where they have been passported into. This concept is at the heart of the pan-EEA network of "officially appointed mechanisms" for storage of information distributed in accordance with the Transparency and Market Abuse Directives. Both the Commission and CESR have in the past suggested that this regime should be extended to include prospectuses. We support the creation of such a network and would encourage the relevant working groups within CESR to co-operate on this project.

Usefulness of CESR`s Q&A on prospectuses

We support any activity aimed at tackling the uneven implementation and application of the Prospectus Directive and Regulation across the EEA. In addition, there is a strong demand for harmonised pan-EEA guidance from a single source respected by national competent authorities. We therefore welcome the publication of the first set of the Q&As and hope CESR will continue to update and expand their list.

At the same time, we believe that there are several steps which could be taken to make the Q&As even more useful to the market participants:

- In several of the published Q&As, some Member States take a different approach than the consensus reached by the majority. If this practice continues, the Q&As will become effectively only guidance to the approach of the various Member States,

which (although certainly helpful) will not achieve the stated aims of supervisory convergence. Such differences of view are also likely to further exacerbate the direct and indirect obstacles to passporting described above. We understand the difficulties associated with finding a common position but suggest that CESR discourages the practice of these "dissenting opinions". As long as they exist, however, competent authorities of the "dissenting" Member States should accept that offers and admissions to trading originating in the "majority" Member States will legitimately comply with the majority position.

- Similarly, CESR should always strive to reach a common position on the Q&As with the European Commission. In addition, as we noted above, the issues arising under the Prospectus Directive and Regulation are of a different nature and may require different solutions. CESR therefore should not limit itself to "everyday questions" best suited to the Q&As but should actively co-operate with the European Commission (and the ESME group) in identifying and solving the various other issues.

- We understand that conducting formal consultations on the topics to be included in the Q&As would inhibit the desired flexibility and efficiency of the instrument. We believe, however, that it would be helpful both to CESR and the market as a whole, if input from a wide range of interested parties was possible before an answer to a particular question is agreed and published. Reliance on the possibility to correct the answer subsequently may not be fully justified because of the disruption which an "incorrect" answer may cause in the meantime. In addition, it is for various reasons usually rather difficult to change an agreed and published position. It would be entirely sufficient, for example, if CESR published on its website not only the answered questions but also the questions which are under consideration, thus enabling the parties interested in the particular issue to provide informal comments - and CESR to make even better-informed decisions.

We are looking forward to engaging with CESR on future Q&As.

ANNEX 2

OBSTACLES TO PASSPORTING

Additional passporting requirements

Under the Prospectus Directive, a prospectus approved and published in the home Member State is valid for public offers and admission to trading in a host Member State if the specified notification procedure is followed. The competent authority of the host Member State may require a translation of the summary but is prohibited from undertaking any approval or administrative procedures. In addition, only the competent authority of the home Member State has the power to control advertising activity in relation to a prospectus.

There are several Member States into which a prospectus can be passported simply using the procedure described in the Prospectus Directive (for example Luxembourg or the UK). A number of other Member States, however, impose (by way of legislation, informal "recommendations" or otherwise) additional requirements in relation to prospectuses passported from another Member State. Such host Member State requirements may be based on "super-equivalent" implementation of the (maximum harmonisation) Prospectus Directive and Regulation or on separate securities, company or other legislation which often preceded the Prospectus Directive and Regulation.

In some transactions, the requirements could be considered as so onerous as to make an offer in a particular Member State (France is sometimes given as an example) commercially unviable, effectively denying investors in such a Member State the benefits of the prospectus regime.

The most frequent examples of such additional host Member State requirements are:

- Translation of the entire prospectus or its significant parts (for example in Germany under consumer protection laws).

- Provision of further documentation to the competent authority (e.g. of documents incorporated into the prospectus by reference).

- Additional publication of the prospectus. This is sometimes required because the host Member State does not recognise the method of publication chosen by the issuer in the home Member State as sufficient (for example Germany does not recognise the publication on the website of the home Member State competent authority). This is despite the fact that the issuer should be able to publish in the home Member State only and using any of the methods offered by the Prospectus Directive (in practice namely the electronic methods).

- Filing of the prospectus with the competent authority.

- Local publication and/or filing with the competent authority of a notice that the prospectus is available (for example in Austria, France, Germany or Norway), in particular if the publication is possible only on certain days or if it requires submission of the documents to be published several days in advance, or other prospectus-related information.

- Filing with and/or approval by the competent authority of advertising/marketing materials (for example in Belgium, France, Portugal or Spain). The process of a review of the advertising/marketing materials (whether by the home or host Member State competent authority) is sometimes very onerous and time-consuming and is on occasion used to make substantive comments on the nature of the product

(for example in Belgium or France). Sometimes, the competent authorities even require that products which do not comply with specific characteristics defined by them are labelled as such in all advertising/marketing materials.

- Registration of the issuer with the local Companies` Register, filing of translated documents (e.g. articles of the issuer) with the Register and publishing a notice of their filing (for example in Belgium or France).

- Approval of the prospectus, the issue or offer by another authority (this has until recently been the case in Italy) or a notification to another authority (for example in Austria).

In case of offering programmes, further examples concern the final terms. They are:

- Translation of the final terms.

- Additional publication of the final terms (for example in France or Germany), sometimes coupled with further administrative formalities (for example in France the final terms must be published on the website of the competent authority which requires the issuer to enter into a legal agreement with it).

- Filing of the final terms with the competent authority (although the final terms have often been filed as a precaution even where this was not explicitly required and the answer to Question 1 in the first set of Q&As is unfortunately likely to reinforce this trend) or another authority (for example in Austria) .

- Review of the final terms by the competent authority, namely if it leads to requesting changes to their contents or even to rejecting them.

There have also been instances of a host Member State refusing to recognise a passported prospectus as a valid basis for a public offer in its territory because some of its elements (concerning, for example, the language requirements or incorporation by reference) were based on a home Member State interpretation of the Prospectus Directive and Regulation which was different from that prevailing in the host Member State. We understand, however, that such instances (which are in manifest conflict with the Prospectus Directive) are now exceptional.

Some of these requirements and practices clearly breach the express prohibition in the Prospectus Directive preventing the host Member State competent authority from "undertaking any approval or administrative procedures relating to the prospectus." There may be cases where this is, on a literal reading of the Prospectus Directive, less clear (as the varying views on the local publication issue in the Q&As illustrate) but this does not make the obstacles acceptable. We believe that all of these obstacles contravene the home country/mutual recognition principle inherent in the Prospectus Directive and, more generally, the single market principles under the EC Treaty and established ECJ case law.

Consequently, we believe that the Member States concerned should abandon all such requirements, whether by abolishing the respective legislation or changing the relevant practices. The passport will be working properly and achieving its aims only when all Member States accept that the only approval and disclosure/information requirements in relation to a public offer or admission to trading in a host Member State are: (i) the approval and publication of the prospectus in the home Member State and (ii) notification and provision of the prospectus (and, if required, translation of the summary) to the home Member State competent authority and (iii) sending of the certificate of approval, the prospectus and (and, if required, translation of the summary)

by the home Member State competent authority to the host Member State competent authority.

Clearly, powers of CESR are limited in this regard. At the very least, however, it could discourage competent authorities from interpretation of the law or engaging in other practices which impose such obstacles. It could also play a role in collecting evidence on such obstacles and sharing it with the Commission.

Inefficiencies of the passporting procedure

The provisions of the Prospectus Directive on the passporting procedure are relatively brief and many details of its practical utilisation depend on their interpretation by the competent authorities. At least in two important aspects, the current practices could be improved by CESR guidance without the need for any legislative action:

- Most Member States (whether acting in the home or host capacity) will not notify the applicant that the passport documents have been received by the host Member State competent authority. This results in a period of legal uncertainty and unnecessarily increases the difficulties associated with co-ordinating cross-border offers. Legally, passporting should be considered effected on the day the home Member State competent authority sends the passport documents to the host Member State competent authority. This is already the approach of some host Member State competent authorities. Practically, however, a speedy notification of the dispatch and receipt of the documents to the applicant or, alternatively, publication of the fact, e.g., on the website of the competent authority (as is the practice for example in Denmark) or in the future central database of prospectuses, would be helpful tools to address this uncertainty.

- Some host Member State competent authorities require the passported documents in hard copies, by post or couriered. This seems an unnecessary strain on the resources of the competent authorities involved and on market participants and again has cost and time implications for cross-border offers. We believe that all competent authorities should be able to process electronic documents.

Disclosure of terms of offer

In its Annex V/5, the Prospectus Regulation requires the disclosure of a number of "terms and conditions of the offer". These are copied from Annex III/5, i.e., based on equity distribution practices. The method of retail distribution of debt securities which is most frequently used in practice is, however, different. It involves the issuer selling the securities through banks arranging the issue ("managers") to private banks who, after the securities are issued and over a period of time (which may be several weeks or months) sell them to their clients for various prices reflecting market conditions at the time of sale - a "retail cascade distribution". There is not one offer, but a multitude of offers, all subject to one prospectus.

It is not meaningful, practicable or, often, even possible for the issuer to fully meet the Annex V/5 requirements for all offers which are likely to be made, even if they are contemplated by the issuer. For example, there is no way for the prospectus (or a series of supplements) to include, throughout the offer period, all prices or all the various terms and conditions on which private banks sell the securities to their clients and receive payment for them. Extensive lists of all private banks involved (even if possible in the circumstances) are also not meaningful disclosure – the investor will know the name and contact details of the private bank it purchased the securities from but the

names of the dozens of other private banks involved (even if known at the outset) are not material information.

While some competent authorities are content to waive or modify the Annex V/5 requirements, others hesitate to do so. This has a number of consequences and some of them relate to cross-border admissions to trading and public offers. When passporting out of a “conservative” Member State into a “liberal” Member State, the issuer is forced to include information which the “liberal” host Member State does not require in the domestic context. When passporting the other way, the issuer faces the risk that the “conservative” host Member State will, formally or informally, object to an “incomplete” prospectus. Cross-border admissions to trading and public offers are therefore being disadvantaged.

The situation could be remedied by CESR giving guidance to competent authorities which would allow them to interpret “offer” in Annex V/5 as meaning only the offer by the issuer (through the investment firms arranging the issue) to the private banks. This would enable them to require only the disclosure of the terms of this offer in the prospectus - and not those of the subsequent offers in the “cascade”.

Various other distribution practices may exist or evolve in the future where literal application of some of the Annex V/5 requirements will be impracticable or impossible. It would therefore be very helpful if the CESR guidance recognised this fact and asked the competent authorities to accept that, in such cases, the information provided in response to Annex V/5 may be less extensive or more generic than would otherwise be the case and that the responses to a number of the points may simply be "Not Applicable."

We recognise that there are more difficult issues surrounding the wider questions of who can use a prospectus prepared by the issuer and for how long. The concerns of the issuers (and investment firms arranging the issue who are usually named in the prospectus) in this respect are based on the fact that the use of “their” prospectus by other entities not vetted and authorised by them may have an unintended impact on their reputation (e.g., when sophisticated structured products are sold without regard to suitability requirements) and their liability to the investors (e.g., if the prospectus is not up to date at the time of the offer to the end-investor). As indicated above, it is also often impracticable to name all relevant distributing private banks. We believe that an issuer should be free to impose limits on which entities may use its prospectus either by naming them where it can do so or by including more general language (e.g., "financial institutions approved by the issuer or any manager"). Specification of the period during which the prospectus may be used serves the same purpose. In the Member States which take the view that the obligation to keep the prospectus up to date does not end on the admission of securities to trading (if the offer continues beyond that date), the specification also clearly defines the period during which the issuer is responsible for keeping it up to date.

Permitted scope of final terms

Debt issues under offering programmes are normally documented by a base prospectus (possibly updated by supplementary prospectuses) for all issues under the programme and, at the time of each drawdown (issue), the “final terms” for the particular issue. Unlike a base or supplementary prospectus, the final terms do not need to be approved by the competent authority. They are, however, published, filed with the competent authority in the home Member State and provided to investors.

It is clear under the Prospectus Directive and Regulation that the final terms are expected to include information which could have been omitted from the base

prospectus, i.e., those which can only be determined at the time of the drawdown, and which were indicated as missing in the base prospectus. They may only contain information about securities (not the issuer) and cannot contain the summary. At the same time, however, the Prospectus Directive provides that any "significant new" information must be included in a supplementary prospectus.

The relationship between the provisions on the use of the final terms included in the Prospectus Directive and Regulation and the rule on producing a supplementary prospectus is not clear. Consequently, the line between the final terms and a prospectus is not clear. Market practices are not always consistent and neither is the approach of the competent authorities.

Some take a cautious view and produce a new full prospectus for each drawdown, which alters the terms of the base prospectus (a so called "drawdown prospectus"). This increases costs and adds complications in operating an offering programme which the Prospectus Directive was intended to facilitate. Others include a wide range of information in the final terms provided that the base prospectus contains a template of the final terms which clearly indicate which new information may be included (usually by filling in blanks or choosing among several options). In principle, this seems to be a prevailing market practice, reflected for example in the standard form final terms published by ICMA. Inconsistent practices appear in particular in case of more complex products where the range of drawdown-specific information unforeseen in the base prospectus is much wider.

Again, the inconsistent approach has a profound impact on cross-border public offers and admissions to trading. When passporting out of a "liberal" Member States into a "conservative" one, the final terms may comply with the practices and competent authority expectations in the "liberal" home Member State but the "conservative" host Member State may consider them to be not final terms but a prospectus – which should have been approved by a competent authority but was not. Again, cross-border admissions to trading and public offers are being disadvantaged because of additional legal risk.

It would not be feasible or indeed desirable, for CESR to attempt to prepare guidance listing what can and cannot be included in final terms. It is improbable that such guidance could be accepted by competent authorities and market participants across the EEA, that it would cover all relevant products in sufficient detail and that it would not shortly become obsolete. Instead, it is the responsibility of market participants to achieve consensus on best practices and steps are indeed underway in that direction.

The competent authorities, however, should be aware of the fact that there are currently genuine differences in the approach across the EEA and that final terms distributed in a Member State on the basis of a passported prospectus approved in another Member State may differ from domestic standards. We would therefore encourage the competent authorities to exchange information about their experience with final terms to better appreciate this situation.

This dialogue should allow competent authorities in host Member States to effectively recognise (by not objecting to their contents) final terms prepared in accordance with practices of home Member States even though they do not comply with domestic practices in the host Member States.

In the long term, of course, it can be expected that, in the absence of regulatory obstacles, a functioning single market for securities will lead to convergence of practices regarding final terms – and the prospectus regime as a whole.