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CONSULTATION DOCUMENT OF THE *COMMISSIONE NAZIONALE PER LA SOCIETÀ E LA BORSA* (CONSOB) ON RECOMMENDATIONS RELATING TO THE OFFERING PROSPECTUS, OR ADMISSION TO TRADING OF FINANCIAL PRODUCTS NOT REPRESENTING CAPITAL, OTHER THAN STOCKS OR SHARES OF OICR AND FINANCIAL PRODUCTS ISSUED BY INSURANCE COMPANIES.

A RESPONSE BY

THE JOINT ASSOCIATIONS COMMITTEE ON RETAIL STRUCTURED PRODUCTS (JAC)

08 October 2009

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COMMENTS ON THE CONSULTATION DOCUMENT (THE DOCUMENT) CONCERNING THE RECOMMENDATIONS RELATING TO THE OFFERING PROSPECTUS, OR ADMISSION TO TRADING OF FINANCIAL PRODUCTS NOT REPRESENTING CAPITAL, OTHER THAN STOCKS OR SHARES OF OICR AND FINANCIAL PRODUCTS ISSUED BY INSURANCE COMPANIES

In this response we have focused on:

(a) the proposed disclosure requirements;

(b) the scope and applicability of the recommendations proposed in the Document (the **Recommendations**);

(c) the interplay between the Recommendations and CONSOB's communication No. 9019104 of 2 March 2009 relating to "*The duty of intermediaries to act correctly and transparently in the distribution of illiquid financial products*" (the **Illiquid Resolution**);

(d) the effect of the Recommendations on issuer/offeror liability for the prospectus; and

(e) the potential impact of the Recommendations on existing programmes.

1. DISCLOSURE REQUIREMENTS

1.1 Inconsistency with European Legislation regulating the contents of prospectuses

The Recommendations relating to the disclosure of costs and to the presentation and contents of risk performance profiles, in our view, go beyond the scope of the disclosure requirements set out in Regulation No. 809/2004/EC (the **Prospectus Regulation**) implementing the provisions of Directive 2003/71/EC (the **Prospectus Directive**).

Article 3 paragraph 2 of the Prospectus Regulation requires a prospectus to contain the disclosure elements set out in Annexes I-XVII therein and in particular, states that "a *competent authority shall not request that a prospectus contain information items which are not included in Annexes I-XVII*". This potentially inconsistent approach, if adopted by CONSOB, would seem contrary to the maximum harmonisation principle underpinning the Prospectus Directive and could result in reduced harmonisation of the retail investment market at European level (discussed further below).

The Document also indicates that the disclosure requirements set out in the Recommendations have as their "source" domestic Italian regulations, namely:

(a) the regulations relating to the disclosure requirements in respect of financial/insurance products[1]; and

(b) the general principles set out in the Illiquid Resolution[2].

However, this approach in our view raises several issues:

[1] See page 2 of the Document.

[2] See page 5 of the Document.

(i) Firstly, the Recommendation that information should be included in the prospectus purely on the basis of these local laws when not required by the Prospectus Directive or the Prospectus Regulation seems to us to go against the maximum harmonisation principle entrenched in the Prospectus Directive;

(ii) Secondly, the financial/insurance products subject to the regulations referred to in (i) above, fall outside the scope of the Prospectus Directive and the Prospectus Regulation and as a result are not subject to the Prospectus Directive disclosure requirements. We therefore, query the extension to all non-equity securities of the rules relating to insurance products since the offer documents in respect of such insurance products are not generally subject to any prior scrutiny and/or approval by any Italian regulatory body; and

(iii) Thirdly, we query the relevance of the principles set out in the Illiquid Resolution in this context (discussed further below). These derive from Directive 2004/39/EC on markets in financial instruments (**MiFID**) (and relate to the activities of intermediaries *vis-à-vis* their clients) and not from the Prospectus Directive which regulates disclosure in prospectuses. Furthermore, the Illiquid Resolution applies only to products which are complex and illiquid and is not intended to apply to all non-equity securities regardless of their complexity or illiquidity.

Finally, it is not clear from the Document how the proposed "*IT Solutions*" is to operate and how this would serve to improve disclosure.

1.2 Inconsistency with the current European initiative on Packaged Retail Investment Products (PRIPs)

In addition, it is not clear how the approach underlying the Recommendations sits with the initiatives on Packaged Retail Investment Products (the **PRIPs**) at European level. Reference is made to the Communication issued by the European Commission (the **PRIPs Communication**) on 30 April 2009 with the aim of creating consistency in approach for all different PRIPs, as well as to ensuring that the relevant markets may be driven by greater transparency, better explanation of proposed investments, and product sales which are aligned with investor interests.

Even though the PRIPs Communication does not set out detailed legislative proposals, the European Commission has established a clear commitment to bring forward its proposals to deliver on a European level a horizontal approach to the regulation of disclosure practice for all PRIPs and for their sale by manufacturers and intermediaries. This approach will require existing legislation to be adjusted across Europe so as to avoid duplication of requirements or legal uncertainty. It will also require a clear definition of the products that are covered, so as to ensure all relevant retail investment products are included whilst avoiding legal uncertainty.

In this respect, the Recommendations do not seem to take into consideration the initiatives on PRIPs in terms of:

(a) approach (the PRIPs proposals envisage the development of a disclosure regime characterised by detailed prescribed disclosure requirements which apply equally across products and jurisdictions. The aim is to improve investors' ability to understand and compare products by ensuring that there is a standardised approach to both the calculation and presentation of information. The PRIPs Communication notes the benefit to cross-border retail distribution that more consistent rules at a European level will bring and that by contast, "*uncoordinated national responses may act as a barrier to the functioning of the single market*");

(b) contents (for example, the Recommendations require that risk ratings and costs information be disclosed in the final terms/summary note, while according to PRIPs approach they should be included in a separate document. Such duplication in disclosure (possibly based on varying methodologies) could hinder rather than facilitate retail investors' ability to comprehend and compare products); and

(c) timing (more detailed proposals as to form and content of the proposed PRIPs regime are expected to be published for consultation before the end of 2009. Given the intention expressed in the Document of ensuring consistency between the proposals at a domestic and European level, it would seem in our view prudent to await the outcome of the PRIPs consultation before proceeding with domestic legislation).

2. THE SCOPE OF APPLICATION OF THE RECOMMENDATIONS

The Document does not make it clear whether the Recommendations apply only to offer documents in respect of a domestic offering in Italy or whether they would apply equally in circumstances where Italy is the Host Member State and the offer documents have been approved by another competent authority.

Depending on how the Recommendations are applied by CONSOB, and on how Italian intermediaries interpret them, the Recommendations may discourage both Italian and foreign issuers from choosing Italy as the Home Member State and encourage greater use of the "*passporting*" mechanism. Furthermore, the stricter disclosure requirements comprised in the Recommendations may force foreign issuers to reduce their offers into Italy, which could lead to a reduction in the number of offers carried out in Italy and, therefore, also to a reduction in the effective range of products and variety in terms of both issuers and financial risks of products available to Italian investors.

Finally, such inconsistent disclosure requirements could lead to issuers providing different levels of disclosure to investors situated in different European jurisdictions or even within the Republic of Italy thus contravening the principle of consistent protection emphasised in Recital 20 of the Prospectus Directive.

3. THE RECOMMENDATIONS AND THE ILLIQUID RESOLUTION

As mentioned above, the Document references the Illiquid Resolution as the basis for the disclosure requirements imposed by the Recommendations. However, we query the relevance of the principles set out in the Illiquid Resolution in this context, for the reasons set out below.

3.1 The consistency of the Recommendations with the overall aim of the Illiquid Resolution's regime.

It is our understanding that the objective of the Illiquid Resolution was to impose disclosure obligations on intermediaries on the basis that when providing their investment services (including placement services in the context of primary market transactions) *vis-à-vis* their clients they must act independently from issuers/offerors and must, accordingly, provide such investors with an autonomous set of transparent and objective information. These principles, governing the relationship between intermediaries and their clients, are derived from MiFID and therefore, in our view, should not be transposed to the Prospectus Directive-regulated relationship between issuers/offerors and potential investors. Such approach will result in the transfer of the obligation to prepare the *Scheda Prodotto* (which is the set of information designed by CONSOB pursuant to the requirements under MiFID) from intermediaries to issuers (as issuers will be required to embed a form-type of *Scheda Prodotto* directly into their offering documents). In this respect, a cost/benefit analysis could be advisable. Distributors currently have an obligation to give this type of

information, and therefore, issuers may want to avoid the additional expense of producing the same information.

3.2 The interaction of the disclosure obligation to be fulfilled by issuers in the Scheda Prodotto to be embedded in the Summary/Final terms under the Recommendations with the requirement for a Scheda Prodotto to be prepared by intermediaries.

In this respect it would also be useful to clarify the following: (i) whether a *Scheda Prodotto* prepared by the issuer pursuant to the Recommendations can also be used to meet the information requirements to be provided by intermediaries (pursuant to MiFID) in their own *Scheda Prodotto;* or (ii) if the *Scheda Prodotto* prepared by the intermediary can be used by the issuer to meet the requirements set out by the Recommendations, or (iii) if issuers and intermediaries will have to prepare two different *Scheda Prodotto*, or if reference can be made to the one embedded in the offering documentation.

Moreover, the related responsibility regime is not clear considering that all information concerning the offer must be consistent with that contained in the prospectus, pursuant to Article 15, paragraph 4 of the Prospectus Directive and article 34-*sexies* of the CONSOB Regulation on Issuers.[3]

3.3 The scope of the Recommendations.

It is not clear how the Recommendations apply in this regard to plain vanilla products since, as a general rule, such products are excluded from the scope of the Illiquid Resolution.

4. LIABILITY FOR DISCLOSURE – APPLICABLE REGIME

The extension of rules that have been drawn up for different products (*i.e.* insurance products, the offer documents in respect of which are not subject to the Prospectus Directive regime and are therefore, not approved by CONSOB or by any other regulatory authority) and in connection with different roles of those subject to such rules (*i.e.* intermediaries carrying out investment services *vis-à-vis* their clients) could raise uncertainty over the applicable liability regime with respect to Prospectus Directive offer documents.

Furthermore, the prospectus liability regime under article 94 of the Italian Financial Services Act [4] relates only to the disclosure requirements provided for by the Prospectus Regulation and is more onerous (as it creates a "*culpa in re ipsa*" of the issuer/offeror for any misleading/incorrect information contained in the prospectus) than the one relating to the disclosure requirements set out in connection with the other set of rules mentioned above. In particular, the prospectus liability regime is more onerous than that applicable to the information contained in the *Scheda Prodotto* to be provided to retail investors by intermediaries

[3] Reference is made to Article 34-*sexies*, paragraph 3 of CONSOB Regulation No. 11971 of 14 May 1999, as amended (in particular, see section highlighted below):

"*3. The offeror, the issuer and the party responsible for making the placement shall be obliged to ensure the consistency between the information contained in the prospectus and that in any event provided during the public offering and possible placement with qualified investors, including therein that which can be gathered from recommendations, as defined by Article 65, made public by the parties indicated by Article 95, paragraph 2 of the Italian Financial Services Act. A copy of the recommendations and the documents used for the placement with qualified investors shall be sent to Consob as soon as these documents have been prepared. The material information provided to qualified investors or to particular categories of investors shall be included in the prospectus or in the supplement to the prospectus as per Article 94, paragraph 7 of the Italian Financial Services Act*".

[4] Reference is made to Article 94, paragraphs 8 and 9 of Legislative Decree No. 58 of 24 February 1998, as amended (in particular, see sections highlighted below):

"8. *The issuer, offeror or any guarantor, as applicable, or the persons responsible for the information contained in the prospectus, shall be liable, each in relation to the extent of their own duties, for damages caused to the investor placing reasonable faith in the truth and accuracy of information contained in the prospectus, unless it is proved that all due diligence was adopted for the purpose of guaranteeing that the information in question complied with the facts and that no information was omitted that could have altered the sense thereof.*

9. The intermediary responsible for placement shall be liable for false information or omissions that could influence the reasoned decisions of an investor, unless said intermediary proves that all due diligence was adopted pursuant to the previous subsection".

distributing the financial products, who are also responsible for it (pursuant to article 23 of the Italian Financial Services Act implementing MiFID[5]).

5. CURRENT ITALIAN PROGRAMMES

It is unclear how the current structure of Italian programmes will be affected by the Recommendations, which supersede CONSOB Communication no. DEM/6042384 of 12 May 2006[6], and whether it would be possible to have only one annual programme covering the different "families of products" thus far identified by CONSOB (for example, plain vanilla programmes, rates programmes, CPPI programmes etc.), and the extent of information to be provided in the Base Prospectus and in the Final Terms.

In particular, it would be useful to clarify:

- what is meant by "multi – product Final Terms";
- whether the inclusion in transaction documents of any such additional information could be done as part of the annual programme update or whether it would be necessary to supplement the base prospectus or whether such information could be disclosed in the Final Terms; and
- whether the Summary will have to be amended where information is included in the Final Terms pursuant to the requirements of the Prospectus Directive and the Prospectus Regulation but where, according to the Recommendations, such information is also of the type that should be included in the Summary.

We hope that this response is helpful. We would be happy to discuss any issues it may raise directly with you as well as any other areas of interest you may have where we might be able to offer an insight. In this regard please do not hesitate to contact Paola Leocani (email: paola.leocani@allenovery.com; telephone: +39 02 2904 9391)

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[5] Reference is made to Article 23 of Legislative Decree No. 58 of 24 February 1998, as amended (in particular, see section highlighted below):

"1. Contracts for the provision of investment and non-core services, except for the service set forth in Article 5 (f), and, if foreseen, the provision of accessory services, shall be reduced to writing and a copy given to customers. Consob, after consulting the Bank of Italy, may issue a regulation establishing that, for justified technical reasons or in relation to the professional nature of the contracting parties, certain types of contract may or must be concluded in a different form. Failure to comply with the prescribed form shall render the contract null and void.

2. Any clause which refers to usage for the determination of the fee payable by customers or any other amount charged to them shall be null. In such cases, nothing shall be payable.

3. In cases referred to in paragraphs 1 and 2, nullity may be enforced only by the customer.

4. Title IV, Chapter I, of the Consolidated Law on Banking, shall not apply to investment services and activities, to the allocation of financial products as well as to transactions and services which are components of financial products subject to the regulations of Article 25-bis or of part IV, title II, chapter I. In any case, the pertinent provisions of title VI of the Consolidated Law on Banking are applied to transactions regarding consumer credit.

5. Within the scope of the provision of investment services and activities, Article 1933 of the Civil Code shall not apply to derivative financial instruments or to similar instruments specified pursuant to Article 18(5)(a).

6. In actions for damages in respect of injury caused to the customer in the performance of investment services or non-core services, the burden of proof of having acted with the due diligence required shall be on the authorised intermediaries"

[6] Quantitative data on financial instruments covered by an offering programme would then be allocated only to the Final Terms, according to the procedures described in the Recommendations, and not in the Base Prospectus.