



EUROPEAN COMMISSION

Internal: Market and Services DG

Director-General

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Lord Woolf  
c/o Bank of England  
Threadneedle Street  
London  
EC2R 8AH

**Subject: Financial Markets Law Committee  
Issue 103: Prospectus Directive- "Offer to the Public"**

Dear Lord Woolf,

Thank you for your letter of 25<sup>th</sup> September outlining some perceived problems of interpretation of some provisions in the Prospectus Directive (2003/71/EC). We apologize for the delay in responding to your queries, which was due to the increased workload of DG MARKET services in the securities markets sector and to the complexity of the issues you raise.

Most of these issues that you presented are well known to me. I understand that you have addressed some of those to the CESR Level 3 Committee as well. Indeed, CESR and the Commission services cooperate on a constant basis in order to get appropriate responses to questions emerging from the application of the Prospectus Directive. Please note that a number of these issues will be addressed in the forthcoming review of the Prospectus Directive. In this context, I would like to express some preliminary comments to your queries.

As regards to your first question on pre-sales communications, you consider that a communication on its own should not be treated as an "offer of security to the public" as defined in Art. 2.1 (d) of the Prospectus Directive. In our view, the contractual element is not central in establishing whether a communication should be treated as an offer. There are more relevant elements, such as the level of information provided in a communication as well as the way a communication is structured (i.e. to enable an investor to decide the purchase of securities). Nevertheless, we encourage CESR to reach an agreed interpretation on what they consider as "sufficient information" in order to ensure that the Directive is applied in the same way in all Member States.

Regarding the potential overlap between MiFID and Prospectus Directive, in respect of research communications, we need some more information from your side in order to provide you with an appropriate answer. It is not clear to us in which way the requirements of Art. 25 of the implementing MiFID Directive (2006/73/EC) could be


"not practically consistent" with the requirements of the Prospectus Directive. It would be useful if you could provide us with more explanations and examples on this particular issue.

Concerning your second question, the level of information must be "sufficient [...] so as to enable investor to decide" to subscribe securities. This is crucial also in determining whether the secondary market activity via screen-based trading should be considered as an offer of securities to the public. We can confirm our position previously expressed in the letter sent in 2005 to the London Stock Exchange, that once the administrative act of admission to trading is completed, communications made in the course of normal secondary market trading should not be treated as offers to the public. Such communications should be regarded as integral to the trading of securities on a market; the prospectus requirement in relation to that activity applies at the time of the admission to trading. It will not be triggered a second time unless there is a new event, such as an offer of those securities that is distinct from a normal trading activity. Furthermore, we consider that the limited items of information made available on trading screens would not be sufficient to constitute a communication which falls within the definition of 'offer of securities to the public' as defined in Article 2.1 (d) of the Prospectus Directive. This could also be the case of the standard market practices you mention to in the second part of your question: however, we need more information on what practices you refer to.

Concerning the "retail cascade" issue - and the related questions of liability and alleged impossibility to comply with the requirements set in Annex V of the Prospectus Regulations - this issue is currently being discussed within the CESR expert groups. In any event, this issue will be most probably addressed in the review of the Prospectus Directive currently carried out by DG MARKET services.

I hope that these explanations are useful. Nevertheless, please bear in mind that the views expressed in this letter are informal views of the Commission services and do not bind the Commission as an institution. Moreover, the Commission would be entitled to take a different view in the future, including in the event of proceedings before the European Court of Justice – which has the final word in terms of interpretation of EU law.

Yours sincerely



Jörgen Holmquist

Contact:

Alberto Parenti, Tel. +32 (0)2 2997872, [alberto.parenti@ec.europa.eu](mailto:alberto.parenti@ec.europa.eu)