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CHAIRMAN:

THE RT.HON. THE LORD WOOLF

10 March 2009

Mr Jörgen Holmquist
Director General of DG Internal Market and Services
European Commission
B - 1049 Brussels
Belgium

Dear Mr Holmquist

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

As you are aware, the main role of the Financial Markets Law Committee ("FMLC") is to identify issues of legal uncertainty, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed. In order to carry out this role, the FMLC established a working group to discuss the European Commission's (the "Commission") consultation and the proposals set out in the "Background Document" in relation to the "Review of Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (the Prospectus Directive)". This letter is the result of the working group's discussions and represents the FMLC's submission in response to the consultation.

The FMLC has previously raised concerns in relation to the Prospectus Directive with the Commission in a letter dated 25 September 2007 (a copy of which can be found on the FMLC's website: www.fmlc.org) and so welcomes the Commission's consultation and is in broad agreement with the proposals. The proposals in the consultation only go so far, however, and some areas of legal uncertainty remain.

Retail Cascades

The FMLC's main area of concern is still the "retail cascades" issue. The Commission has sought to address this issue by deleting the last sentence of Article 3(2) of the Prospectus Directive as set out in paragraph 3.2 of the Background Document. The wording that the Commission proposes to delete is: "The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions (a) to (e) are met for the final placement." The Background Document suggests that this will "clarify the responsibilities of drafting and supplementing a prospectus as well as the level of information to be included in prospectuses used in a retail cascade scenario".

As referred to in the consultation documents, retail cascades occur when securities are distributed through intermediaries and are ultimately offered to the public and, in particular, to retail investors by intermediaries. The issues of legal uncertainty that arise from this development are: (i) that it is unclear with whom liability for the prospectus lies in the case of a placement; and, (ii) that there is

uncertainty over the extent and duration of any such liability on the issuer when distribution is in the control of intermediaries.

The wording in the last sentence of Article 3(2) makes it clear that a prospectus is required if conditions (a) to (e) are not met for the final placement in the context of a placement through intermediaries. What is not clear, however, is where responsibility for that prospectus lies (i.e. with the issuer or with the intermediary) nor the extent or duration or any consequent liability.

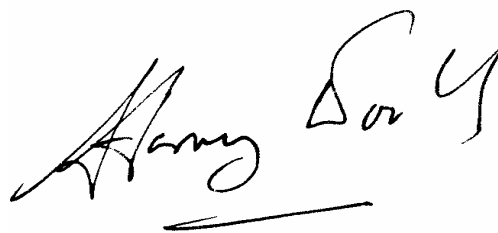
CESR has clarified that where financial intermediaries are acting in association with the issuer, they are not required to draw up a new prospectus and the issuer is only responsible for publishing supplements for the duration of the sub-offer conducted by intermediaries acting in association with the issuer. However, problems arise in the context of offers to the public by an intermediary in a retail distribution where the intermediary is not acting in association with the issuer or is acting outside the terms of the authorisation granted to that intermediary by the issuer. As mentioned in its letter dated 25 September 2007, the FMLC believes that unauthorised placements of this kind should not give rise to liability on the part of the issuer for failure to comply with the Prospectus Directive. Unfortunately, it also considers that the deletion of the last sentence of Article 3(2) is unlikely to solve this problem as it does not, in any way, make clear where responsibility for a prospectus lies in a retail cascade.

The FMLC notes that the wording in the last sentence of Article 3(2) has an anti-avoidance purpose. If the FMLC understands correctly, the wording is intended to bring within the regime placements through intermediaries, which are then aggregated as one "public offer", such that there is no loophole for issuers who seek to circumvent numerical limits by dividing an offer among several intermediaries and describing the placements as distinct offers. The FMLC considers "gate-keeping" to be a policy decision and not an issue of legal uncertainty and as such this aspect of the amendment is beyond the scope of this letter.

Several members of the working group have seen the ICMA's draft response to the consultation and support their submission. The FMLC is in general agreement with the ICMA but, please note that the FMLC is an organisation which focuses only on issues of legal certainty and so is only concerned with the aspects of the consultation which relate to legal uncertainty.

The FMLC would welcome the opportunity to discuss this further if that would be useful.

Yours sincerely

A handwritten signature in black ink, appearing to read "Lord Woolf", with a horizontal line underneath it.

Lord Woolf

cc. David Wright
cc. Maria Velentza