European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken

EACB answer to the consultation of the European Commission on the review of the Prospectus Directive (PD)

10 March 2009

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 4.200 locally operating banks and 63.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 160 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.

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General remarks

1. The EACB welcomes the opportunity to actively contribute to the review of the Prospectus Directive (PD) and to transmit its views on the proposed amendments to single parts of the PD.

2. We share the Commissions view on the overall positive functioning of the PD but would like to highlight that certain parts of it create high administrative burdens for our members. We therefore totally agree with the assessment of the European Commission as well as of the Committee of European Securities Regulators and the European Securities Markets Expert Group that elements of the prospectus regime merit a review.

CHANGES PROPOSED

Article 2 (1) (m) (ii) PD – Modification of thresholds

3. We agree to delete the 1000 thresholds Article 2 (1) (m) (ii) PD. From a practical point of view, the previous limit appears arbitrary. As the features of a non-equity security and the risks to which they give rise are completely independent of its fixed denomination, there is no reason for a differentiation from an investor protection standpoint.

Article 3 PD – Exempt Offers

4. The resale of a security is interpreted and applied in some Member States in such a way that separate prospectuses are required at every stage of the resale of a security, regardless of whether a prospectus has already been issued or not. This means, among other things, that already approved prospectuses which are valid Community-wide under Article 17 and which have been notified accordingly under Article 18, cannot be used at the subsequent distribution stage and have to be supplemented considerably with regard to the information they contain.

5. A clarification is urgently required to the effect that an already approved prospectus or base prospectus for an offering or offering programme is valid in the host Member States in which it has been notified accordingly, for public offerings at any subsequent resale stage and/or for the admission to trading on a regulated market. Such clarification could be achieved by stipulating in Article 3 (2) PD that a prospectus in accordance with the PD only has to be drawn up for second offerings if such a prospectus has not yet been provided.

6. By deleting the passage

   "The placement of securities through financial intermediaries shall be subject to publication of prospectus if none of the conditions (a) to (e) are met for the final placement."

   the Commission argues to reduce doubts as to the scope of the obligation to publish a

public offer with regard to financial intermediaries as well as to questions concerning liabilities in context with a retail cascade. We doubt that such deletion could serve the desired purpose: Primarily, the uncertainties that arise are due to the unsound implementation of the directive on a national level.

Article 3 (2) PD – Retail cascades

7. The retail cascades involve the issuer selling the instruments to investment banks underwriting the issue (the initial offer) who then may sell the instruments to retail distributors. Later on, the abovementioned retail distributors may then sell the instruments to their own retail clients. The problem with this is that Annexes V and XII of the Regulation contain various provisions requiring the inclusion in the prospectus of information on the terms of "the offer". Many of these provisions could be considered to be applicable not just to the initial offer but to subsequent retail offers as well.

8. In this case either the issuer will have to produce a supplement, or the retail distributor will have to produce a new prospectus, each time a subsequent retail offer is made. As retail offers will potentially be made several times, neither one of the options is advisable. In addition to practicality type of concerns, it is difficult to see what essential purpose would be served by requiring the production of a prospectus or supplement including this additional information. The retail distributor will anyway make the offeree aware of the information that is specified in Annexes V and XII and we do not see the value of making that information available to anyone else through the publication of an approved prospectus or supplement.

9. Therefore we agree with the Commission's suggestion to delete last sentence of Article 3(2) as the current situation is to somewhat unclear and confusing from the issuer's point of view. On top of deleting the last sentence of Article 3(2) we would welcome the amendment to the Regulation making it clear that "offer" when used in Annex V or XII refers to the issuer's initial offer, and not to any subsequent retail offer by anyone else.

Article 10 PD – Information

10. We agree with the Commission’s suggestion to abolish the duplicating requirements in respect of the information which the issuer has published or made available to the public in the twelve months preceding the publication of the prospectus (Article 10.1). We consider the obligation to compile an annual repetition of past regulatory disclosures to be unnecessarily burdensome (especially in the context of Transparency Directive where such disclosures are subject to specific dissemination mechanisms).

11. All the essential information is already available to investors because of the disclosure requirements under the Market Abuse Directive and the Transparency Directive. Taking into account that the document is not up to date, the requirement to provide it should be dropped in order to reduce bureaucracy.

Article 16 PD – Supplement to the prospectus

12. The article 16 regulates the publication of the supplement which triggers the walk away right for the investors. The Article provides a withdrawal right of no shorter than two working days which allows the Member States to require longer periods for withdrawal.

13. In the cross boarder issues, the wording of the Article arouses an un-level playing field which is not desirable. Therefore we support the suggestion of the Commission to harmonize the withdrawal period but we would wish to see exact wording saying "*withdrawal right of two working days*" rather than wording "*common period of at least two days*".

14. In addition to the proposal regarding the withdrawal right, we would like to flag the issues regarding the content of the term "*significant new factor*" which we consider not to be entirely clear at the moment for the market participants.

15. The requirement to provide a supplement should only cover mistakes or inaccuracies which lead investors, in their assessment of the securities, to expect a negative performance. The obligation to provide a supplement currently applies in general, regardless of whether any significant new factor it contains may affect the performance of a security positively or negatively. It does not, however, appear appropriate that if this significant new factor is a positive capital market information, the issuer is required to go through the whole supplement procedure.

16. Factors that trigger the obligation to publish a supplement to the prospectus should be defined and enumarated. This would reduce legal uncertainty in case of multinational offers or admission to trading.

17. Furthermore, it should be made clear that the requirement to supplement a prospectus should cease to apply at the earlier of the two times referred to in Article 16 (1) PD, i.e. either the "*final closing of the offer to the public*" or when "*trading on a regulated market begins*". So far, it is not clear whether the earlier or the later of these two times determines when the requirement to supplement a prospectus ends.

18. It should, in addition, be taken into account that the Markets in Financial Instruments Directive (MiFID) is designed to strengthen competition between trading venues. The consequence of this is the establishment of so-called multilateral trading facilities (MTFs), which are also subject under the MiFID (Article 26 ff.) to exchange-like rules and regulations. For this reason, the start of trading on such trading platforms should also lead to termination of the requirement to supplement the prospectus.

19. Any investor who has already acquired securities covered by a supplement has the right to withdraw his acceptance within a period of two days after publication of the supplement. This withdrawal can be handled without any trouble in those cases in which the customer's order can be simply cancelled. Things are much more complicated,

however, in cases where settlement has already taken place through the delivery of the securities. In such cases, the transaction has to be reversed.

20. As the settlement period in Europe is usually two or three days and is thus either the same as or longer than the period allowed for investors to withdraw their acceptance, the withdrawal option would not be restricted in most cases. Only transactions shortly before publication of the supplement would be affected. The right of withdrawal where a prospectus is supplemented should therefore be limited to the time in which settlement has not yet taken place, i.e. the securities have not yet been delivered, in order to avoid complicated reverse transactions.

OTHER ISSUES IDENTIFIED

Disclosure obligations: the prospectus and its summary

21. We are against a further introduction of additional information for investors, following a kind of „key investor information“ approach. This would lead to further administrative burdens for issuers. The goal should be an enhancement of existing disclosure requirements, like the summary in the prospectus. A more standardized summary would enhance the value of the information given to the investor and especially also the comparability of products.

Information requirements in host member states

22. There are discrepancies in the information requirements in the host Member States under different legal regimes, such as consumer protection and prospectus law. For example where an offer to consumers is made in Italy as the host Member State, the whole prospectus has to be published in Italian under Italian requirements, and not only the summary as required by Directive 2003/71. In order to facilitate multinational offers (and reduce costs of such offers) therefore the provisions of the Directive and the national legal frameworks should be harmonised in particular regarding information requirements in the national language.

Disclosure obligations for small quoted companies

23. We welcome the proposed raising of the threshold of € 2,5 million as outlined in Article 1 (2) (h) PD. The current threshold is too low. We would welcome a threshold of € 25 million since the costs for the creation of a prospectus are disproportioned to the refinancing volume of € 2,5 million to € 25 million.

Disclosure obligations for retail investors

24. We are aware that the Commission is analyzing the effectiveness of pre-contractual product disclosures of certain retail investments. We truly appreciate the Commission's

attempts to bring more clarity and consistency to the market but we also see concerns regarding any new legislation.

25. The Financial Services Action Plan Directives form a relatively complex puzzle for the market to ensure the compliance of the FSAP Directives and any new pieces of regulation on top of the existing ones will make the entirety challenging. Therefore we would encourage the Commission to carefully consider any new regulatory initiatives.

26. Also we would like to use this opportunity to remind the Commission that the complexity of a certain retail investment product does not necessarily mean risk as at the end of the day the question is about the level and quality of the disclosure as well as the sale person's ability to describe the content and the risks of the product in question.

Article 1 (2) (j) PD: Extension of the exemption by increasing the total consideration of the offer

27. Practice has shown that small banks practically cannot benefit from the extension of the exemption, as the € 50 million limit is too low for the annual issuing volume. This exemption should therefore be extended by raising the total consideration of the offer to less than € 500 million calculated over a period of 12 months. Given that the size of offering programmes used for funding purposes is usually € 10 – 15 billion, there is no danger of big banks also then being able to benefit from this exemption.

    Examples for the impact assessment:

    Case 1:

    - € 10 million public offering with prospectus (in addition to € 50 million without prospectus)
    - Minimum fixed costs of prospectus (i. e. for lawyer, consultant, internal): € 100,000
    - Minimum running expenses (i. e. for publication, supplements, internal like permanent monitoring): € 50,000 per year
    - Additional costs for prospectus p. a.: € 150,000
    - Interest: 5 % p. a., € 500,000
    - In basis points: 150 basis points

    Case 2:

    - € 500 million public offering with prospectus
    - Minimum fixed costs of prospectus (i. e. for lawyer, consultant, internal): € 100,000
    - Minimum running expenses (i. e. for publication, supplements, internal like monitoring): € 50,000 per year
    - Additional costs for prospectus p. a.: € 150,000
    - Interest: 5 % p. a., € 25 million
    - In basis points: 3 basis points

In case 2 the additional costs are nearly not relevant even if the assumed minimum costs would be higher than in case 1 because of the volume of the public offering.

Article 2 (1) (d) PD – Definition of offer of securities to the public

28. The term "*offer of securities to the public*" in Article 2 (1) (d) PD should be clarified. Article 2 (1) (d) PD defines the term "*offer of securities to the public*" quite broadly and is therefore implemented differently in the Member States. This legal uncertainty currently necessitates a careful analysis of the legal situation in each Member State in which securities are to be offered. This is time-consuming and cost-intensive.

Article 2 (1) (e) PD – Definition of qualified investors

29. The provision at stake provides for a definition of qualified investors. The current proposal amending the existing Prospectus Directive is aimed at aligning the concept of "qualified investor" with the notion of "professional clients" for the purposes of MiFID. We do understand the purported simplification; however, we would like to point out that for an userfriendly handling of the directive a full-text definition would be more suitable than a reference to other directives.

Article 5 (4) PD – Further specification of the base prospectus regime

30. There is no uniform approach in the individual Member States as to which information on an issue may form part of the final terms and which information must be made in the prospectus itself. Article 22 (2) of the Prospectus Regulation merely states in this respect that information items which are not known when the base prospectus is approved and which can only be determined at the time of an individual issue may be omitted from the base prospectus. While this distinction is a good starting point, it should be further specified in the individual schedules with regard to the information required so as to achieve a uniform, EU-wide understanding of the contents and function of the final terms.

Liability

31. We would welcome any attempts to bring more coherence to the cross border liability in respect of the transparency and market abuse directive disclosures. At the moment the situation is extremely unclear and causes a lot of uncertainty, especially for the issuers who are active on the pan-European market. We appreciate that the question needs to be solved also on the national level in parallel but we would like to remind on the importance of the multinational liability as within the current challenging market conditions, issuers do not wish to be sued and "tested" on the level of liability in the court anywhere in Europe, including their home jurisdiction.

32. The civil liability for prospectuses in the EU Member States should be harmonised. At the same time, uniform EU-wide rules on the liability of experts should also be introduced.

33. Depending on how it is set nationally, this liability benchmark may require the provision of further information which can differ from one Member State to another. This leads to considerable liability risks for prospectus issuers, seriously obstructs cross-border offers and the admission of securities to trading on a regulated market and is at odds with the aim of the PD. It thus greatly devalues the European passport for securities prospectuses.

34. An additional factor is that the group of persons responsible for a prospectus is defined very differently in the Member States. In some cases only the issuer or, additionally, a bank accompanying the drawing up and approval of the prospectus, auditors or experts whose professional opinion on certain significant facts has to be included in the prospectus are held fully or partly responsible for the content of the prospectus. The special responsibility attributed to experts should be flanked by corresponding liability rules.

35. So that the European passport for securities prospectuses (Articles 17 and 18 PD) can unfold its full effect in the first place, it is therefore imperative that, in addition to the information contained in a prospectus, the civil liability of the prospectus issuer for this information is uniformly regulated. This could be achieved by, for example, establishing a uniform, final definition of liability for all prospectuses drawn up in accordance with the PD and the PR.

36. Liability regimes based on general civil law, namely, culpa in contrahendo respectively on the duty to provide accurate pre-contractual information should be kept untouched, because those issues do not fall within the scope of the Prospectus Directive.

Article 9 PD: Securities offered in a continuous or repeated manner for more than 12 months

37. In line with CESR's approach at level 3, it should be made clear that the validity of a prospectus applies only to a new offering of the relevant security and not to securities offered publicly in a continuous or repeated manner for a period of more than 12 months.

Article 12 (2) PD

38. If, in accordance with Article 12 PD, an issuer uses a prospectus comprising a registration document, securities note and a summary note, Article 12 (2) PD states that in the event of a further issue he can only update the already approved registration document by including the relevant information in the securities note. Updating the registration document itself is not deemed to be permissible under Article 12 (2). This is difficult to

understand, since such updating is necessary so that the updated registration document can be used for other issues as well. This would not only make things easier for the issuer but would also allow provision of a uniform, updated registration document to all investors

Article 18 PD: Addition to the notification procedure

39. Article 18 PD sets out the formal procedure that is required so that a prospectus that has already been approved in accordance with Article 17 is valid Community-wide in any number of host Member States. The validity of the prospectus in the host Member State concerned depends on due notification by the competent host Member State authority.

40. Furthermore, notification triggers some important duties for the prospectus issuers that are linked to civil-liability aspects. For this reason, we believe it is imperative that either the issuer is allowed to issue the securities after expiry of the period of three working days – without the need for any further action by the authorities – without having to face sanctions for issuing securities without a prospectus or that the competent authority of the host Member State sends written confirmation of notification either (i) directly to the issuer or (ii) indirectly via the competent authority of the home Member State. This is the only way for the prospectus issuer to obtain certainty that the notification procedure has been completed also from the perspective of the competent host Member State authority.

41. There is no requirement for the competent authority of the host or the home Member State to inform the Issuer formally of the notification made to host Member States. However, a formal notification acknowledgement may be required by the Issuer for example in order to list its securities on a stock exchange of the host Member State.

    Thus Article 18 (1) should be amended and provide for formal information of the Issuer for a formal acknowledgement of a notification.

Changes in Annex V and Annex XII

42. Annex V paragraph 4.14 and Annex XII paragraph 4.1.14 of the Regulation require disclosures in the prospectus of information on taxes on the income from the securities withheld at source. This is limited by the introduction to the paragraph to those in the country of the registered office of the issuer and the country where the offer is being made or admission is being sought.

43. Where the ultimate investor holds securities through a custodian or a clearing system, which is normally the case on the wholesale market, it would clearly be impossible for the issuer to identify everyone in the payment chain between itself and the ultimate investor, so as to describe correctly the payment that that investor will ultimately receive.

44. It would therefore be helpful if Annex V paragraph 4.14 and Annex XII paragraph 4.1.14 were reworded to make this clear and say: information on taxes on the income from the securities withheld at source by the issuer or its agents as the agents deal with the custodians and the clearing systems on issuer's behalf.

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