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Vicky Ford
UK Member of the European Parliament
European Parliament
Rue Wiertz
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Dear Ms Ford

Outstanding FMLC Comments on the Proposal to amend the Prospectus Directive

As you may be aware, the role of the Financial Markets Law Committee (the "FMLC") is to identify issues of legal uncertainty, or misunderstanding, 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.

The FMLC has previously raised concerns in relation to Directive 2003/71/EC (the "Prospectus Directive") with the European Commission in letters dated 10 March 2009 and 25 September 2007. Following the publication on 24 September 2009 of the European Commission's draft directive to amend the Prospectus Directive (the "PD Amending Directive"), the FMLC sent a letter of response to the European Commission on 23 October 2009 highlighting those elements of uncertainty previously identified by the FMLC which continued to remain unaddressed in the PD Amending Directive. Copies of the FMLC's correspondence with the European Commission can be accessed on the FMLC's website: <http://www.fmlc.org/>.

The FMLC has recently considered the report (dated 26 March 2010) prepared for the European Committee on Economic and Monetary Affairs by Dr. Wolf Klinz, Rapporteur to the European Parliament on the proposal to amend the Prospectus Directive (the "Parliamentary Report"). Whilst the FMLC is broadly supportive of many of the changes set out therein, certain provisions continue to cause concern.

The purpose of this letter is to draw to your attention (in your capacity as Shadow Rapporteur for this legislative proposal) those provisions, which if left unamended, may give rise to issues of legal uncertainty in the wholesale financial markets. Each of the issues is considered in turn below.

Retail Cascades

Article 3(2) of the PD Amending Directive

In its correspondence with the European Commission, the FMLC identified the "retail cascades" issue as one of its main areas of concern. 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 the Prospectus Directive 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. These issues of uncertainty were acknowledged by the European Commission in section 5.3.4 of the Explanatory Memorandum to the PD Amending Directive.

Neither the PD Amending Directive nor the Parliamentary Report entirely removes the uncertainty as to where liability will lie for breach of the Prospectus Directive in an unauthorised placement. The Parliamentary Report, for example, provides as follows in Article 3(2):

"Member States shall not require another prospectus in any such subsequent resale of securities or final placement of securities through financial intermediaries as long as a valid prospectus is available in accordance with Article 9 and the issuer or the person responsible for drawing up such prospectus and, if applicable, any other entity which, pursuant to national law, is liable for the accuracy of a specific part of the content of such prospectus, consents to its use."

National authorities could interpret the above extract in a manner which would only require that consent is provided in relation to a particular *type* of final placement or resale of securities and that the actual identity of the financial intermediary carrying out such final placement or resale of securities is irrelevant. There is no express requirement for the consent to relate to a particular prospectus, to a particular intermediary or to a particular act of on-selling. The liability of those responsible for the contents of the prospectus could, therefore, be extended in an unintended manner rendering such entities liable for inaccuracies in prospectuses which have been distributed by financial intermediaries without their knowledge. This would seem to be a very inequitable result.

In addition, in circumstances where the issuer has multiple valid prospectuses available in accordance with Article 9 (i.e. in respect of different securities), any consent to the utilisation of a prospectus under Article 3(2) should relate specifically to the prospectus which was published in relation to the securities which are the subject of the subsequent resale or final placement.

It would be helpful, for the reasons set out above, if Article 3(2) made it clear that the consent must relate to (i) a particular act of resale or final placement; (ii) a particular financial intermediary; and (iii) a particular prospectus.

Recital 8

The FMLC welcomes the clarification in Recital 8 which provides that:

"Where the financial intermediary chooses to use the initial prospectus without consent, the intermediary should be liable for the information stated in the initial prospectus."

However, this addition to Recital 8 only partly addresses the confusion which may arise when trying to attribute liability for prospectus inaccuracies in a retail cascade scenario. Clarification to the effect that the financial intermediary would be similarly liable if it failed to act in accordance with the terms or conditions of the consent provided is also needed for market participants to fully understand the circumstances in which they may be liable for inaccuracies in prospectuses distributed in a retail cascade.

Supplements to the Prospectus

The PD Amending Directive introduces an amendment to Article 16(1) of the Prospectus Directive, under which an obligation to produce a supplement to a prospectus would cease on the earlier of the final closing of the offer to the public and the time when trading of the securities begins. The Explanatory Memorandum states in section 5.3.10 that, without this amendment, the Prospectus Directive creates a considerable degree of uncertainty as to when the requirement to publish a prospectus ends in cases where the securities are to be admitted to trading on a regulated market.

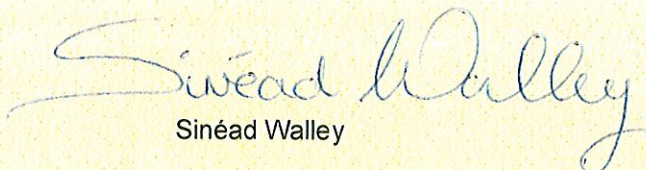
The FMLC is concerned that the proposed amendment may have unintended consequences for investors and issuers; particularly where, for example, a significant new factor relating to the information in the prospectus arises after admission of the securities to a regulated market but before the offering period has closed. In this scenario, an issuer would not be willing to continue to offer securities on the basis of the unamended prospectus for legal and commercial reasons, but the competent authority would have no power to approve an amending document because admission has already taken place. As a result, the issuer would most likely seek to amend the prospectus using an unapproved "wrapper". However, the use of such a "wrapper" would deprive investors of the protection conferred upon them through the formal approval of a supplemental prospectus. It would also deprive the issuer of the possibility of obtaining a passport for the amended prospectus, such that the issuer would be at risk if it were to distribute the wrapper to investors in other Member States.

These problems could be resolved if the obligation to produce a supplemental prospectus were to cease on the *later*, rather than the earlier, of the final closing of the offer and the admission of the securities to trading. This solution was proposed in the compromise texts published by the presidency of the Council of the European Union in November and December 2009 and the FMLC notes that it was also proposed by yourself as Amendment 156 in the draft report of Dr. Wolf Klinz, dated 25 February 2010, containing Amendments 67-172 to the Prospectus Directive.

The FMLC believes that the outstanding concerns highlighted above give rise to issues of legal uncertainty for the wholesale financial markets and the FMLC should be grateful if you would consider these points further, particularly in light of the forthcoming Trilogue on the PD Amending Directive.

If you would like to discuss any of the points detailed above, please do not hesitate to contact me.

Yours sincerely,


Sinéad Walley