

European Commission  
Directorate General Financial Stability, Financial Services and Capital Markets Union  
SPA2 03/079  
1049 Brussels  
Belgium

*(Submitted online at <https://ec.europa.eu/>)*

4 December 2017

Dear Sirs,

**Review of the European Supervisory Authorities – amendments to Prospectus Regulation  
2017/1129**

The primary market constituency of the International Capital Market Association (ICMA) is giving feedback on the proposed amendments to Regulation 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the **Prospectus Regulation**), pursuant to the Review of the European Supervisory Authorities.

Other ICMA constituencies may submit feedback in relation to other aspects of the Review of the European Supervisory Authorities in due course.

Representing a broad range of capital market interests including banks, asset managers, exchanges, central banks, law firms and other professional advisers, ICMA's market conventions and standards have been the pillars of the international debt market for almost 50 years. See: [www.icmagroup.org](http://www.icmagroup.org). ICMA's European Transparency Register number is 0223480577-59.

This feedback is given by the ICMA primary market constituency comprised of borrowers and banks that lead-manage syndicated debt securities issues throughout Europe. This constituency deliberates principally through:

- the ICMA Corporate Issuer Forum<sup>1</sup>, which gathers senior representatives of 27 major corporate issuers;
- the ICMA Financial Institution Forum<sup>2</sup>, which gathers the heads or senior members of the capital raising, funding and treasury departments of 35 ICMA member banks active in capital markets issuance in Europe;
- the ICMA Primary Market Practices Committee<sup>3</sup>, which gathers the heads and senior members of the syndicate desks of 50 ICMA member banks active in lead-managing syndicated debt securities issues in Europe; and

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<sup>1</sup> <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-corporate-issuer-forum/>

<sup>2</sup> <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-financial-institution-issuer-forum/>

<sup>3</sup> <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-primary-market-practices-committee/>

- the ICMA Legal and Documentation Committee<sup>4</sup>, which gathers the heads and senior members of the legal transaction management teams of 21 ICMA member banks active in lead-managing syndicated debt securities issues in Europe.

We set out our feedback in the Annex to this letter and would be pleased to discuss it with you at your convenience.

Yours faithfully,



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<sup>4</sup> <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-legal-and-documentation-committee/>

## ANNEX

### Introduction

1. ICMA's feedback relates to the proposed amendments to the Prospectus Regulation, namely the suggested transfer of the approval of certain prospectuses and control over compliance of advertisements from national regulators to ESMA.
2. We urge the European Commission to reconsider these proposals, which seem unnecessary and could hamper efficiency for market participants.
3. Whilst a single European regulator has been envisaged generally, it is not clear why these specific prospectus changes are being proposed and why they are being proposed now. We note that the Commission's consultation (to which ICMA responded in May) and feedback statement made no mention of these changes. We also note that the new Prospectus Regulation was finalised a matter of months ago following detailed consultations and negotiations and so it seems strange to be proposing these amendments now.

### Supervisory convergence and regulatory arbitrage concerns

4. It is important that EU policy making is evidence-based. In this respect, the Commission notes that ESMA's existing convergence work has been "unable to promote supervisory convergence and the landscape of prospectus approval requirements remains fairly fragmented across the EU" and that there is "also a risk of supervisory arbitrage as issuers might target national CAs which they consider less demanding in order to get approval for prospectuses."
5. However, ESMA's convergence work is not completed, with risk factors for example due to be covered in 2018. Furthermore, it is not clear that market users perceive actual challenges to market operation and investor protection in this area. Regarding qualified investor-only regulated markets at least, European regulatory philosophy considers that such investors require less protection than other investors (indeed offers to qualified investors-only require no prospectus approval at all). The reference to arbitrage as a hypothetical possibility is telling in this respect – there are many hypothetical risks to market resilience, but presumably good regulation principles contemplate that new rules should address circumstances where detriment has actually occurred or is likely to do so (based on evidence).
6. Increased supervisory convergence in this area could also be achieved in a more proportionate manner through measures aimed at strengthening ESMA's role in overseeing national CAs (rather than transferring functions that currently sit with the national CAs, such as prospectus approval). For example, one area that might be considered is a strengthening of the peer review process.
7. The Commission also notes that the PD's current advertisement regime provides for fragmented supervision across host national regulators. However, this concern could be addressed by concentrating such supervision with the current home national regulator that approved the related prospectus.

### Efficiency and cost concerns

8. The Commission also notes: “many national CAs would have to hire prospectus readers with the skills to deal with these relatively rare types of prospectuses” and there may be “duplication of resources in different national CAs for a few cases only”. However, such a burdening of resources is not pre-ordained. Several national regulators are highly experienced in approving prospectuses in specific contexts and issuers of debt securities with denominations of €1,000 or more are already able to choose a national regulator that satisfies the Prospectus Directive’s nexus criteria. Helpfully, this position is due to be retained under the forthcoming Prospectus Regulation, meaning debt issuers can continue to choose an experienced (and therefore efficient) national regulator to approve their relevant prospectuses.
9. The Commission also notes that in the context of the “United Kingdom’s exit from the Union, Luxembourg might be faced with a disproportionate workload” – but this again seems to be general hypothesising (unless Luxembourg’s CSSF has expressed concerns in this respect).

### Increased costs and administrative burdens and technical challenges for market participants

10. The efficiency of the prospectus approval process is crucial to issuers of debt securities, who need to be able to access markets in a timely and straightforward manner. If the proposals were to proceed, it would be crucial that ESMA could deliver a seamless transition by approving prospectuses at the same level of efficiency (in terms of speed, predictability and cost) as the most efficient national regulators currently do (also bearing in mind third country listing options such as New York, Dubai, Singapore and Hong Kong). This may be particularly relevant for third country issuers, who may be even more likely to choose to list securities outside the EU and offer in the EU on an exempt basis.
11. For issuers of debt securities, there are generally minimal concerns with the efficiency of the current approval process. So the proposal to change it now is unwelcome, particularly in light of the high level of other regulatory changes facing market participants currently (MiFID II, PRIIPs, Benchmark Regulation, etc). It also seems curious that these changes are being proposed now, when the Prospectus Regulation (which was subject to detailed consultation) was finalised only recently.
12. A seamless transition would presumably involve significant budgetary and human resourcing implications (including in terms of specific legal/sectoral/ linguistic expertise) and the Commission acknowledges generally (i.e. even without focusing on a seamless transition) that the “personnel implications of a move toward central ESMA approvals of certain wholesale and ABS prospectuses could be considerable”.
13. Regarding specialist issuers specifically, there may also be technical challenges because identifying the “specialist” nature of such issuers is not always straightforward. This might mean that an approval application might be initiated with a national regulator, then suspended partway as specialist status is recognised and then re-started at the ESMA level.

### Conclusion

14. The proposal for transferring certain prospectus approvals to ESMA seems to run clear risks to market efficiency in the pursuit of hypothetical gains. We urge the Commission to re-consider this proposal and retain the status quo, which was only agreed a matter of months ago.