

ABI's response to the CESR
Call for evidence on the
supervisory functioning of
the Prospectus Directive and
Regulation (ref. 06-515)

29 January 2007

1. The Associazione Bancaria Italiana (ABI) appreciates the opportunity provided by the CESR to express its observations on the functioning of the Prospectus Directive (Directive 2003/71/EC) and its implementing regulation (Commission Regulation (EC) No. 809/2004), with respect to the aims of this Directive, specifically, to allow European issuers to raise funds within a fully harmonized legal framework in EU countries.
2. In this regard our comments to the CESR will concern problems that Italian banks, as issuers, have faced due to the manner in which the national authority (CONSOB) has implemented the framework in question.

Introduction of the so-called 'simplified prospectus'

3. CONSOB considered it appropriate to add to the prospectus formats introduced by European regulations (specifically by Commission Regulation (EC) No. 809/2004) and incorporated into its own regulation, an ad-hoc “simplified prospectus” format for plain vanilla bank debt securities offered over a 12-month period for a value of less than 50,000,000 euros¹.
4. According to CONSOB² “the case under examination falls within the cases to which the European framework does not apply and is not an exemption to the latter. Consequently, it has been left up to the national legal system to determine whether such cases should be subject to the rules governing prospectuses”.
5. The simplified prospectus is not subject to prior approval by CONSOB, even though CONSOB can check it ex post. This means that banks are responsible, as for other types of prospectuses, for the contents of the simplified prospectus and are subject to penalties in case of error.
6. From a formal point of view the approach adopted by CONSOB neglects, in our view, the fact that European Community legislation on prospectuses does not grant³ power to national authorities to introduce, of their own volition, an obligation to issue a prospectus.

¹ See article 33, paragraph 4, of CONSOB's Rules on Issuers (Decision no. 11971/1999)

² Letter by CONSOB in response to ABI's of 31 August

³ In effect, Directive 2003/71/EC on prospectuses (article 1, paragraph 2, subparagraph j) excludes from the scope of application, public offers and requests to be admitted to trading of non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer is less than EUR 50,000,000, which limit shall be calculated over a period of 12 months. An issuer, an offeror or a person asking for admission to trading on a regulated market outside of the scope of this Directive, shall be entitled to draw up a prospectus in accordance with this Directive in order to benefit from a harmonized and informative regime (article 1, paragraph 3)

7. From a substantive point of view it would appear that the introduction of a simplified prospectus, which has not occurred in the other principal European countries:

- discriminates, as far as plain vanilla bank debt securities with a value of less than 50 million euros are concerned, against Italian banks compared to their European competitors whose national authorities have complied with community legislation that does not apply tout court to the rules on public offerings these instruments;
- creates, in principle, an entry barrier for foreign issuing banks that wish to make public offerings in Italy;
- does not consider the principle of proportionality, so much so that for low risk and small value issues it calls for a prospectus the costs/manpower for whose preparation are excessive;
- seems to ignore the fact that as small-sized banks are more rooted in their towns and have a closer relationship with each investor, they could be subject to a less complex degree of transparency.

8. That said, it would appear to be appropriate to request the CESR to evaluate if the position adopted by CONSOB conflicts with the objectives of European Community regulations on prospectuses, specifically, for the chance for any European issuer to raise funds within a framework where all the laws of the various European countries are fully harmonized (so-called "passporting").

Approval procedure for the prospectuses

9. From our survey, it appears that CONSOB takes more than the twenty days prescribed by the Directive to approve the filing of the prospectus, thereby substantially slowing down a bank's fundraising activities.

10. The issuing banks have stated that such delay is partly caused by the frequent and repetitious requests for more information, which has the effect – consistent with European Community legislation – of suspending deadline by which CONSOB must give its clearance.

11. In this regard, it appears appropriate that the CESR establish appropriate guidelines which standardizes as much as possible the conduct of national authorities during a delicate moment like that of approving a prospectus.

12. According to the Italian authorities, the filing procedures for prospectuses requires the diskette to be delivered personally and not by e-mail.

13. In that regard, we request the CESR to provide indications as to the possibility of allowing the prospectus to be delivered for approval by e-mail.

Base prospectus

14. In order to ensure offers of attractive products and time to market, European Community legislation provides for the so-called. "base prospectus" by which an issuer can indicate the types of financial instruments that it intends to offer and postpone the publication of more detailed information and related examples to a later date and closer to the start of the offer.

15. Notwithstanding the above, CONSOB, with special Notice⁴, provided that the quantitative examples or the algorithms related to yields, accompanied by appropriate examples, should be inserted wherever possible already as in the base prospectus, and in any event, the risks

⁴ Notice no. 6042384 of 12 May 2006

associated with the financial product being offered shall be described in the same prospectus, as required by point 2 “Risk Factors” of Attachment XII to Regulation EC 809/2004.

16. With respect to that, the possibility to insert examples or algorithms related to the determination of yields fundamentally depends on the type of financial instrument it intends to issue.

17. In cases of structured bonds (in Italy, it is a phenomenon that cannot be ignored⁵), such yield results as unfeasible. In fact, to the extent that the temporal horizon of the offering programme tends to project, as is usual, a month period and not a week, market experience has shown the inability of the issuer to approximate reasonably interest rate trends and investor preferences.

18. We also inform the CESR that the approach by CONSOB on the discussion penalizes Italian issuing banks since it's known that many foreign competitors have obtained from their competent authorities approval of the base prospectus, where, consistent with European Community legislation on prospectuses, the types of financial instruments they intend to issue are indicated; a detailed description, and example, of the specific financial instruments issued shall be given along with the final terms settled.

19. Thus, we request the CESR to evaluate the possibility that national authorities refrain from requiring the publication of examples as it is contrary to same ratio of the base prospectus.

⁵ In Italy in 2005, the placement volume of structural bonds was equal to 15 billion euros