– PRIVATE PLACEMENT REGIMES IN THE EU –

SUMMARY REPORT OF WORKSHOPS ORGANISED BY DG INTERNAL MARKET AND SERVICES

January 15th and February 7th 2008

The two workshops organised by the European Commission brought together representatives from different parts of the financial industry, including asset managers, all segments of the banking industry, stock exchanges, institutional investors and national supervisors.

The workshops were convened in order to give in-depth consideration to some issues which were not conclusively addressed by responses to the Commission 'call for evidence'. A summary of those responses is available at:
http://ec.europa.eu/internal_market/investment/consultations/index_en.htm#call

The workshops were the occasion for open discussions about the potential need, scope and form of an EU private placement regime. Opinions expressed during the meetings did not reflect official positions of the organisations present. The workshops did not aspire to achieve consensus on the issues discussed – they were simply a forum for preliminary exploration of different aspects of 'private placement'. This summary report does not reflect the views of all participants. Instead, it provides a summary of the main themes in discussions and the principal viewpoints expressed (no attribution of remarks).

1. OVERVIEW OF VIEWS ON PRIVATE PLACEMENT

- ***What is private placement?***

The main objective of an EU private placement regime should be to create a distribution channel through which eligible buy and sell side participants can transact on a peer-to-peer basis free from regulatory restrictions designed to protect the average (retail) investor (in practice, notably conduct of business rules, financial promotion, disclosures and product approval/registration). Private placement should be conceived as a 'special' distribution channel – open to designated buyers and sellers subject to respecting conditions regarding marketing and advertising methods.

- ***What benefits/impacts are to be expected from an EU private placement regime?***

The main advantage of officially recognised EU private placement arrangements would be:

– greater legal certainty for transactions that are currently possible (subject to risk of legal challenge);

– and widening of cross-border private placement possibilities to some Member States where it is effectively impossible.

Enhanced market access would also benefit investors through lower cost and greater choice. Greater liquidity of the relevant markets would be another important benefit,

especially in smaller jurisdictions. An EU private placement regime would place the EU on a par with other non-EU jurisdictions which already operate open private placement regimes. A number of participants highlighted the paradox that it is currently more difficult and complex to place products privately throughout the single market than to do so in non-EU jurisdictions.

Interventions underlined the need to be as concrete as possible about the sources and (to the extent possible) the scale of benefit - both direct transactional savings and dynamic/longer-term benefit for the overall market. A convincing demonstration of potential benefits will be needed to justify any eventual action. However, evidence so far was either of a very indirect and qualitative nature, e.g. comparison of cross-border activities in non-harmonised funds compared to UCITS, or focused on the cost side of providers only. It is difficult to quantify missed opportunities compared to a counterfactual situation where private placement exists. Discussants suggested a conservative estimate that annual legal costs for a pan-EU fund would be in the range of 100.000 to 200.000 Euro per year. There was anecdotal evidence of funds whose legal fees, per year, per fund, were 500.000 Euro.

The workshops discussed also a number of concerns by some supervisors relating to the impact of private placement arrangements on overall functioning of markets:

- Concern that extensive use of private placement could potentially reduce market transparency, supervisory ability to monitor trading, markets. In response, it was observed that reporting of private placement transactions to authorities in the country of the buy-side entity (in addition to sell-side reporting and supervision in its domicile) would not be a useful or proportionate means of protecting market integrity and efficiency;
- Concern about the capacity of some parts of the buy-side to evaluate properly the instruments which would be offered to them in a private placement context;
- Danger of leakage and 'retail cascade' needed to be addressed by any framework;
- Perception that private placement could give rise to a counter-intuitive situation where cross-border sale of non-harmonised/institutional products to institutional investors may become easier than the cross-border sale of harmonised retail products. Others observed that it is normal to expect cross-border retail access to be associated with stricter conditions.

- ***What type of investment product should be covered?***

Interventions suggested that the focus of any work should be confined to (all types of) funds. Non-harmonised (open-ended) funds in particular had no formal arrangements to support their cross-border offer to either the public market or on a private placement basis. Common understanding of private placement could provide an important distribution channel for these products. The benefits of such a distribution method should not be confined to non-harmonised open-ended funds but should also be open to UCITS and, in the view of some speakers, to closed end-funds, including funds organised as partnerships. The work should not extend to transferable securities (including securities in listed vehicles), derivatives etc.

However, regarding non-UCITS funds, some speakers made clear that developing an EU cross-border private placement regime will not be sufficient by itself to facilitate the cross-border marketing of EU non-UCITS funds both within the EU and at worldwide level. Facilitating the offer of funds to qualified investors through an EU private

placement regime will not solve the issue for these qualified investors to invest in such products, as buy-side restrictions applicable to these qualified investors may prevent them from investing in non-UCITS funds in many Member States (e.g. insurance companies, pension funds, etc.).

2. BARRIERS TO CROSS-BORDER PRIVATE PLACEMENT

The workshop reviewed the types of administrative/ regulatory practice that impede cross-border private placement. Reflections were informed by a case-study based on attempts to place (privately) a non harmonised LUX Part II fund with institutional investors in different Member State markets. Different Member States imposed different types of requirement. These are presented below in decreasing order of difficulty for private placement:

(1) Prior registration requirements before the product can be placed on the market. This often involves a formal/box-ticking approach to verify whether all conditions for public offer are met. Non-harmonised or institutional products which are not designed or prepared for public marketing cannot satisfy those requirements and find themselves excluded.

(2) Reverse solicitation: - provides limited solution: can be difficult to demonstrate or prove that the investor initiated the commercial contact: creates source of legal risk.

(3) Quantitative limits on investors to be approached; number of investors that can be approached range from 10-100: despite apparent clarity, not obvious (does the quantitative threshold relate to the number of ultimate investors subscribing or number of investors approached?). It is also hard to avoid products cascading onwards or prospectus circulating outside the restricted circle. Source of legal risk.

(4) Extend Prospectus Directive (disclosure) exemptions to wider range of instruments, allowing the offer of partner country instruments in that Member States without requiring the existence of a harmonised Prospectus. This approach is being followed in some Member States (e.g. Hungary, Bulgaria, and the Netherlands).

(5) Exemptions for offers to high net worth individuals (HNWI); this test is used in some Member States (e.g. Sweden, Belgium and the United Kingdom).

(6) Exemption for offers to qualified investors.

There is a need for clarification on whether approaches to individual (discretionary) portfolio managers properly belong within the scope of private placement. Individual portfolio managers are treated as an "eligible counterparty" for purposes of MiFID implementation.

Comments confirmed that 'reverse solicitation' gives rise to legal uncertainty and potential legal liability.

Some participants confirmed that prior registration/product approval requirements are the most problematic in terms of obstructing market access. Such product approval requirements, motivated by investor protection reasons, were understandable in the context of products being marketed to the public. But there was no rationale for these controls when offers were restricted to qualified investors (on a private placement basis).

Discussions revealed that it made no sense to try to prioritise barriers in order of importance. A global approach is required to create the conditions under which private placement is possible.

Cost/benefit assessment:

There was discussion of ways to measure the benefits that cross-border private placement would bring compared to status quo. This confirmed the main sources of benefit identified in the responses to the call for evidence. It was noted that the observed benefits are specified in terms of savings per transaction would vastly underestimate the aggregate impact of EU level private placement in terms of improved functioning of financial markets. However, it would not be possible to calculate these impacts. The workshops reflected on ways to further develop the cost-benefit analysis. This included an assessment of costs associated with the status quo (e.g. need to set up local management companies to service certain markets); the size of the business accounted for by non-harmonised funds; and an identification of markets which are closed to cross-border offer but where potential for business exists.

3. ASSESSING EXISTING EU PROVISIONS

EU financial services legislation contains provisions which are relevant points of reference for reflections on possible steps to facilitate cross-border private placement. The workshops provided an opportunity to evaluate the purpose of these provisions, the extent to which they already contributed to facilitating cross-border private placement, the potential for building further on these provisions, any experience with the implementation of these provisions.

3.1. Prospectus Directive:

The workshop benefited from an authoritative review of experiences with the Prospectus Directive to date. The Prospectus Directive is generally considered to work well in terms of its basic objective – apart from rules concerning the listing on regulated markets – harmonising public offer disclosures for transferable securities and defining conditions under which these are waived. The maximum harmonisation approach of Directive has been important in achieving this outcome.

However, restrictions arise in terms of other marketing/promotional restrictions are not comprehensively dealt with by the Prospectus Directive. It is therefore not appropriate to view Prospectus Directive compliance/exemption as a 'one-stop-shop' solution for facilitating cross-border offers.

The Prospectus Directive applies to offers of transferable securities. It does not, however, apply to units issued by open-ended collective investment undertakings. Units issued by a closed-ended collective investment undertaking could, on the contrary, fall within the scope of the Prospectus Directive if they are qualified as transferable securities. However, there is considerable uncertainty regarding the extent to which closed end funds actually fall within the scope of the Prospectus Directive. It is not always clear whether a fund should be regarded as closed or open-ended, nor whether types of unit in certain types of fund should be regarded as "transferable securities", given the contractual/trust/partnership form of some closed-end funds. Furthermore there are quite different definitions of closed ended funds throughout the Member states, if any. Even where it is clear that a closed-ended fund falls within the scope of the Prospectus Directive, the Article 3 (2) exemption from obligation to publish a prospectus, does not mean that funds can be freely promoted (on private placement basis)

to 'qualified investors'. Some member states impose additional marketing and advertising restrictions. Thus the Prospectus Directive does not provide an effective passport even for closed-ended funds which are clearly within its scope. Thus whilst the Article 3(2) exemptions from the obligation to publish a prospectus are regularly relied on in the context of corporate securities, they are not the end of the story in relation to the cross-border private placement of the securities of closed-ended funds.

There are concerns relating to 'retail cascade'. This may imply some residual risk in cases where instruments are traded outside the restricted circle without the appropriate disclosures – even if responsibility for onward selling lies with an independent distributor/investor.

Workshop discussions focussed on the need for clarification of the situation on closed-end funds; desirability/feasibility of 'public offer' definition; retail cascade; and limits to extending approaches for transferable securities to the fund world. Discussions suggested that it would not be sufficient to extend the Prospectus Directive scope/provision or replicate them for funds. Nevertheless, certain elements or structures of the Prospectus Directive could be a useful reference point when thinking about features of an EU private placement regime.

3.2. MiFID Directive:

Commission services introduced the relevant provisions of the Directive (conduct of business rules for services provided to clients, client classification, eligible counterparty regime). It was recalled that the MiFID category of 'professional client' implies the existence of a firm-client service relationship where conduct of business obligations are owed to the professional investor. It was recalled that conduct of business obligations, albeit less demanding, are also owed to ‘professional clients’.

Some participants were of the view that MiFID provided a comprehensive framework for most aspects related to the distribution of financial instruments. This regime had just entered into force and should not be tampered with. Focus of work on private placement should take MiFID as given and focus on other issues restricting the offer of products (approval/registration, disclosure).

The MiFID eligible counterparty regime was seen to contain some restrictive elements (on types of service, authorised entity, products covered) which reduced its effectiveness as starting-point for EU private placement. It does not allow for scenarios in which an asset manager not having relevant MiFID authorisation could directly approach eligible counterparties in another Member States, and does not (at least in not in the interpretation of some Member States) cover many of the closed-end funds. Also the flexibility for Member States in allocating some categories of investor to non-eligible counterparty was seen as problematic. The right of investors to request a higher or a lower degree of protection together with the options granted to Member States to further refine the client classification categories adds another layer complexity.

3.3. Prospectus Directive/MiFID interaction (perspective of securities/ Eurobond market):

The workshop also considered the combined impact of Prospectus Directive/MiFID Directives on the euro-bond/international bond markets. The broadly positive assessment could be attributed to systematic adherence to maximum harmonisation approach and home country principle. The Prospectus Directive provided the necessary clarity on disclosure obligations for cross-border offer of transferable securities; MiFID was seen

as having the potential to remove the conduct of business obligations. However, liability issues remained.

4. ELEMENTS OF A POTENTIAL CROSS-BORDER PRIVATE PLACEMENT REGIME

Much of the second workshop was devoted to presentation and discussion of ideas developed by 5 sub-groups of workshop participants. The ideas presented by the sub-groups were developed as a first set of proposals to kick-start discussions.

4.1. Product coverage:

Sub-group proposal: The sub-group proposed that an EU private placement regime should encompass – in descending order of priority – the following categories of product:

1. UCITS funds – to allow easier cross-border distribution to institutional and other eligible investors without having to go through the burdensome UCITS passporting notification mechanism;
2. Non UCITS European funds (collective investment undertakings (CIU) and pooling asset like non-UCITS funds or other similar CIU, including those of the closed-end type);
3. Other European securities or financial instruments outside the scope of the Prospectus Directive;
4. 3rd country funds or instruments.

The sub-group underlined that existing EU-level legislation was not sufficiently precise (e.g. lack of clarity or common understanding of even key terms such as 'transferable securities', 'closed-end fund').

A new definition should cover a wide variety of instruments across and outside Europe. The discussion regarding 3rd country products should clearly distinguish between managers and instruments/funds. A passporting regime similar to the Prospectus Directive could be envisaged.

Reactions to the sub-group proposal: A vast majority of workshop participants favoured an approach which focussed on all types of fund/collective investment – including UCITS and non-harmonised funds, including closed-ended funds. There was limited appetite for extending the work to securities or derivatives instruments and no support to encompass 'services'.

Regarding the treatment of 3rd country products, three approaches could be distinguished. Firstly, requiring reciprocity as is often the case in trade policy; secondly, focusing on risk-control requesting equivalence of regulation/supervision; and thirdly, adopting an open, self-confident approach that, in general, would accept respective 3rd country products irrespective of the situation in the country.

Discussions on the treatment of third country funds were not conclusive. Some participants argued in favour of focus on third country product and manager risk controls. Regulatory equivalence could probably be assumed for the major financial centres like the US and Japan but not necessarily for funds domiciled in and managed from some off-shore locations. Some participants cautioned against a liberal approach towards 3rd country products and providers because of potential adverse impacts on financial stability in the case of some off-shore jurisdictions where there is insufficient transparency and regulation. Some of these concerns might be allayed if an EU-regulated placement agent was to assume responsibility for the offer/sale of the instrument.

Another suggested solution would be to limit to privately place instruments to funds/entities where the management company is domiciled in the EU.

A number of industry representatives argued for an open EU private placement regime. EU financial markets do not need protection from international competition. Instead, EU should press for an open approach here, confident in the ability of its institutions and products to win business around the world. A protectionist reflex would be unnecessary and counterproductive. Some participants queried the emphasis on 'reciprocity' on the grounds that the regimes of the most important 3rd countries are already relatively liberal.

It was also noted by some that European based managers may operate funds constituted outside the EU for entirely legitimate reasons, particularly where the firm is serving clients globally.

4.2. Eligible buy- and sell-side participants:

Sub-group proposal: The relevant sub-group proposed that investors should either be professional investors as defined in MiFID, or be capable of making an investment of a certain (unspecified) amount: the conditions are alternative – not cumulative. The use of a threshold would be easy to understand and enforce. For discretionary portfolio management it should be the manager that needs to have the respective qualification, not the underlying client(s). Only MiFID-regulated entities should be authorised to place instruments on a private basis. It should be the responsibility of the intermediary in direct contact with the end-investor to check eligibility for participation in private placement deal. Any potential onward-sale to non-professional investors would have to comply with the respective MiFID rules, including appropriateness and suitability tests.

Reactions to the sub-group proposal: Views regarding the appropriate definition of eligible investors were split. Some argued for a cautious approach based on the eligible counterparty concept of MiFID to reduce risk to vulnerable investors and to facilitate political acceptance. Only players of equal standing and experience should be able to participate in private placement deals. Others favoured the broader definition of the 'professional investor' in MiFID. Others noted that these categories excluded certain investor types who were more frequent investors in alternative asset classes such as private equity and real estate, and who had real expertise in these areas.

Some participants expressed reservations against allowing investors to opt-in on a voluntary basis. This could create major difficulties in supervising the regime and undermine legal certainty and investor protection. Some participants were also reluctant to pursue the idea of using minimum subscription/'ticket' to assess eligibility. Such an approach would be too blunt: it could too easily catch investors who are not suited to participate in private placement deals (who have borrowed to invest, or place a large proportion of a small portfolio in a single instrument).

Regarding the sell-side, interventions focused on the fact that some relevant offerors are not eligible to initiate/propose transactions under the MiFID 'eligible counterparty' regime – notably, fund managers who are excluded from MiFID under the article 2(h) exemption.

Some believed that additional problems arose from the way in which Member States had implemented eligible counterparty rules – particularly Member States which had chosen to restrict excessively the possibility for certain entities (e.g. municipalities) to be classified as eligible counterparties -, and from the range of products covered by MiFID (particularly regarding closed-end funds).

In conclusion, there was broad consensus that MiFID 'eligible counterparty' regime was close in spirit and conception to private placement regime. The relevant definitions and rules would provide a good basis to start from when defining eligibility for an EU private placement regime. However, they were possibly too restrictive in terms of both the eligible sell-side and buy-side entities.

4.3. Permissible marketing/advertisement/promotion approaches:

Sub-group proposal: The sub-group regarded MiFID principles (fair, clear, not misleading) as a good starting point for regulating permissible marketing/advertisement/ promotion within private placement. Requiring the offeror to be a MiFID-licensed entity/ regulated EU entity would also help to minimise the risk of a retail cascade: any onward sale would have to comply with the MiFID requirements on suitability, appropriateness test, customer classification etc.

The sub-group proposed a clear set of principles to govern the types of approach to investors that would be permitted under private placement: no marketing to the public should be permitted and promotion should only be directed towards eligible investors. The responsibility for complying with marketing/advertisement restrictions would lie with the locally accountable distributor. No further restrictions would be needed besides the requirement that all marketing material would have to be clear, fair and not misleading. It would have to be clearly marked as intended to eligible investors only, and make clear that onward distribution is prohibited. Such rules should provide sufficient protection even in the case of non-EU funds.

Reactions to the sub-group proposal: Participants agreed that the approach to information requirements/marketing documents would be sufficient. Some participants stressed that approaches from institutional investors often come as a request for proposal (RFP: documents used to support placement with institutional investors usually follow a question and answer format, and often focus on the organisation of the asset manager, resources and risk management capabilities). RFP requests are in addition to the provision of the Prospectus and already exceed information provided in any prospectus (if published). Attention was drawn to the need to avoid 'selective disclosures' – whereby participants in private placement deals enjoy privileged access to information not available to participants in public markets in the same instrument.

4.4. Regulatory requirements for the smooth functioning of private placement:

The fourth and fifth presentations provided a useful opportunity to recall and clarify some guiding principles and objectives for EU level private placement.

The MiFID principle of fair, clear and non-misleading disclosure should be a cornerstone of any EU private placement arrangements. However, there should not be any specific requirements regarding the form of information or disclosure by home or host Member State, and no registration and approval or any other product-, producer- or offer-related requirements in the host Member State.

Any onward sale or repackaging to retail consumption should not be covered by a private placement regime but be subject to the rules concerning suitability and general conduct of business rules as laid down for example in MiFID.

Any private placement arrangements should apply not only to MiFID entities but also to providers of products that are currently not covered by MiFID, such as management companies or venture capital funds in the form of partnerships in the UK. Otherwise

relevant asset classes and fund structures would be excluded from the regime and continue to find their cross-border institutional distribution restricted.

Some supervisors expressed a preference for additional reporting requirements in order to develop an overview of transactions involving their domiciled investors. Specific reporting of individual private placement transactions is not currently widespread (if used at all). The competent authority of the sell-side institution already oversees the activities of that institution and can obtain information on activities, transactions on a regular or ad-hoc basis. Queries were raised about the utility of and purpose of private placement transaction reporting to the authority of the buy-side entity. Such reporting of bilateral transactions would not be useful for the purposes of protecting market efficiency and integration. Reporting of individual trades would not be relevant in reducing the disclosure deficit encountered in structured credit and assed backed markets.

It was asked whether a one-time notification by an investment firm that it intends to be active in a host Member State would be a useful contribution to building supervisory confidence in cross-border private placement. It was noted that such notification (of intention to provide investment services) is already provided for MiFID firms seeking to use their MiFID passport.

Drawing on the discussions, some contours for an eventual private placement regime would include the following:

- Removing restrictions to cross-border private placement (buy-side and sell-side entity in different Member States) as a complement to national regimes. In addition, any national regime which allows certain types of investors (of a kind beyond the scope of any EU wide regime) to be approached by anyone (whether local or not), should be allowed to continue. Member States could be allowed to operate more flexible regimes if they wish, but should allow cross border private placement at least at the terms established in any EU arrangement.
- Inclusion of MiFID regulated entities and other EU authorised asset managers on the sell-side;
- Notions of either professional investors or eligible counterparties as defined in MiFID could be used as a reference on the buy-side; and
- Product coverage: include all types of investment funds;
- Regarding the buy-side, views were somewhat divided, but there was consensus that there should be no possibility to change status from retail client to eligible counterparty.
- There would be no requirements regarding disclosure and no approval or other product- producer- or offer-related requirements. Conduct of business rules would not apply in the case of eligible counterparties. There were differences of view on the need for transaction reporting or on what useful information it would generate means in this context.

5. OPTIONS: IMPLEMENTING INSTRUMENTS

5.1. Non-legislative options:

The Commission presented four possible non-legislative and legislative techniques for establishing an EU private placement regime. These options were broadly assessed against the status quo (the 'do nothing' option) on the basis of the following five criteria:

1. Legal Certainty / market access
2. Cost-benefit
3. Ease/speed of political delivery
4. Coherence effectiveness
5. Unintended consequences

Option 1: Do nothing

The status quo is perpetuated; although some Member States might decide to reflect on their current regimes unilaterally. At the international level, the position of European players might deteriorate because of the restricted set of business/investment opportunities. This option was roundly rejected by participants.

Option 2: Case-by-case approach

This option would be based on the principle of 'mutual recognition'. Offerors that were hindered in doing cross-border private placement on the basis of mutual recognition would be encouraged to file complaints at the relevant courts. Over time, case-law could emerge which could be used to strike down disproportionate or illegal Member State restrictions and establish easier access and a shared common understanding of private placement in the EU.

The desired clarification and improved legal certainty could only be achieved over a longer period of time. Some market participants would have to bear costs of legal disputes, others might free-ride. The impact on the legal situation and markets would therefore be piecemeal, gradual and marginal. In the worst case, no progress would be made at all. A question-mark hangs over the feasibility of mutual recognition: existing EU legislation could limit progress to the extent that it contains elements that contravene the objectives of the desired private placement regime or which confer discretion on Member States in implementation of its provisions.

On the plus-side, the political and legislative 'costs of delivery' would be low.

Option 3: CESR/COM guidance

The Commission and CESR could work in a coordinated effort towards a common understanding and alignment of national definitions and requirements. This could be done via guidance and interpretative documents – to the extent that clear and operational provisions of EU law can be identified which support an 'interpretation based approach'. Such work would be of non-binding legal nature and Member States would retain some discretion as to whether to comply with non-binding interpretations. The only real 'sanction' would be moral suasion and peer pressure. Under these conditions, it could not be taken for granted that greater convergence of national approaches would result. Nevertheless, some improved market access could be achieved at low cost where existing EU provisions are sufficiently clear and enforceable.

Discussion of non-legislative options

Participants did not regard any of the first three options as adequate. Mutual recognition would not result in any noticeable improvement. Experience in the sphere of industrial goods does not provide grounds for optimism. Application to financial transactions would be even more problematic given the moiré tailored, complex and specific situations encountered.

While CESR work was regarded as very useful in clarifying details and in achieving a certain degree of supervisory convergence, participants were sceptical regarding the

ability of level 3 agreements to deliver the types of legally secure and comprehensive outcome that is desired.

5.2. Legislative options:

Option 4: Amendment of existing EU law

Existing EU provisions, in particular MiFID and Prospectus Directive, already provide some reference points for a private placement regime. These could be built upon to create a cross-border private placement regime. In order to do so, the scope of the Prospectus Directive could be extended to at least include all closed-ended funds or even all funds. MiFID rules could be clarified in a way that it provides a proper private placement exemption for eligible counterparties. However, neither Directive provides a clear answer to the problem of national product approval/registration rules - the number one obstacle to cross-border private placement.

This option would entail the risk of overstretching the Directives with adverse unintended impacts on other financial products or market participants. Furthermore, amending several Directives at the same time would not be an easy thing to do. It might be as time-consuming as drafting a new law.

Extension of the Prospectus Directive was not seen as promising: in order to benefit from the Prospectus Directive exemptions, it would first be necessary to bring closed-ended funds/non-harmonised funds within the scope of the obligation to produce a prospectus. This could imply new prospectus publication obligations for those instruments which do not qualify for the article 3(2) exemption.

Extension of MiFID would need to bring non-MiFID entities within scope. MiFID is also silent regarding many of the requirements to be waived like host Member State registration, approval or other product- producer- or offer-related requirements. In order to establish a true EU private placement regime, any solution would have to deal with these issues.

Option 5: New EU Directive

To avoid major changes to existing Directives one could envisage a new Directive to establish an EU regime for cross-border private placement. Implementing such a Directive would nevertheless most likely require some amendments to Prospectus Directive/MiFID in order to establish legal coherence.

A significant advantage would be that legal certainty could be achieved for both those inside and those outside the private placement regime: eligible participants could act without the current fear of involuntarily violating laws, and non-eligible retail investors could be better protected from investment products which are not suitable for them.

Greater legal certainty would allow eligible providers to benefit from reduced costs and broader markets, and investors to enjoy wider choice at lower costs.

By opting for a new legal instrument, efficiency and coherence could be optimised while minimising unintended consequences for other players. A disadvantage would be the costs and time involved in getting EU law adopted, transposed, and implemented.

Such a Directive would have to clearly distinguish between domestic private placement and cross-border private placement. In some Member States with restrictive regimes this could result in a situation where rules are more favourable for participants in cross-border private placement than for participants in domestic private placement.

Discussion of legislative options

Participants favoured legislative measures over non-legislative action because of the need for legal certainty. Few participants proposed a Regulation as the appropriate form. This would deliver full harmonisation and ensure legal certainty in the Single Market. However, it would deprive Member States of the possibility to implement a domestic private placement regime that takes into account national characteristics.

Overall, there seemed to be a preference for a new Directive. Participants understood that this would not be a panacea and accepted that this would most likely involve some amendments to the existing Directives. Ensuring consistency with existing Directives would be a major task, intellectually and politically. Member States should remain free to have regimes more liberal than under the Directive private placement regime.

Few advocated amendments to MiFID as the best way forward. This was seen as easier. The new rules would in any event be integrated into a single investment law at national level. However, others argued that relying on MiFID and the Prospectus Directive would not suffice to address all relevant issues properly. For example, non-MiFID asset managers and partnerships would not be covered by MiFID. Product approval and registration could not be addressed either.

Some suggested that both approaches could be combined to some extent: The ongoing reviews of UCITS and Prospectus Directive could be used to already prepare the ground for a private placement regime to the extent possible.

One participant suggested that the opportunity of forthcoming UCITS amendments should be seized in order to establish a cross border private placement regime for UCITS funds as quickly as possible. This would not exclude a wider approach of private placement, covering other financial instruments as well.

Overall, industry participants seemed to be much less concerned about the choice of instrument but insist on noticeable progress and results in substance.

6. CONCLUSIONS

The workshop had provided a much clearer view regarding the form and especially the content of a potential EU measure. However, there is still need to demonstrate conclusively from a cost-benefit perspective the need for action: there remains some uncertainty as to the implications of making certain choices regarding the key features of the regime, e.g. the definition of the eligible investor.