

Dear Ms Heffernan,

The International Capital Market Association (**ICMA**) is pleased to respond to the DTI's consultation on new draft clauses on a proposed regime for liability in connection with the Company Law Reform Bill. ICMA is the self-regulatory organisation and trade association representing the investment banks and securities firms issuing and trading in the international capital markets worldwide.

Our two comments concern the proposed new Section 90E of the Financial Services and Markets Act 2000.

Section 90E (2)

We believe that the scope of the section should be extended to all issuers of securities traded on an EU regulated market.

The obligation under the TD for the issuers of securities admitted to trading on an EU regulated market to disseminate the so called "regulated information" throughout the EU gives rise to the risk of a "pan-European liability."

Theoretically, investors who consider a particular report incomplete or misleading could bring their claims against the issuer and its directors under the law and before a court of any Member State. This of course exposes such issuers and their directors to a considerable legal risk.

This risk can be fully addressed only at an EU level. It is, however, in the interest of the UK to ensure that - where such a claim is brought under English law - the liability regime is clear and reasonable. We believe that the proposed Section 90E serves this purpose and commend the DTI for introducing it. At the same time, we feel that the legal certainty should be offered to all issuers who could be faced with a liability claim under English law based on the TD. We would therefore strongly support extension of the scope of Section 90E to all issuers of securities traded on an EU regulated market.

We are aware of the fact that the DTI is considering to address this issue by introducing conflict of laws provisions which would refer an English judge deciding on a liability claim made against a non-UK issuer listed on a non-UK EU regulated market to the law of the place where the document in question was produced (as the place where the damage/loss occurred). On the basis of the limited information available about such a solution, however, we still strongly prefer extension of the scope of Section 90E.

Any proposal for a conflict of laws solution should be analyzed in detail, namely to ensure its compliance with the EU law in the field of the law applicable to non-contractual obligations. In particular, introduction of such a provision may be inconsistent with the pending EU regulation on the subject and the restrictive interpretation of the meaning of "the place where the damage/loss occurred" inconsistent with any interpretation of this term which the European Court of Justice may make in the future. That is because the "place where document was produced" will not necessarily be the place where the damage/loss actually occurred. The precise connecting factor would have to be carefully considered as "the place where the document was produced" may be difficult to determine considering the modern methods used to disseminate commercial information or completely irrelevant in the particular circumstances. Such a solution would also offer lesser protection to the issuers and their directors as it would only refer the matter to another set of law, rather than extending the beneficial protection of the UK regime. On a practical level, it would require a separate legislative process.

Section 90E (5)

We note that if Section 384 is retained, the investors who will not be able to satisfy all the requirements of Section 90E will be motivated to exert pressure on the FSA to exercise its powers to provide them with a partial redress in this manner. It would be desirable if the powers of the FSA were subject to the same limitations as in Section 90E. We would prefer if this was made clear in the legislation but, if that is not feasible, guidance from the FSA might be a sufficient alternative. We will engage on this issue with the FSA within its consultation on the implementation of the TD in the UK.

We would be pleased to discuss our response with you at your convenience.

Yours faithfully,

Ondrej Petr

Advisor

International Capital Market Association Ltd