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CESR consultation on disclosure standards
Comments by ABN AMRO
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I. INTRODUCTION

ABN AMRO is very supportive of CESR's efforts to achieve harmonisation of primary market disclosure standards in Europe given our experience with the failure of present legislation to guarantee a satisfactory operational Single Passport for Prospectus. We particularly support CESR's intention to provide a flexible and innovative regime via the "building block approach" to adapt disclosure standards to the different types of products and markets.

We are however worried that the rush in developing these disclosure standards, under very tight deadlines for consultation, will endanger the whole objective of this harmonisation exercise. We understand CESR's concerns that these deadlines have been imposed by the European Commission's provisional mandate to provide technical advice by March 2003. However, the political agenda has changed since the Commission issued its mandate in March 2002 and the Directive will not be adopted until at least the Summer. Therefore, not only is politically sensitive to provide technical advice to the Commission by March 2003 on technical implementing measures on a Directive which is not yet adopted, but also those deadlines make it impossible for market practitioners to provide detailed feedback.

We therefore recommend that CESR request the Commission an extended deadline to provide the technical advice that reflects the political agenda of adoption of the Directive. This should leave CESR further time to consult the market again on the disclosure measures of the first consultation and the addendum.

We would also like to draw the attention of CESR to the difficulty of providing comments on the basis of a system of separate documents, which is rarely used by issuers in the majority of EU countries. While we understand the logic of CESR to structure its work on this basis, further work is essential to avoid duplication of information in the documentation. Most importantly, it is essential to highlight the differences, in terms of due diligence, between a Registration Document that is simply filed and a Registration Document that is used as an offering document. This distinction is particularly important in the context of CESR's requirement to disclose risk factors in the Registration Document, as we comment in detail below.

Finally, we think it will be helpful if attention was paid to facilitate that European issuers can raise capital both in the EU and in the US, as they do now, without having to undertake essentially different due diligence processes. We can see particular problems with US offerings if there is an obligation to report in detail on profit forecasts.

II. REGISTRATION DOCUMENT

1. EQUITY SECURITIES

1.1 General

Q. 44 Do you agree with the disclosure obligations set out in Annex A?
We broadly agree with the disclosure obligations except where otherwise specified in our comments.

- **Responsibility of the prospectus – Annex A I.A.I**
  During the public hearing of 26th November, we raised the problem of the inconsistency of CESR proposal, where **both** natural and legal persons should be identified, with the text of the Directive, where natural **or** legal persons should be identified. CESR representatives did not seem to consider this a problem since it was argued that the CESR disclosure requirement could not make people responsible if they were not responsible by national law.

  While we understand this point, we still consider that this does not provide a justification to have inconsistent wording between the text of the Directive and the technical implementing measures that CESR will propose to the Commission. Furthermore, under the current CESR proposal, it can be argued that CESR goes beyond the provisions of the Directive and therefore exceeds the mandate given by the Commission.

  We therefore propose that CESR simply limit itself either to replicate the current text of the Directive or to make a more general statement in line with the IOSCO standards[1].

- **Advisors – Annex A I.B**
  We believe this requirement brings no particular added value, and on the contrary can mislead the investor, while possibly increasing the costs for the issuer. We understand that under the current CESR proposal advisors are not considered liable for the information in the prospectus since the liability requirement is considered under disclosure item I.A. However, the specific mentioning of corporate address of legal advisors and bankers could be assumed in litigation procedures as an undertaking of responsibility for the content of the prospectus. This will in turn require that advisors contract additional insurance to cover such litigation risk with the obvious increase of transaction costs for the issuer.

  Moreover, in relation to bankers, the text does not specify whether it is the issue arranger, the dealers or the underwriters that should be mentioned. The term "*principal bankers* [ ] *to the extent the company has a continuing relationship with such entities*" is too generic and misleading. The principal bankers of an entity will in most cases not be the same ones that arrange or underwrite an offering.

  Furthermore, while questioning the need for such a requirement in the case of corporate retail debt, CESR does not seem to provide a justification for its inclusion in equity disclosure except that this disclosure is "*relevant*"[2]

  We therefore propose that this requirement be deleted or alternatively it is left to the choice of the issuer.

- **Information about the issuer – Annex A - III.A**
  While it may seem logical to mention the web site address as part of the company information, this may have the effect of incorporating by reference information on the company that has not been prepared for that effect and thus creating liability problems for the issuer.

  We therefore propose that this inclusion be deleted. This should not preclude the issuer to make a reference to its corporate web site where other information can be obtained with the necessary disclaimer that that information is not part of the prospectus.

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1 IOSCO I.A: Provide the names, business addresses and functions of the company's directors and senior management.

2 "*this disclosure is relevant for the purposes of an investor in the company's equity*" Paragraph 133, page 28

- **Liquidity and capital resources – IV.B**
  During the first public hearing, the CESR representatives acknowledged that the reference to working capital statements had been omitted but were to be introduced in the 2nd consultation document. We were concerned that the UK requirements[3] will be applied for all the EU countries with the consequences of increasing costs for the issuers and extended delays for the timing of the offer.

  Having read the working capital requirements in the 2nd consultation paper, we understand that this is not the intention of CESR but that the requirement will be "*to include a statement by the company that, in its opinion, the working capital is sufficient for the company's present requirements, or if not, how it proposed to provide the additional working capital needed*". This is in our view the IOSCO sentence that CESR acknowledges to have mistakenly omitted from IOSCO standard V.B.1.a.

  This intention was confirmed during the second public hearing and we hope that CESR will not go beyond this requirement.

1.2 Risk factors

Q 47 Do you agree with this approach?

As noted in our introduction, in relation to risk factors it is particularly important to keep in mind the differences between a filing and an offering Registration Document in terms of due diligence obligations. As underwriters, we feel uncomfortable with the possible obligation for issuers to provide detailed disclosure of risk factors in a Registration Document that is just being filed with the competent authority and not subject to a due diligence process. If such document is subsequently used as an offering document, a due diligence process will be required, in particular in relation to the risk factors. This can entail a difficult situation for the issuer if the underwriters feel that the previous disclosure on risk factors is not appropriate for an offering. This is why typically, disclosure of risk factors in the US shelf documents is very broad or a due diligence process is also contemplated for the shelf. Even if, as clarified during the second hearing, the securities note can update the risk factors, we wonder if the issuer may not be subject to liability from investors, if the securities note reveals a fundamental different approach to risk factors compared to those disclosed under a Registration Document.

We therefore recommend that CESR clarifies that the disclosure of the risk factors in the Registration Document is limited to the cases where such document is intended to be used as an offering document.

Furthermore, although the current approach to include business-specific risk factors in the registration document and security/market-specific risk factors in the securities note is a sensible one in view of the nature of the respective documents, this leads to a fragmented presentation of risk factors, which we do not believe is in the best interests of investors:

- risk factors will likely be contained in separate documents if issuer has filed a registration document;
- proposed inclusion in securities note of updated risk factors as included in the registration document;
- proposed inclusion in securities note of summary (and cross reference) of risk factors contained in other sections (it remains unclear of which other sections CESR is referring to, would it be sections in the securities note or in the registration document?)
- proposed inclusion in summary document of a summary of all risk factors

This contrasts with the current practice of one specific chapter on risk factors and cross-references in other sections and CESR should clarify in future consultations the need to avoid fragmentation in the disclosure of risk factors.

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[3] In the UK the sponsor of the issuing company is required to provide a letter to the FSA stating that the working capital statement has been made after "due and careful inquiry". In order to be in a position to make such a statement to the FSA the sponsor will require a working capital report to be prepared by the reporting accountants. This is a very substantial undertaking that not only is extremely costly for companies (the cost of accountants working capital reports can be a few millions of Euros) but it also delays considerably the timing of the offer. Moreover, the sponsor' letters are not part of the prospectus documentation.

With respect to the proposed inclusion in the summary document of a summary of all risk factors, we would propose to only include such summary in the event the summary document is published as a separate document. In our view it should suffice to include a cross-reference to the risk factor chapter in the summary section where a prospectus is being published in one document.

On the specific question, we agree with the difficulties pointed out by CESR on creating a list of risk factors, even if illustrative and we also agree with CESR's conclusion that guidance is a better approach. However, we think that guidance by CESR could also be seen as a finite list of risk factors and therefore we recommend that any guidance is clearly identified as such and avoids listing or giving too much detail on what should be considered as a risk factor.

1.3 Pro forma information

Q 51 Do you agree that pro forma should be mandatory in case of a significant gross change in the size of a company, due to a particular actual or planned transaction?

Q 52 Do you agree that pro forma financial information should also be required in all cases where there is or will be a significant gross change in the size of a company?

Q 53 Do you agree that 25% is the correct threshold figure? Would a different figure, say 10%, be more appropriate?

We agree with the definition and proposals for pro forma financial information in cases of "significant gross change" as proposed by CESR. However we believe that it is difficult to establish a universal figure to suit all circumstances. There will be circumstances/examples where less than this amount would be the correct level. We therefore propose that any agreed figure includes a qualification that the level be set lower in certain circumstances.

Q 55 Do you agree that the competent authority should be able to insist on pro forma information being included where this would be material to investors?

We are concerned about the statement by CESR that pursuant to articles 5 and 21 the competent authority of the home Member State can insist on pro forma financial information to be included in the prospectus even if the criteria are not met. The aim of the Prospectus Directive and its forthcoming technical implementing measures is to provide a fully harmonised regulatory framework so that differences among national disclosure regimes are minimal. We would imagine that this is particular the case given the level of detail in the CESR proposals. We acknowledge that according to article 21 (and not article 5), the competent authority receiving the application for approval can require the issuer to provide "supplementary information" if necessary for investor protection. However, we do not regard pro forma financial information as "supplementary information" but as essential information.

Therefore, if the criteria proposed by CESR are not met, we do not believe that the competent authority should be entitled to require pro forma financial information to be included. If the information is material for the investors, the issuer should include such information without necessarily having to provide it pro forma. We would therefore agree with point 2 in Annex B which contemplates this optionality ("or other additional information").

Q 64 Do you agree with the disclosure requirements in respect of pro forma financial information as set out in Annex B, in particular with the obligation of an independent auditor's report?

There should be clarity as to the basis upon which the pro-forma information is presented. In this respect, the introductory explanatory paragraph needs to be "sufficiently prominent".

We believe that the exemption contemplated in paragraph 59 of the consultation document ("*when the previously published information is not directly applicable (….), pro forma financial information may be based on other than published information, in order to provide investors with the best understanding of the new company(ies*)") should be added to point 6 of Annex B.

1.4 Profits forecast

The inclusion of profits forecasts in a prospectus raises many problematic issues, as the CESR document already identifies. In our view, the main controversial aspect is the fact that such profits forecasts are difficult to verify and thus its disclosure runs contradictory to the mere essence of a prospectus, which is to provide factual information verifiable through a due diligence process. It is in this aspect in particular where we believe that CESR should investigate a bit further into the consequences of such disclosure for EU issuers that would like to run both a European and an US offering. Typically in the US, prospects are not covered in auditors' comfort letter nor lawyers' 10b-5 opinions.

Therefore, we advocate the inclusion of profits forecasts on a voluntary basis as CESR seems to imply in paragraph 70.

Q 73 ***Do you have any comments at this stage about this preliminary definition of a profit forecast?***
We broadly agree with the definition of profit forecast presented in paragraph 72 but we would prefer a more general statement along the following lines: "*any form of words which puts a ceiling or floor on profits or one which contains the data necessary to calculate an approximate figure for future profits*".

We would therefore explicitly delete any reference as to dividends since we consider that dividends forecast should not be treated as a profit or loss forecast in the definition. If the company has a stable dividend policy, dividend projections will reflect earnings growth unless there is a change in the payout ratio. If the company has an insufficient level of retained earnings, normally the payout ratio will be reduced. Therefore, references to dividend projections are directly related to earnings forecasts but not the inverse, as the CESR explanation implies in our view[4].

We consider however that if a company is making earning projections it may be desirable to establish the effects on the dividend policy of the company.

Q 85 ***Should issuers be required to repeat or update outstanding ad-hoc profit forecasts in the prospectus?***
Yes but only in the prospectus and not in any other publication. The issuer should only be obliged to update any profit forecast until the closing of the transaction, but not afterwards. The introduction of a continuous information requirement regarding such forecasts, is incompatible with the temporary nature of such forecasts.

Q 86 ***Do you agree with the disclosure requirements in respect of profit forecasts set out in disclosure requirement CESR reference IV.D.3 (a) and (b) of Core Equity Building Block (Annex "A")?***
Generally we would expect estimates of profit for a completed period and for a limited period (e.g. the next quarter) to be treated as profit forecasts; but if there is no period mentioned (e.g. "in the medium term") then they should not necessarily be so treated. We would also expect interim and preliminary figures to be reported upon as if they were profit forecasts.

Although we support that any profit forecast should be clearly justified, we consider that the requirements included in IV.D.3.a are far-reaching and will only lead to misinformation for the investor. Having to list the principal assumptions that could have a material effect on the achievement of the forecast will force the issuer to provide an exhaustive list of factors that can influence such forecast, out of the fear of forgetting one factor (and thus be subject to liability risk). Furthermore, although theoretically one may assume that the issuer can segregate the factors that are under control of management (e.g. lay-off of staff) and those that are not (e.g. consumer spending behaviour), in practice, there is a grey area of factors that can prevent the achievement of the forecast and that cannot be identified, for example competitors' marketing efforts.

We also believe that reference needs to be made that if earnings enhancement or merger benefits statements are made, then the statement needs to include a disclaimer expressly stating that they are not necessarily to be interpreted as meaning that earnings will necessarily be greater than the preceding period.

[4] As we understand paragraph 72, CESR considers that a dividend forecast should be treated as a profit if the company has a stable dividend policy and as a loss if the company has insufficient level of retained earnings. This implies in our view that the company is making dividend projections without mentioning earning projections, which we do not think a company will do.

Q 87 ***Do you agree with the arguments set out regarding mandatory reporting by the company's financial advisor?***

Firstly, we would like to note that we see somehow a contradiction in what is explained in the consultation paper as to the fact that the company's financial advisor should not be obliged to report on the forecast (paragraph 80) and item IV.D.2 which requires that the forecast or estimate should be examined and reported on by the reporting accountants or auditors.

Secondly, while we note that in the UK accountants do provide comfort on profit forecasts, this is not normal practice in the rest of the EU given the difficulty of verifying such information. Furthermore, in the UK, such comfort is based on very descriptive profit forecast, typically not based on quantitative projections.

Thus, we agree with CESR in paragraph 80 that such a review would entail extra costs for the company and that such disclosures should be voluntary. However, in order to provide additional safeguards for investors, we propose that if those forecasts are not reviewed by third parties a statement to that effect is included.

1.5 Directors and Senior Management privacy

Q 89 ***Do you agree that such information may be material to an investor's decision to invest? Would the provision of such details breach privacy laws in your jurisdiction?***

We think that material information should include securities dealings (or absence of) of directors and that the other information proposed should only be made available to regulators.

1.6 Documents on Display

Q 93 ***Do you feel that issuers should be required to put on display all documents referred to in the prospectus (as set out in CESR reference VIII in Annex A)? Would this cause problems due to privacy laws or practical problems as a result of having to review lots of documents for commercial information?***

During the public hearing there were extensive discussions on whether it was really necessary to put documents on display for inspection by investors, in particular since some of the information could be commercially sensitive. The CESR representative explained that in the UK it is allowed to blank out commercially sensitive information and that if this information was not detrimental to the issuer, there was no reason for not putting those documents on display. The CESR representative also explained that some jurisdictions argued that if those documents refer to commercial measures then they should not be on display.

We believe that material contracts should not be put on display (therefore we would propose to delete letter b) in item VIII.F) even if the competent authority is allowed to exclude or hide commercial information. The material information of these contracts should be included in the registration document as already contemplated in item VIII.C.

1.7 Specialist building blocks

Q 95 ***Do you believe that the building blocks in Annexes D, E, F, G and H are appropriate as minimum disclosure standards?***

See comments below for some of these building blocks.

Q 96 ***What other specialist building blocks (if any) should CESR consider producing in the future?***

We support CESR's inclusion in the second consultation document of a specific registration document for credit institutions. We believe that this block is particularly important in relation to the issuance of derivative and debt products and CESR's future work on a programme document (base prospectus) that will possibly be required under the next mandates from the Commission.

Q 100 ***Do you agree with the specific disclosure requirements set out in the building block for start-up companies?***

We think that the disclosure of company's business plan (item II.A) will be controversial and we suggest therefore simply including material information of company's business plan in the prospectus.

Q 101 ***Do you feel that additional disclosure requirements should be included, for example, an independent expert opinion on the products and business plan?***
We believe that independent expert opinion would be helpful in certain circumstances despite the obvious cost implications for the issuer in order to ensure an independent impartial and reasoned opinion to allow investors to make an appropriately informed investment decision.

1.8 SMEs

Q 102 ***Do you feel that disclosure of restrictions regarding holding by directors and senior management should be applied to all companies through the core building block? Or should this only be required for all companies where there are such restrictions?***
Yes, such disclosure should be done through the core building block.

Q 105 ***Do you believe that SMEs should only be required to provide details for two years under disclosure requirement II.A?***
No, we believe that the same regime should apply for all companies.

1.9 Property Companies

Q 111 ***Do you agree that valuation reports as set out in Annex D should be required for property companies?***
We disagree. Such valuation reports seem to be more of a snapshot and information in the annual report seems to us more reliable. For property companies the presence/ownership of property can be assessed through other means than an expert report.

1.10 Mineral Companies

Q 116 ***Do you agree that expert reports should be required for mineral companies?***
Yes. Given the paramount importance of the mine (concession) for the overall value of mineral companies, an expert report on the presence of minerals seems crucial. The value of minerals (digged or not) does not seem to be something that has to be encompassed by such reports, but rather by the market.

2. DEBT SECURITIES

2.1 General

Q 129 ***Do you consider that the disclosure requirements for debt securities should be identical to those for equity, as set out in Annex A?***
No. The disclosure requirements of Annex A reflect almost integrally the IOSCO standards that were designed exclusively for equity securities. As CESR already clarifies, the interests of bondholders and shareholders are different and thus the disclosure standards should reflect those different interests.

However, an issuer that has filed a registration document using the equity disclosure document should be able to use such documentation for a debt offering. If that is not the case, then the issuer should be able to use a differentiated Registration Document for a debt securities offering.

2.2 Disclosure about the advisers of the issuer

Q 134 ***Do you consider disclosure about the issuer's bankers and legal advisers to the extent that the company has a continuing relationship with such entities to be relevant for corporate retail debt?***
Please refer to our answer to question 44.

Q 135 ***Do you consider that disclosure relating to the bankers and legal advisers who were involved in the issue of that particular debt instrument to be relevant?***
It is normal market practice to name the bankers that were involved in the issue but this should not be a prospectus disclosure requirement.

2.3 History of the company's investments

Q 137 ***Do you consider disclosure about a company's past investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?***

Q 138 ***Do you consider that disclosure about a company's current investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?***

Q 139 ***Do you consider that disclosure about a company's future investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?***

CESR acknowledges in its second consultation document that information on past or current investments "*does not provide wholesale investors with sufficient benefit to justify the costs imposed on these issuers in providing such disclosure*". We believe that this logic should also apply to corporate retail debt. We do not see the benefit of including a separate disclosure requirement where the information on past and current investments, as currently described, will be included in the company's financial statements. Please note that the requirement of three-year information for past investments contrasts with the requirement of two-year financial data (II.A.1).

We agree with CESR that information on future investments is relevant but should be subject to a materiality test.

2.4 Operating results, liquidity and capital resources

Q 142 Do you agree that these different interests should be reflected by different disclosure standards and in particular that retail bondholders do not need the same disclosures as shareholders in respect of these sections of the IOSCO IDS?

Yes, we agree. Please also refer to our answer to question 44 in relation to working capital statements.

2.5 Documents on Display

Q 148 Do you feel that issuers should be required to put on display all documents referred to in the prospectus (as set out in CESR reference VIII in Annex A)? Would this cause problems due to privacy laws or practical problems as a result of having to review lots of documents for commercial information?

Please refer to our answer to question 96.

Q 150 Please give views on which if any of the documents that are not in the language of the country in which the public offer or admission to trading is being sought should be translated.

The only translation requirement should be into a language customary in the sphere of international finance. Other translations that the issuer may feel necessary for marketing purposes should be voluntary.

2.6 Additional Information

Q 153 On a review of the equity disclosure requirements (CESR ref VIII.G of the Core Equity Buildings Block) set out in Annex "A", please advise which if any of these requirements you consider to be relevant for retail corporate debt. Please give your reasons.

Q 154 Do you agree with the CESR disclosure proposals for corporate retail debt as set out in Annex "I"?

Q 155 Please advise which if any items of disclosure should not be required for corporate retail debt. Please give you reasons.

In relation to related party transactions (VI.B), we consider that these should be limited to two years (as with financial data) and not three years as currently proposed. We see that the second consultation document (wholesale debt disclosure) has corrected this figure to two-years.

Our comments on the Registration Document for equity apply *mutatis mutandi* to the Registration Document for debt.

3. DERIVATIVE SECURITIES

Since CESR has issued its addendum proposing a specific Registration Document for derivatives, we do not think is necessary to comment any more on this section of the first consultation and defer our comments to the consultation on the addendum.

III. SECURITIES NOTE

As a general comment we believe that CESR, in defining the content of the Securities Note, should avoid duplication of items already disclosed in the Registration Document, in particular since such Registration Document can be incorporated by reference. We welcome CESR's acknowledgement during the second public hearing about the need for such exercise.

1. QUESTIONS

Q 249 ***Do you consider it an appropriate approach to obtain flexibility by creating specific building blocks on particular characteristics of some issuers, offers, markets and securities?***
Yes, we agree with this approach and we are analysing, taking into consideration the new Securities Notes proposed in the addendum consultation document whether other Securities Note may be necessary or whether the proposed ones will be sufficient.

Q 250 **Format of the Schedules –** ***Is the format of the three main schedules suitable? These schedules are composed of (i) common items and (ii) specific items for each type of securities, amalgamated into one single document Is this approach sensible or should the common items and the specific items form distinct blocks?***
Yes, we agree with this approach in order to avoid duplication of items.

Q 251 **Complex financial instruments –** ***In order to ensure adequate disclosure for securities that do not fall within just one of the three main types, do you agree that the Competent Authority should (as envisaged by Article 21(4)(a) of the Directive) be able to add specific items of another schedule to the main schedule chosen, that it considers necessary having regard to the characteristics of the securities offered, as opposed to their legal form?***
We assume that CESR refers to Article 21.3 (a) and not 4 (a) which allows competent authorities to require supplementary information if necessary for investor protection. We think this is essentially different than requiring the whole addition of items of another schedule depending on the securities to be offered. We see a risk in possible arbitrary decisions in both using article 21.3 (a) and the exception proposed by CESR in this question. We believe that, in particular given the addendum consultation document and the possible results of that consultation (for example proposing further types of Securities Notes), most of the securities currently being offered will be basically be covered. Further schedules as the market evolves in the coming years should be the subject of level 3 discussion and possibly further level 2 measures but not nationally agreed additional measures.

Q 252 ***Section I.2. - Should advisers be mentioned in all cases, or only if they could be held liable by an investor in relation with the information given in the prospectus?***
See our answer to question 93.

Q 256 ***Section III.B asks to list the reasons for the offer and the use of proceeds. While this is an important item for shares and bonds, is it also the case for derivatives?***
We think this is not important. The proceeds from a derivative offering are used to buy a particular return (hedge) and pay the profit.

Q 257 ***Section III.C.2.(d) - Under Section III.C.2.(d) requires inclusion of a worked example of the "worst case scenario".***
1) Does this information provide material information for investors?
2) Are there circumstances in which an example of the worst case scenario is not appropriate?
3) Would the disclosures as set out below be an appropriate alternative:
a) a risk warning to the effect that investors may lose the value of their entire investment, and/or
b) if the investor's liability is not limited to the value of his investment, a statement of that fact, together with a description of the circumstances in which such additional liability arises and the likely financial effect.
We think that this information does not provide material information and it is a time consuming exercise which does not provide the investor with clearer information than simply state that the worst case is to lose the entire investment. Therefore, we think that a risk warning to that effect (alternative a) in question 3) should suffice.

Q 259 **Section V.A. –** ***Section V.A. lists the items to be disclosed in order to give a description of the securities that are offered or admitted to trading. Should the following additional items be added to Section V.A.:***

a) Legislation under which securities have been created;
b) Court competent in the event of litigation;
c) Redress Service available for investors, if any?

We do not think that it is relevant to include the competent court since if an investor will sue the issuer, because of consumer protection rules, s/he will do so in its local court.

Should information about the rating of the issuer or of the issues be mentioned under that item? If yes, which one of the following wording would be more appropriate:

- ***"Rating assigned to the issue or to the securities by rating agencies and/or commercial bank lenders pointing out the name of the rating organisation whose rating is disclosed and explaining the meaning of the rating. If a rating does not exist, to the knowledge of the issuer, it is required to disclose the fact that there is no rating", or***
- ***"Rating assigned, at the issuers requests or with its co-operation, to the issue or to the securities by rating agencies and/or commercial bank lenders, pointing out the name of the rating organisation whose rating is disclosed and explaining the meaning of the rating".***

Generally, the securities are not rated but only the issuer is rated.

Q 260 ***Section V.B.12, first indent of Annex M requires a statement concerning the past performance of the underlying and its volatility. Is this disclosure necessary? Should the requirement for disclosure vary depending upon whether the underlying instrument is admitted to trading on a regulated market and the nature of the market? Should the requirement for disclosure vary depending upon the nature of the underlying instrument?***

We think that this disclosure requirement adds costs to the issuer without any added value to the investor and on the contrary, may mislead the investor since past performance is no guarantee/indication for future performance.

2. COMMENTS TO ANNEXES K, L, M

ANNEX K (equity)

In relation to **Annex K**, apart from the comments on the risk factors provided in our answer to question 47, we have the following comments:

- **V.B.1:** application forms are often not used in the Netherlands and we do not see a particular reason why they should be now used. We therefore think that simply the description of the application process should be included.
- **V.B.3:** the process in which investors are notified of allocations is a matter of bank practice and these differ between banks. In order however to ensure a fair treatment for investors, without interfering unnecessarily in banks' practice, the disclosure should be limited to notify the period during which investors will be notified of the allocations.
- **V.B.6:** we seek clarification as to which type of disclosure is intended under this heading.
- **V.C.4 Pre-Allotment Disclosure**

  During the second public hearing, it was clarified that the CESR mandate was exclusively related to disclosure and not to establish any specific allotment requirements, which was the purpose of CESR standards on stabilisation and allotment of April 2002. It was therefore clarified that the disclosure requirement in relation to the division of tranches (letter a) did not oblige the issuer to establish tranches but simply to inform about those tranches, **if any**. We would appreciate that CESR will clarify this in its final document. Furthermore, we think that the disclosure about tranches can only be indicative, since tranches will be fixed at the end of the book building exercise. In relation to letter b), we think that disclosure about any claw-forward should also be contemplated.

  Therefore, we propose to redraft letters a) and b) as follows:

  a) **If any,** the division into **any indicative** tranche of the offer including the institutional, retail and issuer's employee tranches and any other tranches
  b) The conditions under which the claw-back **or claw-forward** may be used, the maximum size of such claw back **or claw-forward** and any applicable minimum percentages for individual tranches;

- **V.E.1:** We do not think that the disclosure of the "amount" of the expenses charged to the subscriber or purchaser is realistic since these are a matter of bank policy, based on the investment services contract with investors and thus those expenses charged differ (both in national context as well as international context). It should suffice if the prospectus indicates that expenses may be charged and that the investor should consider requesting such information to the bank offering the securities.
- **V.E.4:** in relation to the inclusion of "*who established the price or who is formally responsible for the determination of the price*...' As a general rule the issuer bears ultimate responsibility for the content of the prospectus. This will be unaffected by any advice an issuer may seek from external parties. In the case of a court proceeding, the judge will establish according to civil law who must bear the responsibility, regardless of what the prospectus states.
- **V.I.2:** Disclosure of expenses: should be limited to disclosure of those expenses which are to be borne by the company. Expenses incurred by other parties involved in the process are of no concern to investors.

ANNEX L (debt)

- **II.B.3:** this disclosure requirement (reduction of subscriptions) should be deleted since this only applies to equity
- **III.A:** normally in the capitalisation statement for debt disclosure there is no reference to contingent liabilities since these will normally be included in the footnotes to the accounts.
- **III.B:** we propose to delete the inner sentence "*if the anticipated proceeds […] and sources of other funds needed*" since we think it may be impossible to anticipate if the proceeds will be sufficient and the future sources of other funds needed (since this will mainly depend on for example market conditions for future debt offerings).
- **V.A.16:** the obligation should only be to provide the basis for the yield since the yield may be different for each investor and will in any case change once the securities are admitted to trading.
- **V.A.17:** if a summary of the guarantees is included in the document, we do not think that those documents should be put on display (cf our comments on documents on display).
- **V.B:** we think that this information is only relevant for issuers of equity securities.
- **V.D.3:** please note that this information is irrelevant if for example the securities are deposited with Euroclear.
- **V.E.1:** please refer to our comments in relation to Annex K.
- **V.F.3:** we do not see the benefit to the debt investor of including the entities that may provide liquidity in secondary market trading, in particular since these may vary in time and may include basically all major investment banks. Furthermore, in general there is little secondary trading among retail debt investors.
- **V.H:** we think it is materially impossible to provide information of material relationships of the selling persons (which can be many banks) with the issuer for the last three years and we question why this requirement is necessary for the investor. We do not see a particular conflict of interests reason with selling entities, compared with the placing entities where disclosure is required (IV.B).

ANNEX M (derivatives)

- **III.C.2. c):** It is our experience that the provision of an example is currently only required in Italy. We consider this requirement as a time-consuming exercise that is of limited interest and misleading to the investors. Any example is based on hypothesis (e.g. variation of the underlying) that will be completely different in reality. Although we understand the "didactic" purposes of this requirement, we believe that the prospectus' objective is not to "educate" investors on how derivatives work.
- **V.A.6:** this disclosure is not relevant for derivatives securities (there are no covenants, negative pledges, etc), since this is only relevant for debt securities.
- **V.B.10:** we think it is necessary to add in the second bullet "*and receive or make payment if any*" (e.g. in the event of a put).

IV. INCORPORATION BY REFERENCE

We fully agree with the list of documents proposed by CESR to be incorporated by reference, in particular the possibility to incorporate press releases. However, we would like to propose the addition of the same type of documents that relate to offerings connected with for example a merger transaction where incorporation by reference for example of the financial statements of the target company should be possible.

During the first public hearing, we raised the point that we believed that the documents incorporated by reference could be previously or "simultaneously" published. An issuer could publish its prospectus and interim financial report on the same date and incorporate such interim report by reference into the prospectus (this was done for example in the December 2001 share issue of Royal KPN). This did not seem possible under the terms of the Directive (article 11.1) which requires that incorporation by reference could only be provided on previously published documents, which have been approved or filed.

We were happy to hear that the CESR representative clarified that simultaneous publication was contemplated by CESR so long as the documents were filed with the competent authority and that that could happen at the same time. This seems to be the intention of paragraph 279 - second bullet point-, which according to CESR representative does not conflict with article 11.1.

We would however appreciate a clear statement from CESR in this respect in its final paper.