

IRISH STOCK EXCHANGE

Response to CESR Consultation Paper dated June 2003 “CESR’s Advice on Level 2 Implementing Measures for the Proposed Prospectus Directive” (“the Consultation Paper”)

Introduction & Methodology

- 1.1 The Irish Stock Exchange welcomes the opportunity to comment on the Consultation Paper. We welcome the concept of developing an integrated and unified regulatory environment which should, in principle, provide better access to capital for European issuers. We appreciate the body of work which has been done by CESR in bringing the regulations to this consultative stage.
- 1.2 As outlined in the Irish Stock Exchange response to the October 2002 Consultation Paper, as well as the response to the Addendum to the consultation paper, to ensure a comprehensive and wide ranging response to the CESR consultation papers, the Irish Stock Exchange established two expert consultative panels to consider matters contained in the consultation papers. One panel consisted of prominent advisers to and participants in the Irish capital market, drawn, in particular, from banks and the legal and corporate finance sectors, and provided input on wholesale debt related matters. The other panel also consisted of prominent advisers to and participants in the Irish capital market, drawn, in particular, from the legal, corporate finance and listed company sectors, and provided input on equity related matters. Both panels have provided input on the responses contained in this document.

DERIVATIVE SECURITIES

Questions 32-39

We have analysed the disclosure requirements for issuers of derivative products and are of the view that these are sufficient for investors to make an informed investment decision. The additional disclosure items as set out in questions 32 to 39 provide little, if any, additional value information for investors in these types of securities, and should not be included as mandatory disclosure requirements for all issuers of derivative products.

Article 5(1) of the Prospectus Directive contains a general requirement that all material information be disclosed in a prospectus. Therefore, in exceptional cases, if the information set out in questions 32 to 39 is relevant/material for a particular issuer, it will be necessary for the issuer to include that information in its prospectus.

Question 59

Do you agree with CESR's revised approach in relation to retail non-equity securities and wholesale non-equity securities? If not please give your reasons.

We agree with CESR's revised approach in relation to retail non-equity securities and wholesale non-equity securities.

Question 61

Do you agree that information about investments should not be required for banks issuing wholesale debt securities? Please give your reasons.

Information about investments should not be a mandatory disclosure requirement for all banks issuing wholesale debt securities as, other than in exceptional cases, this information would be of little benefit for wholesale investors. If this information is material for a particular bank, then it will fall under the general obligation to disclose all material information in a prospectus (Article 5(1) of the Prospectus Directive).

Question 64

Do you consider that information on investments is relevant for wholesale debt securities? Please give your reasons.

In exceptional circumstances, information on investments may be relevant for wholesale debt securities, for example, where such investments would impact on the ability of an issuer to fulfil its obligations under the debt security. If material, disclosure of this information would fall under the general obligation to disclose all material information in a prospectus (Article 5(1) of the Prospectus Directive). In addition, such information would be likely to be disclosed under the Risk Factors section of the prospectus. Therefore, it is not necessary to mandate this disclosure requirement for all wholesale debt issuers.

Question 75

Do you consider that examples are necessary in order to fulfil the principle that the prospectus must contain a clear and understandable explanation of how an investor's return is calculated and how the instrument works? Please give your reasons.

We consider that examples are not necessary in order to satisfy the principle that the prospectus must contain a clear and understandable explanation of how an investor's return is calculated and how an instrument works. In very exceptional circumstances, where an instrument is extremely complex, a competent authority may require an issuer to include an example in a prospectus, if this is the only method of presenting the relevant information in an easily analysable and comprehensible form. However, we do not accept that examples are normally the only way to present information on complex products in an easily analysable and comprehensible form in a prospectus. The use of examples in cases of complexity may cause investors to place undue reliance thereon.

It must be noted that a prospectus must contain the material terms and conditions of the securities being issued. Given the potential for examples to be misleading, there may be significant legal issues relating to examples, whether positive, neutral or anything representing itself as being the worst case scenario. There are problems in presenting examples in that potential investors may place undue reliance thereon and that to avoid this and protect the issuer of the prospectus, the caveats required would be so substantial as to render the worked example virtually meaningless.

We consider that the circumstances in which investors may achieve a positive return should be set out in narrative form in a prospectus, rather than by way of a numeric example. We do not accept the argument that inclusion of examples in a prospectus is necessary in order to demonstrate that investors could earn more by investing in other products unrelated to the product being offered to the public or admitted to trading on a regulated market. Again, legal issues may arise in connection with the use of such examples.

Whatever the justification for the use of examples for retail derivative products, it is essential that worked examples are not required to be included in prospectuses relating to wholesale non-equity securities, which are aimed at wholesale investors who are particularly knowledgeable in investment matters.

Question 76

What other methods (if any) do you consider can be used to provide investors with a clear and understandable explanation of how an investor's return is calculated and how the instrument works? Please give your reasons.

Only inclusion in the prospectus of all material terms and conditions of the securities is necessary.

Questions 77 to 82

Please see answer to question 75.

Question 83

Are there any other type of securities for which you consider examples should be provided, for example structured debt instruments that have a derivative component?

In our view, there are no types of securities for which examples should be provided.

Question 89

Which of the above options do you consider should be adopted by CESR (1, 2 or 3)? Please state your reasons.

Option 1 should be adopted by CESR, i.e. disclosure of past performance and volatility should not be required. Past performance does not provide investors with any reliable information regarding future performance. The prospectus must already contain all

material information for investors to make an investment decision. In addition, information regarding past performance can be easily manipulated by issuers, particularly when presented graphically, encouraging investors to place undue reliance on such information.

BASE PROSPECTUSES

General comments

The Prospectus Directive clearly sets out the requirements for base prospectuses and, in particular, articles 5(4), 7(2), 8(1) and 9(2) are relevant. It is essential to ensure flexibility at Level 2 through less prescriptive requirements, in order to facilitate the continuous issuance of non-equity securities by issuers under offering programmes.

It is currently unclear as to when a “supplementary prospectus” rather than “final terms” document should be drawn up for new securities issued under a base prospectus.

Question 101

Do you agree with this generic rule?

We agree with the generic rule. It is important that the generic rule proposed by CESR does not interfere with the smooth operation of current market practices.

Question 112

Which of these two approaches do you think should be applied to base prospectuses? Please give your reasons.

Under Article 5(2) of the Prospectus Directive, where the prospectus relates to the admission to trading on a regulated market of non-equity securities having a minimum denomination of at least €50,000, there shall be no requirement to provide a summary except when requested by a Member State as provided for in Article 19(4).

For retail non-equity securities issued under a base prospectus, the final terms should not form part of the summary and, therefore, should not have to be translated. It is essential that the final terms document, as the name suggests, only sets out the final terms of an issue, which must be consistent with the principal terms and conditions of the securities that will be set out in the base prospectus itself. It must be pointed out that if issuers have to translate final terms, then the value of using a base prospectus format diminishes considerably, thus hindering the ability of issuers to issue non-equity securities in an efficient and effective manner.

Question 115

Which of these views do you consider should apply to base prospectuses with multiple products? Please give your reasons.

As stated in the response to Question 112, under the Prospectus Directive, summaries are not required for issuers of wholesale non-equity securities.

Issuers must not be forced to prepare separate summaries for each product included in a base prospectus. Again, this type of requirement will result in issuers no longer using base prospectuses to issue non-equity securities. It should be left to each issuer to decide how to comply with the general requirement of summary content as set out in Article 5(2) of the Prospectus Directive.

Question 122

Which of these views do you consider should apply to the form of final terms? Please give your reasons.

The final terms document, as the name suggests, should set out the final terms of an issue, which must be consistent with the principal terms and conditions of the securities that will be set out in the base prospectus itself. One must question why an issuer would replicate information from the base prospectus in the final terms document, when the final terms document must be read with the base prospectus.

Question 125

In relation to the publication of the final terms, should the method of publication be restricted as set out in Article 14?

The method of publication should be as set out in Article 14 of the Prospectus Directive.

Question 127

Do you agree with this analysis?

The method of publication used for the final terms does not need to be the same as that used for the publication of the base prospectus, provided that Article 14 is complied with.

Question 131

Do you agree with the above additional disclosure requirements in relation to base prospectuses?

We agree with the additional disclosure items suggested.

Question 132

Are there any other disclosure requirements that are not specified above that you consider necessary for base prospectuses? If so, please specify what these are and give your reasons for why you think they are necessary.

None.

Question 136

Do you agree with the above types of base prospectuses?

We question the merit of setting out a list of the types of securities that can be issued under base prospectuses, and the necessity to mandate this at all. There is a myriad of non-equity securities that can be issued under base prospectuses and we do not understand the purpose or status of the list as set out in paragraph 135.

Question 137

Are there any other types of base prospectuses that you consider are necessary? Please give your reasons.

It is important to note that, in the future, other types of securities may be developed which fall within the definition of Article 2(1)(k) of the Prospectus Directive.

WHOLESALE DEBT SN**Question 143**

Do you agree with this approach?

It is appropriate to distinguish between the SN debt disclosure requirements for wholesale and retail investors.

Question 144

Do you consider that the information provided for in Annex F is adequate for wholesale investors? Please give your reasons.

In general, the information provided in Annex F appears sufficient for wholesale investors, particularly as wholesale investors are deemed to be particularly knowledgeable about investment matters and, therefore, do not require the same level of information as retail investors. In item 6 of Annex F, we suggest including a requirement to disclose the total net proceeds of the issue/offer.

Question 145

Are there any other items included in the retail debt SN that should be included for wholesale investors? Please give your reasons.

No, the information to be provided by issuers under Annex F is sufficient for wholesale investors.

SN BUILDING BLOCK ON UNDERLYING FOR EQUITY SECURITIES**Question 162**

Do you agree with this approach?

Question 163

Do you agree with the disclosure requirements of the building block concerning the underlying for equity securities as set out in Annex H?

We agree with the approach taken by CESR and the disclosure requirements as set out in Annex H.

Question 165

Do you deem the Working Capital Statement and the information on Capitalization and Indebtedness necessary for an informed assessment of the securities in cases of products which can be converted or exchanged in newly created shares? Please give your reasons.

Working capital statements and capitalisation and indebtedness statements should not be required to be included in a prospectus by issuers of these types of non-equity securities. These statements provide investors with a ‘snap shot’ of an issuer’s working capital position and capitalisation and indebtedness position at a particular time. Given that these statements would have to be provided at the time of the securities note and a significant amount of time may elapse until conversion/exchange of the non-equity securities, such outdated information at time of conversion would be of little, if any, benefit to investors.

Question 167

Do you agree with this approach?

The approach set out appears reasonable.

Question 168

Do you agree with the combinations set out in the table?

Yes.

FORMAT OF THE PROSPECTUS**Question 172**

Which of the options set out above do you support? Please give your reasons for your choice.

We support option 3 and are opposed to options 1 and 2. CESR must not prescribe the order that information items disclosed in a prospectus must follow. Each issuer must choose the appropriate order of the disclosures in a prospectus, which will depend on the nature of the issuer and securities being issued. The key concerns are whether an issuer has complied with the relevant disclosure requirements and that all material information is disclosed in a prospectus, rather than the order of disclosures in that prospectus.

Question 176

Which of the options set out above do you support? Please give your reasons for your choice.

No specific order should be set for a single document prospectus, for the same reasons as those set out in the response to Question 172.

Question 182

Which of the options set out above do you support? Please give your reasons for your choice.

It is important to note that the production of a supplement to a prospectus does not necessarily mean that the summary document needs to be updated.

Where a supplement to a prospectus has been produced and this affects information disclosed in the summary, the original summary document should be updated. We are opposed to option number 2 where a supplement to the summary, in addition to a supplement to a prospectus, would need to be produced.

Question 237

Do you agree with the method of publication proposed?

Yes.

Question 238

Do you consider CESR should limit the issuer's choice to one or more methods of publication? Which ones?

CESR should not limit an issuer's choice to one or more methods of publication. Issuers should be able to choose the method of publication that they deem most appropriate.

Question 239

Do you consider that a deadline should be defined? If so, do you agree with the proposed deadline or would you suggest a different one? Please give reasons for your answer.

The imposition of a deadline is sensible and 7 business days after publication of the financial statements would appear to be appropriate.