

**ABI RESPONSE ON CESR PROPOSALS ON LEVEL 2 IMPLEMENTING
MEASURES FOR THE PROSPECTUS DIRECTIVE**

This note from Italian Banking Association is composed by the three following parts:

- *the first part concerns the functioning of the so-called “Lamfalussy procedure” in this current consultation process;*
- *the second part contains some general comments on the implementing measures proposed by CESR;*
- *the third part reports some answers to the most relevant questions raised by CESR in its consultation document.*

Part I - General remarks on “Lamfalussy procedure”

1. Remarks on how the current Level 2 is currently working

1.1. According to the four-level approach of Lamfalussy procedure, the regulation provisions as defined at Level 1 and 2 derive from the principles established in the Directive proposals (Level 1). Thus, in order to ensure an appropriate implementation of the aforesaid principles at Level 2 and 3, a clear definition of these same principles is necessary. As for the current consultation procedure, since the Directive proposal contains some principles that are not clearly defined (i.e. the definition of “qualified investors” of art. 2, par. e), CESR implementation measures risk to be unclear and not workable.

1.2. Although we are aware that CESR cannot take measures to fix the aforesaid situation as well as that CESR mandate received by European Commission is limited only to some topics, we believe CESR may address an invitation to the European Commission aimed at obtaining some re-wordings in the definition at least of those principles particularly affecting CESR future measures.

1.3. Furthermore, we are aware that Level 2 implementing measures should be adopted by national regulations. We are similarly aware that the prospectus topic is currently dealt by national regulators in different ways. In consideration of above, we believe that CESR should draft a kind of glossary containing the most common terms used in its implementing measures. Said glossary jointly with common standards that have to be adopted at Level 3 would greatly contribute to an harmonised European regulatory framework.

1.4. Finally, we demand CESR that European finance services industry will be allowed to express further suggestions or comments before the final text will be transmitted to the European Commission.

PART II – GENERAL COMMENTS ON PROPOSALS

1. IOSCO disclosure standards are not to be taken as minimum requirements

The Proposed Directive states that the implementing measures shall be “based” on the IOSCO disclosure standards. While the IOSCO standards should therefore be used as a guideline, there is no requirement in the Proposed Directive to adopt those standards as the minimum disclosure requirements.

In many instances, the proposed disclosure requirements are based on existing IOSCO disclosure standards. In some cases, however, the disclosure goes beyond the disclosure required under this regime. Thus, we think that where an extension or alteration to current regimes is thought necessary, justification for this change should be provided.

2. Lack of definitions

It would be opportune to set out, under current Level 2, a common definition of derivative instruments since it is of the utter importance that the investor could recognise the risk arising from the investment by the denomination of the financial instrument: the single name of the security shall enable the investor to know its characteristics, that is whether the principal is totally guaranteed or not; in other words, the investor could have the possibility to understand immediately if he/she will be provided at least with the return of the principal or not. Providing for a common definition of the category of the derivative instruments could represent a simpler approach for investors; on the other hand, with reference to the alternative approach proposed in the Consultation Paper dated October 2002, we consider very difficult to list all fundamental and exhaustive features of these product, especially due to the fact that derivative instruments raise continuously from the practice and they cannot be definitively standardised.

Thus, the following definition appears as appropriate:

“Derivative securities are those from which their value derive from other activities (securities, goods, products, so called underlying instruments) traded on the market and which could present a series of different features and characteristics depending upon the prospective yield and risk”.

Furthermore, it has to be pointed out that in the practice an offer to the public of “pure derivative instrument” is a residual case, given that derivative instruments are basically offered to the public jointly with other debt securities (so called “structured debt”). As a consequence, we could assume that the concept of “derivative” could be regarded as a component of the financial instrument belonging to the category of structured debt.

Thus, the category of structured debts could be divided into:

- structured debt where the whole return of the principal is guaranteed;
- structured debt where the whole return of the principal is not guaranteed.

Consequently, in order to harmonise all Member States' legislation related to securities and to allow issuers to be provided with a sole and common scheme for drafting prospectuses, it is necessary that at the Level 2, a common meaning of the category of debt, regarded as "plain vanilla" or "structured debt" be drafted.

With reference to plain vanilla debt, the following definition may be appropriate:

"Plain vanilla debt securities are those debt securities with a guaranteed reimbursement of the principal, where the return, corresponding to a fixed or floating rate, is not linked to a derivative instrument".

3. Professional Investors need different disclosure requirements

We strongly believe that professional investors should be treated differently to retail investors. Professional investors (that is, investors investing in denominations of at least EUR 50,000 and/or the minimum subscription amount is EUR 50,000) need less protection than retail investors. As such, the requirements of Annex I are far in excess of what is required for professional investors and should be significantly reduced.

4. Duplication between Registration Document and Securities Note should be removed

Article 5, paragraph 3 of the Proposed Directive states that the registration document shall contain the information relating to the issuer and that the securities note shall contain the information concerning the securities offered or to be admitted to trading on a regulated market. It is only to the extent that some information is not available for inclusion in the registration document or need updating that it should be included in the securities note. This structure has not however been followed through in the CESR Proposals. There are a number of areas where the disclosure requirements in the registration document and securities note are duplicated and this should be rectified. For example, most of the information in section 1 of Annex N (Securities Note: Common Items) on the identity of directors, senior management, advisers etc. would already be covered in the registration document.

5. Incorporation of documents by reference¹

The opportunity of allowing issuers to incorporate by reference documents containing the information required to be disclosed under a prospectus is limited to documents that have previously been filed and accepted by a competent authority in accordance with the proposed Prospectus Directive or the Listing Particulars Directive. As a result, this provision is unlikely to be of use to issuers and defeats the purpose of introducing the concept of incorporation by reference. The best way of dealing with

¹ Article 11 of the Proposed Prospectus Directive

this issue would be to allow incorporation by reference of all documents that are publicly available (see our detailed comments in Part II).

6. Consistency with other initiatives under the Financial Services Action Plan is essential

It will be vital to ensure that the proposed implementing measures in relation to the Prospectus Directive will be consistent with other initiatives under the Financial Services Action Plan including, in particular, the proposed Transparency Directive and Market Abuse Directive.

PART III –RESPONSES TO QUESTIONS RAISED IN PROPOSALS

1. DEBT SECURITIES

Operating results, liquidity and capital resources

Question 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?

We agree. While it may be necessary to use the IOSCO disclosure standards as a guideline in light of the Directive requirement that implementing measures shall be “based” on the IOSCO disclosure standards, there is no requirement in the Proposed Directive to adopt these standards as the minimum disclosure requirements.

Age of latest accounts

Question 146: If you consider that the reduced level of detail is more appropriate, should the same approach be taken for equity?

We believe that the same approach should be taken for equity.

Documents on Display

Question 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?

Since the issuer is deemed as responsible for any information contained in the prospectus, we do not believe that issuers should be required to put on display all documents referred to in the prospectus.

Question 149: On review of the list of documents set out CESR ref VIII.E of the corporate retail debt building block in Annex “I”, please advise with reasons: (1) Whether or not there are any documents that are listed that you consider do not need to be put on display? (2) Whether or not there are any documents that are not listed that should be put on display?

Please see our response to question 148. We believe that the only documents required to be put on display should be those documents that have been provided to the home state competent authority.

Question 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.

We believe that all the documents should be required to be translated into the language of the country in which the public offer or admission to trading is being sought.

2. INCORPORATION BY REFERENCE

Characteristics of incorporation by reference

Question 281: Do you think that the above illustrative list is acceptable?

We believe that there should not be any limitations on the documents that can be incorporated by reference provided that the requirements of the Proposed Directive are met in relation to that document. We would suggest that the competent authorities should be allowed general flexibility to allow documents to be incorporated by reference.

Question 282: Should further technical advice be given on the documents that can be incorporated by reference in the prospectus? In the case of an affirmative answer please indicate which technical advice should be given.

It would be helpful if it was made clear that even single parts of documents can be incorporated by reference.

Documents that can be incorporated by reference for annual up-dating of the registration document

Question 289: Should other aspects concerning the accessibility of the documents incorporated by reference be considered?

We agree that documents incorporated by reference should be accessible in the same way as the prospectus to which they relate.

Question 290: Should CESR give other technical advice on further aspects of incorporation by reference? In the case of an affirmative answer please indicate which technical advice should be given.

See our response to question 282 above.

3. AVAILABILITY OF THE PROSPECTUS

As a general point, we believe that the prospectus and other documents incorporated by reference should be available in a password protected area of a website which warns a user as they leave that section that other material on the website does not form part of the prospectus. This is of vital importance to ensure that other material on an issuer's website does not form part of the prospectus.

Question 307: Should there be technical implementing measures at Level 2 further defining what is deemed to be “easy access” and which specific file formats are accepted for this purpose?”

No, it is not necessary to have detailed advice in this area. In any event, such advice would become out of date in a very short time frame because of technological advances.

Question 314: Are there any additional factors and/or requirements that should be taken into account at Level 2 concerning the availability via the press?

We believe that these requirements are too restrictive. The circulation requirements may mean that certain newspapers fall within this category which would probably not be regarded from issuers as suitable newspapers for the publication of a prospectus.

Question 325: Do you consider appropriate the requirement to publish the said notice in the absence of a specific provision in the Directive proposal?

The amended Directive now includes specific provision for such notices.

Question 326: Should the minimum content of the notice be determined at Level 2 legislation?

Yes.

Question 327: When the prospectus is made available by its insertion in one or more newspapers or in the form of a brochure, besides the publication of a specific notice, should the list available at the web-site of the competent authority (see Introduction) mention where the prospectus is available?

Yes.

Question 328: In case of an affirmative answer to the previous question, should the indication in the website of the competent authority be considered enough and, consequently, should it be considered as an alternative to the publication of a formal notice by the issuer/offer?

Yes, as this would lessen the costs to issuers while still providing the information to potential investors.

Question 331: Which other issues regarding the availability of the prospectus in the form of a brochure should be covered by CESR’s technical advice?

We do not think further advice in this area is necessary.

Question 334: Do you agree that the issuer should not ask the investor the payment of the deliver or mail costs?

We agree.

Question 335: Should additional issues regarding the delivery of a paper copy of the prospectus be dealt with by Level 2 legislation?

We do not believe that this is required.