

**Response to
CESR's Recommendations
for the Consistent
Implementation of the European
Commission's Regulation
on Prospectuses n°809/2004**

INTRODUCTION

The stated objective of CESR's Recommendations is to achieve the consistent implementation of the European Commission's Regulation on Prospectuses throughout the European Union.

In view of that objective, we would like to bring to CESR's attention the perspective of a Pan-European network of leading law firms active in the capital markets of their respective jurisdictions: Bonelli Erede Pappalardo in Italy, Bredin Prat in France, Hengeler Mueller in Germany, Slaughter and May in the United Kingdom and Uría & Menéndez in Spain.

In large part due to the harmonization effort of the Commission and CESR over the years, the capital markets in these countries today function according to the same fundamental principles. Differences remain, however, in each jurisdiction, due to local customs or laws and regulations resulting from a unique heritage. The consistent implementation of the Regulation remains, therefore, a challenge. Our firms have established close ties in order to provide coordinated high-quality services in major European jurisdictions, including in the area of capital markets. We have sought here to provide CESR with a set of common answers which, we believe, would allow the Recommendations to be well understood and received in the capital markets of the five countries listed above.

Although we find most of the Recommendations helpful in clarifying the Regulation, we have indicated below the areas where our firms believe that investors in the French, German, Italian, Spanish and United Kingdom capital markets would overall be better served by deleting, altering or adding to the proposed Recommendations. In certain instances, we believe that the additional burden that would be placed on issuers and advisers by the proposed draft of the Recommendations would not improve the quality of the disclosure received by investors. We hope CESR will find these suggestions helpful and wish to thank CESR for giving us the opportunity to make our contribution to this process.

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18 October 2004

I. HISTORICAL FINANCIAL INFORMATION

I.1. Selected Financial Information

30. Although we agree with most of the paragraph, we note that a practice has developed in the international capital markets of including in the Selected Financial Information certain other key information which is not “some kind of calculation from, or elaboration based on, the basic figures directly contained in the financial information”. This information, which may or may not be audited, may consist of subscriber numbers (for communications companies), page views (internet companies), circulation numbers (media) etc. We would therefore suggest revising paragraphs 24, 25, 27 and 28 in order to explicitly allow the inclusion of this type of information so long as (i) it is made clear that this type of information is not extracted directly from the historical information and (ii) the general principles set forth in paragraph 25 (sources, methods, clarity and relevance of the information, etc...) are fully complied with.

I.2. Operating and Financial Review

31. We consider that the Operating and Financial Review (“OFR”) should, except to the extent specifically required by the Regulation, be a commentary on the issuer’s historical financial performance. The reference in paragraph 31 to a “prospective review of the issuer’s performance” is not supported by the wording of the Regulation and should be deleted.
32. We do not believe that this paragraph should single out any particular key performance indicators, since the circumstances of individual issuers will differ. We therefore suggest that the reference to environmental and employee matters should be deleted.
33. We believe that this paragraph should be deleted. We find it in part too general to be of any practical guidance (e.g. “performance should be discussed in the context of the long term objectives of the business and related measures drivers”) and in part over-specific as to the drivers that it may be appropriate to mention.
34. We agree with this paragraph.
35. We agree with this paragraph.
36. We would suggest a number of amendments to this section:
- (1) **Audience**: the audience of the OFR will depend on the transaction for which it is prepared. If the issue is of complex high-value securities directed at sophisticated institutional investors there should be no requirement to write the OFR as if it was directed at retail investors.
 - (2) **Time-frame**: we agree with this sub-paragraph.
 - (3) **Reliability**: we do not think that it is necessary to add to the general requirement contained in Article 5(1) of the Prospectus Directive, and would suggest that this sub-paragraph should be deleted.

- (4) **Comparability:** we do not think that it is necessary or appropriate to require that the disclosure should facilitate comparison with prior periods or to state that it is desirable to use measures used by others. We believe that management of the issuer should have the freedom to present the OFR in the way that they think is appropriate for their particular company at that particular time.

37. We consider that there should be no requirement to include key performance indicators but that issuers should be free to do so. Some issuers may take the view that traditional measures of performance, i.e. profit as shown in the financial statements, are more meaningful than other key performance indicators.

I.3. Capital Resources

42. We believe that the current wording of paragraphs 39 and 41 (by referring, for instance, to “any legal or economic restriction” or requiring covenant disclosure without regard to the importance of the credit facility) may lead to some cumbersome disclosure of little or no interest to investors. We would therefore suggest adding a materiality qualifier to those paragraphs. In addition, we would suggest clarifying the meaning of the disclosure intended to be elicited by the “objectives in terms of the manner in which treasury activities are controlled”, which seems unclear.

I.4. Profit Forecasts or Estimates

43. We believe that this paragraph should be deleted. The standard of care required in drawing up a prospectus is implicit in the provisions of the Directive itself and should not be added to or glossed in guidance.

44. We believe that this paragraph is too general to be of any practical guidance and should be deleted. In order to be of use, guidance on the drawing up of prospective financial information must be much more detailed and we believe that this would go beyond CESR’s remit. UK issuers for instance will refer to the Guidance on Prospective Financial Information published on 8 October 2003 by the Institute of Chartered Accountants in England and Wales; this paragraph is at best a partial and incomplete summary of that guidance.

45. We agree with this paragraph.

46. We do not agree with this paragraph and consider that it should be deleted. The Regulation specifically limits the profit forecast requirements to a profit forecast in a prospectus. This guidance would therefore go far beyond what the Regulation authorises. There are many circumstances when individuals may have made statements that amount to a profit forecast but it would be inappropriate to include these statements within a prospectus. We do not agree that such statements “will inevitably be material information”. There are, in any event, sufficient safeguards relating to statements outside the prospectus by virtue of market abuse and other provisions in member states.

47. We agree with this paragraph.

48. We agree with this paragraph.

49. We agree with this paragraph.

50. See our comments above.

51. We do not believe that it is helpful to provide examples of statements that may amount to profit forecasts or estimates.

I.5. Restatements of Historical Financial Information

75. We agree with this paragraph, provided that it is clear that issuers are not under any obligation to provide IFRS information except where the Regulation so requires.

85. We agree with this paragraph. In connection with the historical financial information and the audit reports thereon, however, we would like to mention one additional issue which might be German specific but could be an issue for other member states of the European Union as well: in the past, German auditors have refused to consent to the reproduction of the auditor's report if annual financial statements have been presented in a comparative table with consolidated notes. This refusal was based on a provision in the German Commercial Code which provides that the auditor's report may only be reproduced if the financial statements are presented in the form in which they have been audited. This question may become even more relevant if financial statements are incorporated by reference but auditors reports need to be reproduced in the prospectus.

I.6. Pro Forma Financial Information

92. We agree with this paragraph.

98. The definition of "significant gross change" (paragraph 96 of the consultation paper) is insufficiently described in paragraph 9 of the recitals to Regulation 809/2004. The test should be calculated using the threshold of 25% of paragraph 9 of the recitals to Regulation 809/2004 and in line with other regulations which are regarded as international standard (e.g. SEC, Regulation S-X) as follows: there should be an obligation to prepare and to publish pro-forma-information if one of the following criteria applies:

- 25 % of the issuer's total assets: the total assets of the acquired or the sold business exceed 25 % of the issuer's total assets;
- 25 % of the issuer's total net sales: the total net sales of the acquired or sold business exceed 25 % of the issuer's total net sales.
- Investment/disinvestment exceeds 25 % of the issuer's total assets: the issuer's investments in and advances to the acquired business or the proceeds received by the issuer for the disinvestment exceed 25 % of the issuer's total assets.

99. It is not possible for CESR, by referring to IAS/IFRS, to indirectly force issuers to use IAS/IFRS accounting. On the other hand we would assume that the indicators mentioned above should be available no matter whether the issuer's financials are under local GAAP or IAS/IFRS. Therefore we would propose to recommend the criteria described above regardless of whether the issuer's financial statements are prepared in accordance with local GAAP or IAS/IFRS.

I.7. Financial Data Not Extracted from Issuer's Audited Financial State ments

100. We agree with this paragraph.

101. We agree with this paragraph.

102. We agree with this paragraph; interim financial statements should in most cases be given greater prominence than any forecast, estimated or pro-forma figures, especially if such interim financials have been audited or are accompanied by a comfort letter, except in circumstances where the business has undergone a very significant change since the interim financial statements in which case it might be appropriate to give due weight to the pro forma information. Regardless, we suggest that some flexibility be left to the competent regulatory authority to appreciate this matter on a case by case basis depending on the specific situation of the issuer.

I.8. Interim Financial Information

104. We agree with this paragraph. Furthermore, any interim financial information included in the prospectus should be compared with the same period in the prior financial year, and should be presented together with the final results of the last financial year (preferably of the two prior financial years); see also below under 111. If no comparison is possible, the competent regulatory authority should have the power to grant an exemption or to authorize the presentation of pro-forma information.
105. We agree with this paragraph. Although the content of this proposed recommendation seems to restate paragraph 20.6.2 of Annex I to the Regulation, we believe that it may be helpful to clarify that the update is required even if the issuer has not previously published any interim financial information. If the interim financials have been audited or subject to a limited review, a copy of the auditors' report or comfort letter should be provided in the prospectus.
107. We agree with this paragraph.
108. We agree with this paragraph. It is essential that any interim financial information included in the prospectus be capable of comparison with the same period in the prior financial year; no worthwhile comparison is possible if the two sets of financials have not been prepared using the same accounting policies.
109. We agree with this paragraph.
110. We agree with the inclusion of a condensed cash flow statement and a condensed statement of changes in the interim financial information, although some discretion should be left to the local market authority in the case this requirement imposes a significant burden on the issuer.
111. Interim financial information should be presented in such a way as to be easily comparable not only with the same period in the prior financial year, but also to show trends when presented next to the final results of the previous financial year (the same is applicable to the interim financials of the prior year which should also be reported together with the final results of the previous financial year). As noted above, cash flow statements and statements of changes in equity for the previous period may be difficult to determine in some cases and some discretion should be left to market authorities in this respect.

I.9. Working Capital Statements

113. We agree with this paragraph.
114. We believe that it is a general matter incorrect to state that a prospectus may be valid for up to twelve months. Recital 34 and Article 16 of the Directive 2003/71 clearly indicate that there is a

difference between the prospectus and the modified version of a specific transaction document. Issuers of equity will not rely on a base prospectus but rather on a transaction specific prospectus that is valid only as of its date. It is inappropriate to set specific minimum periods for which disclosure must be accurate. Any forward-looking statement needs by its nature be made subject to qualifying language; something that paragraph 121 deems not acceptable. The Regulation asks for a statement that “in the issuer's opinion” the working capital is sufficient. This is a subjective statement based on assumptions and qualifications. The Consultation Paper rather seeks an objective statement and goes beyond the Regulation. We therefore believe that this paragraph should be deleted since it appears to qualify or add to the general provisions in the Directive concerning the standard of care and liability applying to a prospectus.

116. We believe that this recommendation would, in practice, be very difficult to apply. The issuer may have only incomplete information as to the position more than 12 months ahead and it is not possible to prescribe when it must make additional prospectus disclosure. Where the issuer foresees cash-flow difficulties arising more than 12 months ahead, it may have a general disclosure obligation under Article 5(1) of the Directive. However, whether such obligation in fact arises will depend on the circumstances of the particular case. We therefore suggest deleting this paragraph.
117. We believe that this paragraph should be deleted since it appears to qualify or add to the general provisions of the Directive concerning the standard of care and liability applying to a prospectus.
118. - 126 Although we agree generally with these paragraphs, we believe that even “clean” working capital statements require a minimal level of assumptions and should not be turned into a “guarantee” that the issuer will have adequate working capital in the next 12 months. For instance, we can envisage circumstances (e.g. litigation having a fundamental uncertainty as to outcome) where it is not possible for the directors of the issuer to say definitively whether the issuer does or does not have sufficient working capital. In such cases we believe it would be more helpful to investors to permit the issuer to state that if X transpires, the issuer will not have sufficient working capital, but that if X does not transpire, the issuer has sufficient working capital. We would therefore suggest rewriting paragraphs 121 and 122 accordingly.
127. We do not think that it will always be possible for the working capital shortfall to be precisely quantified.
128. We agree with this paragraph.
129. We agree with this paragraph. However, since issuers are highly unlikely to be advised to express confidence that actions outside their control will succeed, the disclosure that results will inevitably be “pro forma” in style (i.e. “no assurance can be given ...”).
130. We agree with this paragraph.
131. We believe that this paragraph qualifies or adds to the general provisions of the Directive concerning the standard of care and liability attaching to a prospectus, and therefore goes beyond the scope of the recommendation. We believe that it should be deleted.
132. We consider that this paragraph should be deleted. The procedures to be undertaken to give a working capital statement will vary from issuer to issuer.
133. We agree with this paragraph.

134. See our comments above.

I.10.Capitalization and Indebtedness

136. We agree that the information covered in this section is of interest to investors and should be included in the prospectus. We believe, however, that the way in which information on indebtedness has to be provided should vary from issuer to issuer depending on the specific sectors to which they belong.

Moreover, we wonder whether it is appropriate for the information on capitalisation and indebtedness to be given as at a date not earlier than 90 days prior to the date of the document. Such requirement would imply the preparation and delivery of specific interim financial statements (as at a relevant date within this period). It seems also that Shareholders Equity would have to be determined in view of an underlying specific profit and loss report. Thus, in our view, it would be preferable for issuers to have the ability to give such information as at the date of the latest available balance sheet of the issuer or, if different, as at the date of the interim financial statements to be included in the prospectus, coupled with a statement as to the absence of material change.

We would also suggest adding historical and forecast information on the level of interest rates of the issuer's indebtedness and the debt servicing obligations of the issuer.

II. NON-FINANCIAL INFORMATION ITEMS

II.1. Specialist Issuers

Generally, we believe that the recommendations should recognise that the requirements for experts' reports in the case of property companies, mineral companies, scientific research companies and shipping companies may not always be appropriate for certain types of offer or admission to trading. These may include offers of equity to existing shareholders and certain issues of debt securities, when the provision of such reports may involve excessive cost and delay.

II.1.a. Property Companies

143. A better definition of property and of property companies should be given which does not give rise to uncertainties in both common law and civil law systems (e.g., does the definition encompass also *iura in re aliena*, i.e., rights *in rem* of third parties on assets owned by third parties ?)

144- 150/

152-153. The recommendation should not go beyond the requirements of Article 23 of the Regulation, which, taking into account the specific nature of the activities, only requires adapted information (including a valuation or other expert's report) "where appropriate". In drafting such recommendation, it should be noted that the required valuation report may be quite expensive for small property companies not only considering the extent of the properties owned by the issuer (see further considerations below), but also in terms of additional reports required in the future (e.g., in case of a bond issuance following a listing). In such a situation, issuers could be allowed to include in the prospectus only an update of the valuation report already provided.

We agree with the proposal that in case of companies owning more than a certain number of properties (60, as indicated by CESR, could be the correct figure), a condensed report would be adequate; in such cases, however, a long-form report should not have to be made available as a document on display, as it would be unduly burdensome to ask issuers to prepare such a document if it is not required for the prospectus. Furthermore, to the extent that a condensed report contains all information necessary for the purpose of evaluating the properties, we believe that it could be reasonable to use it also in the case of companies owning less than the relevant threshold of properties.

151. We believe that the rules followed for the preparation of the report may not disregard the country where the properties are located since, in principle, these properties should be governed by the rules of that country. If this country is the country of the competent authority no issues arise.

CESR seems to have in mind a situation where the country of the competent authority that approves the prospectus is different from the country in which properties are located: in light of the above principle, we suggest to apply the rules of the country where the properties are located, especially in the event that the majority of the properties concerned are situated in (one and) another country.

154. Reports up to 120 days old should be allowed, especially in situations where there are more than a certain number (to be determined) of properties, provided that the independent expert (and the issuer under its own responsibility) affirms that no material events have occurred altering the situation depicted in the report.

155. Please see our comments above.

II.1.b. Mineral Companies

156. The definition of “mineral company” suggested in this paragraph limits such companies to those whose principal activity is or is planned to be the extraction of mineral resources. We believe that this is too limited, and that where a sufficiently substantial part (say 25%) of the assets or profits of an issuer relate to mineral extraction, the competent authority should have the flexibility to require the production of an independent report.

159. We have two comments on this paragraph:

- (1) First, we consider that the term “valuation report” is misleading. The report in question is a competent expert’s report on reserves and certain other matters but will not usually include any valuation of the reserves in question.
- (2) Secondly, we do not consider that it will always be appropriate for a mineral company to include a report in its prospectuses. Such reports will be appropriate to first-time issuers, but would represent a significant increase in cost and delay for issuers who are already admitted to trading on a regulated market. It is noteworthy that the UK Listing Authority’s Rules, on which much of CESR’s Recommendations appear to be based, do not require an expert’s report but only a statement of certain information relating to reserves in the prospectus of an issuer who is already listed (paragraph 19.5 of the UK Listing Rules) and even this statement is not required if the issuer is issuing shares to existing shareholders or is issuing debt securities (paragraph 19.6 of the UK Listing Rules).

164. See our comments above.

165. We have no comments on the definitions proposed.

166. We do not believe that it is possible to apply exactly the same requirements to issuers that are only involved in exploration. We believe, however, that there should be special safeguards attaching to such issuers, since there are particular risks that investors may be misled into acquiring investments that are highly speculative. The prospectus should contain a report of a suitable expert that makes clear the extent to which the expert considers the acreage held by the company to be prospective, makes clear the extent of the uncertainties in proving the existence of minerals and quantifies the risk involved in extracting any minerals that are found, to the extent that the expert is able to do so. There should also be a requirement for specific risk factors in such cases.

167. See our comments above.

II.1.c. Investment Companies

171. We believe that the CESR proposed recommendations raise the following questions:

at 170/ 1

- define “investment company” and distinguish from other issuers, in particular “collective investment undertaking” and “property company”

- define “director” (cf. no 1.8 of Schedule 1 of Directive 2001/107/EC: “names and positions in the company of the members of the administrative, management and supervisory bodies.”)
- In addition, “directors” should indicate details of their main activities outside the investment company where these are of significance with respect to that investment company (cf. no 1.8 of Schedule 1 of Directive 2001/107/EC) – disclosure of possible conflicts of interest (to the extent not already covered by recommendation 303).
- define “investment managers” (e.g. individuals making ultimate investment decisions); clarify whether the term extends to individuals employed by a delegatee company; clarify whether requirements also apply to advisory company (entity providing investment recommendations only – without discretionary powers concerning the management of the collective investment undertaking)

at 170/2

- clarify whether these disclosure requirements extend to delegatee companies and/or advisory companies
- disclosure of basis of remuneration for delegatee companies/advisory companies only required if payment is made out of investment vehicle (not if made out of management company’s fees, if applicable)

at 170/3

- define “relevant details” of all investments.
- “gross/total assets of issuer” should be substituted by “net total assets of investment vehicle” – and in the case of umbrella structures: “net total assets of sub-fund”

at 170/4

- define “controlling stakes” (51%, 10%, other percentage?)
- substitute reference to “local tax law” to “local law” (e.g. in Germany, this would be governed for some types of investment companies by the Investment Act)

at 170/5

- add: “indication of distribution dates”

at 170/6

- extend disclosure to lending of securities, the use of techniques and instruments and other possible means for creating leverage. Indication for the maximum leverage permissible would be helpful.
- clarify whether language include cascade funds (i.e. funds of funds of funds ...).
- indicate a minimum investment in other investment companies (better: “collective undertakings”) which triggers the disclosure requirement concerning such target investment.
- in sentence 2: replace “fewer than 20 companies” by “fewer than 20 issues”.

II.1.d. Scientific Research Based Companies

177. We agree that the information required in this section should give investors a good picture of the nature and scope of activities of the issuer; we believe, however, that a lesser level of detail in certain respects would not adversely affect this objective.

We believe that it is necessary to establish a more accurate definition of scientific research based companies, since the reference to companies “involved in the areas of agriculture and food” is too broad and confusing.

Moreover, we believe that details of the relevant expertise and experience of the key technical staff may not be essential for purposes of an offer of securities and could therefore be omitted: in most cases, details of the relevant expertise and experience should be provided about the company as an entity, not about individual employees, except in exceptional circumstances in the presence of a well known employee (e.g. Nobel Prize winner with recognized influence in the market, etc). These individuals, however, are rarely employed by private companies and usually carry out their activities within universities or other types of knowledge institutions. We would therefore suggest deleting this requirement.

We also believe that the information requested in paragraph (c) may be of a confidential nature at very early stages of the relevant research and development, which research and development could in turn be affected and prejudiced by such disclosure. In addition, the reference to organizations of “high standing and repute” should be removed, particularly as the lack of such a reference may be unduly mis-interpreted by investors. We would suggest, however, adding a disclosure on the terms of any material agreements entered into with third parties in respect of proprietary patents applied for by the issuer (licenses, etc.). In addition, the issuer may be asked to provide information on any relevant safety and efficiency tests for the products, whether conducted by the issuer or third parties, and disclose whether such products have already been approved for commercialisation; otherwise, a description of the administrative authorisation status could be requested.

It would be advisable to clarify what is considered “material” in paragraph (d) and perhaps a determination in terms of time of the “future prospects” (i.e. a year, three years, five?).

It may also be appropriate to add a new subsection dealing with the principal competitors of the issuers by products and/or markets, including the presence in the market of generic medicines (bio copies of the issuer’s products). In the latter case, an explanation of when such generic medicines can be commercialised in the markets may be relevant.

Regarding licenses, we would suggest a description of the underpinning, if any, of the issuer with respect to a licence of specific compounds of products commercialised by the issuer, in particular those with a short life and which may significantly affect the issuer’s profitability.

Finally, a description of the current applicable regulation and of any rules in preparation known to the issuer which may affect its business, together with any description of past disputes on damages caused by its products may also be requested.

II.1.e. Start-up Companies

187. Although we agree with paragraphs 183, 184 and 186, we do not agree with paragraph 185 for the following reasons:

Whereas we believe that it is necessary for start-up issuers to disclose in the prospectus their strategic objectives (with respect to their contemplated axes of development, the development of new sales, the introduction of new products, the positioning on the market, etc...) we oppose requiring that start-up issuers systematically include a business plan with figures in the prospectus for the following reasons:

Experience shows that business plans for start-up companies are unreliable. At best, even with the best intentions and with good faith assumptions, issuers are very likely to produce business plans which will bear little resemblance to the actual development of their activities. At worst, issuers will have an incentive to present overly optimistic business plans, or so-called “best case scenario” business plans.

For this reason, we believe that it is preferable for investors to base their investment decision on the issuer's historical track record (albeit a limited one), its current state of development and clearly spelled out (but not quantified) strategic objectives, rather than on multi-year projections showing what is generally a high teen compound annual growth rate (the CAGR included in every business plan).

As a practical matter, issuers, investment banks and their advisers are generally very reluctant for obvious liability reasons to the inclusion of business plans and/or projections in prospectuses. This reluctance benefits investors insofar as it makes it obvious to investors that there is limited tangible information about the issuer for investors to base their decision on. This in turn acts as a healthy investment deterrent. Quantified business plans and forecasts, on the other hand, may have the effect of lending more substance and credibility to the issuers' business than there really is and act as an incentive to invest. We also believe that when disclosed, quantified business plans and forecasts tend to become the focus of investors' attention to the detriment of the assumptions underlying them and other carefully drafted disclosure regarding strategy and risk factors.

Also, once an issuer has included this type of quantified information in its public filings, it will be difficult to stop providing the information to the market down the road, even long after the issuer has lost its "start-up" issuer status. Doing so might therefore create serious issues with investors who might adversely react to the issuer's decision to stop providing this type of information.

For these reasons, we believe that well-advised issuers and their investment banks will want to shy away from including such quantified business plans and forecasts in their prospectuses. We therefore believe that the inclusion of quantified business plans should not be mandatory.

188. We agree with the recommendation, so long as it is made clear that if a company which is not a start-up issuer becomes prior to a public offering a subsidiary of a new holding or similar company, regulators will look at the substance of the new group and will not merely apply the start-up issuer regime to the holding company.

189. Our strong preference goes to sub-paragraph (iv) of question 189.

We believe that in most cases, start up issuers will not be able to raise funds on the capital markets on the basis of unproven products and services, that is to say on the basis of products and services that have not already begun to be sold on the market. We believe that for products and services which are already available on the market, an expert report is not necessary as the market and investors can decide for themselves whether such products and services offered by the issuers work and whether they are worthy of additional funding to further their commercial success.

We believe that what is really unproven with respect to products and services offered by start-up issuers is the commercial success of such products and services, i.e. whether the issuers will be able to derive sufficient revenues and earning from the sale of such products and services. We do not believe that expert's reports can provide any useful assessment in this respect and would view the requirement of such a report as an unnecessary burden on issuers.

With respect to products and services which require a long development time before reaching the market (such as the drugs developed by biotech companies for instance or long term projects such as energy projects), we believe that the funding of issuers is usually not provided through the capital markets but through other sources of funding such as venture capital (in the case of biotech companies) or project financing (in the case of energy projects), unless and until the issuer already has a portfolio of proven products (albeit not commercially proven) on the basis of which it can access the capital markets. In any case, we believe that from a practical standpoint, experts would be unable to render a useful report with respect to products and services requiring a long development

time given that they are in the development or elaboration phase and by nature unproven. Again, we would view the requirement of such a report as an unnecessary burden on issuers.

190. For the reasons stated above, we do not believe that an expert's report on the products and services and/or other aspects of a start-up issuer should be mandatory. Regarding risk factors, we note that they act as a protection against disclosure liability for issuers and that issuers already have the incentive to make them as extensive and complete as possible.

II.1.f. Shipping Companies

191. We note that this paragraph defines a shipping company as one which has shipping as "a main activity". By contrast, paragraph 156 defines a mineral company as one whose "principal activity" is extraction of mineral resources; paragraph 172 defines a scientific research based company as one "primarily involved" in scientific research; and paragraph 143 defines a property company as one "primarily engaged" in property activities. It would be helpful if CESR could take a consistent approach to these issues. We would suggest that a test of "a principal activity" is appropriate for all three cases.

195. We suggest that the language be adjusted in line with our comments on paragraph 191. In addition, the word "activates" does not make sense in this context; perhaps "operates" would be better.

197. This requirement does not appear to be appropriate for issuers who have operating leases or charterparties of their vessels and do not own them.

200. We have no additional comments on the disclosure requirement.

201 - 206. See our comments above.

II.2. Clarification of Items

II.2.a. Principal Investments

Generally, we feel that the recommendations should take into account the different nature of each instrument and accordingly should be adapted thereto, depending on whether the securities issued are equity, debt or derivatives, and therefore, we think that adaptations would be necessary with respect to those different needs.

219. We agree with this paragraph.

220. We agree with this paragraph. It may be appropriate, however, to clarify several concepts, for instance, what is the time frame for the future investments and what does "firm commitments" mean ("final" agreements?, MoU?, and with whom, independent – non-related third parties?). Moreover, the term of commitment should be clarified: are the firm commitments for the next year? The next three years?

We would propose to substitute the reference in paragraph (a) to a "proportion" rather than to an absolute amount.

In addition, the proportion represented by the investment when compared to the profits of the issuer will vary greatly depending on the timeframe chosen by the issuer and may not be relevant.

The recommendation should also clarify that “the importance of an investment to the issuer’s business plan” must be analyzed in light of the financing for such investment and its impact on the net worth/financial situation of the issuer, depending on the special circumstances involved.

221. We do not necessarily advocate stricter approach but a more objective one. Rather than an absolute number, we would propose to use a threshold or percentage based on an objective criteria to highlight weight rather than numbers.

For instance, reference to determine what a “principal investment” is for an issuer could be to the percentage (i.e. 10% or 20%) that such investment represented in the issuer’s annual capital expenditure.

We believe, however, that under certain circumstances (e.g. the issuer may have little material capital expenditure in a given year, in which case it is not clear why it makes sense to disclose the investments that make up 10% or 20% of the annual total) it would be more appropriate for the issuer to make the judgment as to which of its investments are “principal investments” based on its own assessment rather than any particular objective test. We believe that some flexibility should be provided to address such circumstances.

II.2.b. Property, Plants and Equipment

224. We have the following reservations on this paragraph: we believe that the requested disclosure should be relate to the contribution of such property, plants and equipment towards the issuer’s business and disclosure should only be necessary where the property, plants and equipment are relevant for such purposes. Moreover, such information will vary from issuer to issuer and will depend on the special circumstances involved. For instance, it would be very difficult in certain cases to determine the “extent of utilisation of the issuer’s facilities” in case of companies with several or numerous facilities. Is the information referred to the relevant key facilities for the business? Is it requesting a list of all locations? In same cases (i.e. a retail company) a list of all locations would not provide useful information to investors. We believe that more flexibility should be provided to issuers in those respects.

Generally, we would try to provide more objective criteria to determine when such information on property, plants and equipment is essential to the activity or expectations of the issuer. In particular, section (c) should be limited to information available; the estimation of timing, costs and financing may be very difficult to determine and may create unrealistic expectations that are not material information for investors.

II.2.c. Compensation

229. Generally, we agree that investors should be provided with certain information on the track record and compensation of directors and senior management of the issuers. Such information, however, should not have to be provided if it is not required by the issuer’s home country or not otherwise publicly disclosed by the issuer in such cases. To avoid privacy and confidentiality issues, the information to be disclosed in relation to this section should be information which is available from public sources (e.g. the Commercial Registry).
230. In addition, we would suggest requiring directors and managers of the issuer to disclose any restrictions applying to the holdings of their compensation plans.

A clarification as to whether any contribution to pension plans has been made by the issuer on behalf and for the benefit of the directors and senior management might also be requested.

231. As discussed above, information on an individual basis should not have to be provided if not required by the issuer's home country or not otherwise publicly disclosed by the issuer.

II.2.d. Arrangements for Involvement of Employees

234. We agree with this paragraph. Furthermore we suggest that disclosure should also include participation of employees to dividends without involvement in the capital, where permitted by applicable laws.

II.2.e. Nature of Control and Measures in Place to Avoid it Being Abused

235-239. We agree on the principles underlying the recommendation. We understand, however, that these matters are addressed separately in Directives in force and in project. Care should be taken to make ensure the consistency of the requirements of those various Directives. That being said, we believe that, considering the sensitivity of this disclosure, additional information on the following issues should be given in order to better assess the nature of the control exerted over the issuer and the measures adopted to ensure that such control is not abused:

- (i) rights to acquire additional interests in the issuer;
- (ii) contents of the shareholders agreement in place;
- (iii) presence of independent directors and composition of the board of directors;
- (iv) compensation of directors;
- (v) internal controls (i.e., procedures designed to monitor the efficiency of the company's operations, the reliability of financial information, compliance with laws and regulations, and the safeguarding of the company's assets);
- (vi) any relationship (contractual or otherwise) giving rise to a *de facto* control over the issuer; and
- (vii) any other measure actually adopted to prevent abuses of majority.

Information concerning transactions and relationships between the issuer and the controlling entity should also be given in the context of related party transactions and therefore repetition should be avoided, if possible.

It should be made clear that a negative statement will satisfy the disclosure requirement. For example, if there are no provisions of applicable law or other arrangements in place that would prevent a majority shareholder from using its shareholding rights in its own interests rather than those of the issuer, this should be disclosed but should not be a ground for refusing admission to listing. There is nothing in the Directive that indicates that its scope includes the imposition of additional limitations on the actions of controlling shareholders.

II.2.f. Related Party Transactions

243. We agree with this paragraph.

244. We agree with this paragraph.

II.2.g. Legal and Arbitration Proceedings

247. We believe that there is a longstanding practice in the European market as to how legal and arbitration proceedings are best disclosed and do not believe that further guidance is required on this matter.

248. Please see answer above.

II.2.h. Acquisition Rights and Undertakings to Increase Capital

252. We agree with this paragraph.

II.2.i. Option Agreements

257. Although we agree with the recommendation, we would suggest providing the ability for issuers to provide certain information (such as exercise prices and exercise periods) in the form of ranges, especially as regards employee stock option plans. Not providing this flexibility would result in very burdensome disclosure for certain companies which in some cases may have more than 10 stock option plans and hundreds of stock option grants with different terms for their employees.

II.2.j. History of Share Capital

261. We agree with this paragraph.

II.2.k. Rules in Respect of Administrative, Management and Supervisory bodies.

265. We would not regard these recommendations to be appropriate for item 21.2.2 of Annex I. (RD for shares) and item 21.2.2 of Annex X (RD for depositary receipt issues over shares). It should be rather a recommendation for item 14.2 of Annex I (RD for shares). The recommendation for item 21.2.2 (of Annex I and Annex X) should be a more general recommendation on a description of (i) the different bodies of the Company and (ii) of the powers of those different bodies of the Company.

II.2.l. Description of the Rights Attaching to Shares of the Issuer

266 - 269. We have no comments on these paragraphs, other than that this information should not be required if it is not material in the context of the securities being offered or for which admission to trading is sought.

II.2.m. Material Contracts

270 – 274. We believe that the terms of contracts that should be disclosed are those that are material in the context of the prospectus, and it is not necessary to provide a prescriptive list of provisions to be described. In some cases the material terms will not include some of the factors listed in these paragraphs; for example, a contract may not involve a material amount of consideration but may include a restriction on the issuer's freedom of action which is material. We also believe that it is important to provide a mechanism whereby the issuer can ask market authorities that confidential treatment be afforded to certain information the disclosure of which would prejudice the issuer, as is the case under securities regulations of several other countries.

II.2.n. Statements by Experts

275 – 281. We suggest that these paragraphs do not provide useful guidance:

- (1) **Ownership of Securities:** the experts referred to in the prospectus will often be accounting firms, consultants or investment banks and are required by other provisions of the Regulation and recommendations to be "independent". The recommendations give no guidance on how interests in securities should be ascertained. Is it relevant if certain partners in an accounting or consulting firm own shares in the issuer? The answer must be that it depends whether the interest in shares is sufficiently material to call the expert's judgment into question. If that self-evident fact is the conclusion, it is not clear why it is necessary to include this factor in the recommendation.
- (2) **Employment:** again, this may or may not be self-evidently a material fact in the individual case. The expert is likely to receive compensation (a fee) from the issuer, and we do not think that that fact alone should give rise to a material interest.
- (3) **Membership of Issuer's Bodies:** this (rather unlikely) fact would clearly give rise to a material interest but we cannot envisage that it would often arise.
- (4) **Relationship to Financial Intermediaries:** this seems unlikely to arise very often.

We do not believe that additional guidance is necessary or helpful.

II.2.o. Information on Holdings

291. We agree with this paragraph. It is unclear, however, whether such level of detail should be required in relation to holdings of the issuer. For example, the amount of the debt owed to and by the issuer with regard to the undertaking are sometimes difficult to be obtained. If the issuer includes holdings that are consolidated, the equity and debt of the group rather than of the individual undertakings matter from an economic standpoint.

II.2.p. Interest of Natural and Legal Persons Involved in the Issue

295. We agree with this paragraph.

296. Although we agree with the recommendation, we wish to clarify that legal advisers – absent from any economic interest in the issuer – as a general matter have no interest in the success of an offering as they are paid regardless whether the offering proceeds or not. In addition, legal advisers are bound as a matter of law by confidentiality and secrecy obligations towards their clients which restricts disclosure to third parties. Although we do not believe that the current drafting of the recommendation infers such a disclosure obligation for legal advisers, we would welcome a clarification in this respect.

II.2.q. Clarification of the Terminology used in the Collective Investment Undertakings of the Closed-end Type Schedule

We agree with most of CESR's proposed recommendations. We would like, however, to make the following proposals:

299. Include information on limitation of leverage, if applicable.
300. Specify that the index must be recognized by the competent authorities (cf. Art. 22a of Directive 2001/108/EC).
301. Consider disclosure of use of fees (e.g. subscription fees) received by the collective investment undertaking (e.g. to defray distribution costs); a reference to distribution or placement fees and incentive arrangements (in particular soft commissions).
302. When referring to the regulatory authority supervising the Investment Manager: clarification that the reference to the regulatory authority must not create the impression that the investment is in any way approved or guaranteed by such authority (German requirements for German public mutual funds).
303. Add some language to clarify that these disclosure requirement also apply to a delegatee company and clarify whether they also apply to an investment adviser (i.e. person or entity providing investment recommendations only – without discretionary powers concerning the management of the collective investment undertaking).

II.3. Recommendations on Issues Not Related to the Schedules

II.3.a. Content of the Documents mentioned in art. 4 of the Directive

310. We agree with this paragraph.
311. We agree with this paragraph.
312. We do not believe that recommendations should be issued in this respect. We believe no further burden should be placed on the issuer, who should have the choice of the language and the modalities of publication for those documents.

II.3.b. Identification of the Competent Authority for the Approval of Base Prospectuses Compiled in a Single Document and Base Prospectuses Comprising Different Securities

- 314 - 329. We consider that these paragraphs, like the provisions of the Directive itself relating to choice of Home Member State, are highly confusing. They do nothing to bring greater clarity and should be deleted. The paragraphs relating to a base prospectus for several issuers do no more than reiterate the problem created by the Directive and are not, therefore, guidance or recommendations within the accepted meaning of those words.

In order to be of any value, the recommendation would need to make clear that competent authorities should be expected to transfer approval to another authority and state the criteria for

identifying the lead authority. We believe that this should normally be the Home Member State of the principal issuer or guarantor of the securities to be issued under the base prospectus, judged in terms of size.

II.3.c. Disclaimer when a Prospectus is Published in Electronic Form

333. We believe that it would be advisable to differentiate whether the prospectus is going to be posted on the issuer's web site or that of the regulator. In the latter case, a special disclaimer stating that the prospectus has been registered in accordance with the local regulation should be included.

We agree that a "clear warning" expressly indicating that the offers are not available to residents in specified jurisdictions and that they are only available to residents of the countries detailed in the said warning should be visible alongside the information illustrating the offer or prior to it. However, certain guidelines on whether a list of countries where the offer is registered or an express reference to the countries where the offer is not made, should be clarified in the recommendation.

We would propose to modify paragraph (a) as follows:

"The information contained herein regarding the offering of securities is not for publication or distribution to persons in the [specified jurisdictions if relevant i.e. United States of America, Canada, Australia, Japan or any other jurisdiction where the distribution of such information is restricted by law], and does not constitute an offer to sell, or solicitation of an offer to buy, securities in those jurisdictions in which it is unlawful to make such an offer or solicitation. The securities referred to herein have not been and will not be registered under jurisdiction other than in compliance with the laws of [specified jurisdiction]. No money, securities or other consideration is being solicited, and, if sent in response to the information contained herein, will not be accepted."

We would also propose the deletion of paragraph (b) which may be read to restrict the resale of shares on the secondary market even in those cases where the transfer or sale of such securities to other legal or natural persons is permitted.

Finally, disclaimers would not avoid compliance with public offering requirements if the factual circumstances of the offering were to trigger the applicable local rules on public offerings. Disclaimers, however, may help to maintain before a relevant court that investors were warned not to enter a site where a prospectus was posted, and therefore that any loss incurred by such investors was not caused by any issuer action. This analysis would be helped further if investors had to click and accept the disclaimer as it would imply that investors had accepted and approved the contents of the disclaimer. We would therefore suggest to include an express reference to this fact in the recommendations. In addition to the disclaimer, a system allowing entry on the site only to residents or investors of specific jurisdictions where the offer has been registered and barring the others would completely remove the type of risk this recommendation is trying to protect against. We have reproduced below an example of such system which has successfully been used in the past:

Are you a resident or citizen of [specified jurisdictions]

☐ No ☐ Yes

Country

City:

Postcode

By clicking herein I declare (i) that I have read and accepted this legal disclaimer and (ii) the data provided by me herein are true and correct.

[Access / Acceder](#)