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CESR's Report on the supervisory functioning of the Prospectus Directive and Regulation

June 2007



EXECUTIVE SUMMARY

The Prospectus Directive (2003/71/EC) (PD) came into force on 31st December 2003 by its publication in the EU Official Journal. Member States were required to implement the PD in their jurisdictions no later than 1 July 2005. In accordance with the report of the Committee of Wise Men, (the 'Lamfalussy process'), the implementing measures of the PD, the Commission Regulation 809/2004/EC was published, on 29 April 2004.

Now that new European Prospectus regime introduced by the Prospectus Directive and Regulation has been effective for approximately 2 years, CESR has decided to assess whether it is achieving its objectives of protecting investors and lowering the cost of capital, and in particular whether it is contributing to the development of the single market for securities.

To this effect, CESR has undertaken a public consultation process, publishing a call for evidence in November 2006 and organising an open hearing in January 2007, to seek input from market participants on the practical functioning of the new prospectus regime.

In addition to the input provided by market participants through the public consultation process, CESR members have provided some statistical data on the number of prospectus passported and on the transfer of the approval of prospectuses that has been included in section III of the report.

Section IV of this report provides a detailed summary and analysis of the responses of market participants. The obstacles considered to pose a risk to the proper functioning of the single market and, more specifically, to the fluid functioning of the passport, have been described in that section.

In section IV, CESR has only provided a summary of the comments made by respondents. This does not imply that CESR endorses the respondents' observations, including alleged practices of the specific competent authorities mentioned in their responses. As stated below, CESR will analyze in detail the comments made and will publish its response through the regular updates of its Q&A on prospectuses or through other means if the solutions are beyond CESR's remit.

Finally, section V of the report includes the overall conclusions that can be extracted from the comments made by market participants. In general most market participants seem to be satisfied with the new European legislation. They consider the Prospectus Directive and Regulation to be a step in the right direction in achieving a single market. Among the positive aspects of the new legislative framework, and despite the existence of a few obstacles in its practical functioning, they especially mention the passport mechanism as a useful tool in the development of a single market. Nevertheless, they have also identified certain provisions in the Prospectus Directive and Regulation that are causing some practical difficulties and they expect CESR to advise the European Commission to work on the necessary amendments.

Notwithstanding, their main concerns were not focussed on the legislation as such but on the divergent practices of the different competent authorities that they have identified in a number of areas. In this respect, they expressly commended CESR's Q&A on prospectuses as a means of reducing the divergent practices in Member States. However, they consider



that CESR should increase its coordination activities at level three. In particular, on those areas that have been identified in the report as being the most conflicting ones they consider that the lack of harmonization at CESR level could hamper the good functioning of the passport and diminish the range of investment opportunities. Thus they strongly encourage CESR to keep working on the development of common practices at EU level.

Next steps

CESR expects this report to be a useful input for its future level 3 agenda on those areas where CESR can positively act. It could also form a basis for CESR's contribution to the review of the Prospectus Directive by the European Commission in 2008. On issues where harmonisation could be achieved by CESR, those issues will be published through the regular updates of CESR's Q&A on prospectuses on its website. On other issues where only legislative action can address the problem, CESR will inform the Commission.



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I. INTRODUCTION

Background

1. The Prospectus Directive (2003/71/EC) (PD) is one of the key measures that underpin the Financial Services Action Plan which aims to deliver an integrated financial services market across the European Union. The PD is a maximum harmonisation directive and its objectives are to ensure investor protection and market efficiency. CESR has been very active in the area of prospectuses over the last four years.

CESR's level 2 advice

2. CESR provided the European Commission (Commission) with technical advice on the implementing measures of the PD. This initial work was completed in 2003 and its advice was reflected in the Commission Regulation on Prospectuses (EC) N° 809/2004 (PR).
3. Similarly, in 2005, CESR advised the Commission on how to deal with circumstances where the historical financial information to be included in the prospectus might not sufficiently reflect the issuer's whole business throughout the required period ("complex financial histories"). This advice led to an amendment of the PR through the Commission Regulation (EC) N° 211/2007 of 27 February 2007.
4. In addition, CESR provided advice to the Commission in relation to the equivalence of third country accounting standards. This advice was reflected in an amendment of Article 35 of the PR, introduced by the Commission Regulation (EC) No 1787/2006 of 4 December 2006.
5. These two amendments to the PR described above are excellent examples of the legislative flexibility of the Lamfalussy process. In both cases, CESR has had an important role, first, in identifying the need for an amendment of the PR and, afterwards, by providing its technical advice, following an extensive consultation process, to the Commission.

CESR's "level 3" activity

6. CESR has continue to work in this area to ensure convergence following its initial task on providing level 2 advice to the Commission. Its activity since 2004, besides the advice on "complex financial histories" and on "equivalent accounting standards", has focused on ensuring the consistent application of the prospectus legislation. CESR considers its ongoing role in the area of prospectuses to be that of ensuring convergence on the basis that uniformity is crucial for the effective functioning of the PD, a maximum harmonisation directive.
7. To this end, the CESR expert group prepared a set of recommendations (Ref. CESR/05-054b) which provided some guidance on some of the disclosure requirements set out in the Annexes of the PR as well as some provisions in the PD itself.
8. In addition, since the new prospectuses regime became effective on 1 July 2005, CESR members have held practical and operational meetings that have materialised in the publication in CESR's website of a 'Q&A' on prospectuses (Ref.CESR/07-110) (CESR's Q&A on prospectuses). The intention of CESR is that this document should provide a guide for market participants, reflecting CESR members' common approaches on frequently

asked questions on the day-to-day application of the EU legislation regarding the preparation of prospectuses.

9. In a parallel manner, these meetings have led to increased cooperation among CESR members in respect of procedures devised to assist a seamless operation of the passport mechanism and to deliver supervisory convergence.
10. A more detailed summary of the main actions undertaken by CESR's in its level 3 role, has been included in the next section of this report.

Objectives of the report

11. Now that this European Prospectus regime has been effective for approximately two years and taking into account CESR's activities in the area of prospectuses, it seems valuable at this point for CESR to assess whether it is achieving its objectives of protecting investors and lowering the cost of capital, and in particular whether it is contributing to the development of the single market for securities. As reconfirmed by the ECOFIN conclusions adopted on 5 May 2006 by the EU Finance Ministers, CESR's main role to fully achieve the benefits of the single market is to promote supervisory convergence amongst Europe's securities supervisors.
12. Therefore, in addition to its ordinary work on prospectuses, CESR decided to undertake a different exercise, the outcome of which is this report, to determine how in practice the application of the new prospectus regime is performing and whether its members are following the path of convergence after around two years of application of the new regime.
13. It is not the objective of the report to propose actual solutions to the problems identified as this would require a more detailed analysis. Section IV suggests the possible ways of addressing these issues (CESR level 3 work or legislative amendments). CESR expects this report to be a useful input for its future level 3 agenda on those areas where CESR can positively act. It could also form a basis for CESR's contribution to the review of the PD by the European Commission in 2008. On issues where harmonisation could be achieved by CESR, those issues will be published through the regular updates of CESR's Q&A on prospectuses on its website. On other issues where only legislative action can address the problem, CESR will inform the Commission.

Public consultation

14. CESR published a call for evidence in November 2006 in order to seek input from market participants. Around 40 written responses were received and those that are non-confidential can be viewed at CESR's website.
15. In addition, an open hearing was held in January 2007 at CESR's premises where market participants were invited to express orally their concerns in relation to the functioning of the new prospectus regime.
16. Section IV of this report provides a detailed summary and analysis of the responses of market participants. The obstacles considered to pose a risk to the proper functioning of the single market and, more specifically, to the fluid functioning of the passport, have been described in that section.
17. CESR has also included in section IV market participants comments to the question on whether investors consider that the new prospectus regime is enlarging the range of



investment opportunities and providing an enhanced level of disclosure and protection or not.

II. DESCRIPTION OF CESR'S WORK IN PROVIDING SUPERVISORY CONVERGENCE IN PROSPECTUSES ACROSS THE EU AND CLARITY FOR MARKET PARTICIPANTS.

18. Since CESR started its work on the area of prospectuses it has been aware of the important role it can play in facilitating a harmonised application of the new prospectus regime. In this respect, CESR has produced several public documents with the aim of achieving convergence across the EU in the day-to-day operation of this legislation and of providing guidance for market participants.
19. In addition, CESR has been working on internal processes and documents to promote an efficient cooperation between competent authorities (CAs) and to ensure a smooth functioning of the passport notification.

A) CESR's Recommendations on Prospectuses (Ref.CESR/05-054b)

20. One of CESR's objectives when producing its advice for the European Commission was to focus on the disclosure requirements of the level 2 legislative measures on the information that is relevant to the investor, in line with the Lamfalussy Process. Another objective was to avoid any kind of ambiguity that could lead to different interpretations of the rules and, therefore, hamper the functioning of the Single Market.
21. In order to facilitate the understanding of certain disclosure requirements, and before the new EU prospectus regime became effective, CESR published in February 2005 a set of recommendations (Ref.CESR/05-054b) with the aim of facilitating the consistent implementation of the PR but without imposing further obligations on issuers.
22. The purpose of these recommendations was to assist issuers and their advisers in reaching a common understanding with regulators as to the extent of the information required to fulfil the disclosure requirements of certain items in the PR schedules and to assist consistency across Europe in the way in which these schedules were interpreted.
23. When producing its recommendations, CESR undertook an extensive consultation process to decide those issues where more clarity was needed and to ensure that the views from market participants and end-users were fully considered in the final document.
24. These recommendations have proved to be very useful in promoting a convergent application of the PR. Although they do not constitute European Union legislation and have not required national legislative action, CESR Members have voluntarily introduced these recommendations in their day-to-day regulatory practices and market participants have considered them as an excellent guidance to follow when preparing prospectuses.

B) CESR's 'Q and A' publication on Prospectuses (Ref.CESR/07-110)

25. During the course of the 2005 and 2006, regulators and market participants have had to respond to issues arising from the practical application and the operational aspects of the

implementation of this Community framework into national law. As the PD is a maximum harmonisation Directive and the level of interaction between competent authorities has increased because of the passport mechanism, it soon became clear that it was essential for CESR members to achieve convergence in their approaches.

26. To this end, CESR created a Prospectus Contact Group where prospectus experts from CESR members, with the European Commission present as an observer, could discuss specific implementation and application issues and, to the extent necessary, agree common solutions. To this effect practical and operational meetings have taken place on a regular basis.
27. The work of this group materialised in July 2006, when CESR published its first set of questions and answers (Ref. CESR/06-296d). In February 2007, CESR published a consolidated 'Q&A' (Ref. CESR/07-110) adding new material to the July document.
28. The 'Q & A' guide establishes a convergent response from all EU securities supervisors to commonly asked questions on the day-to-day application of the EU legislation regarding the preparation of prospectuses. It focuses on responses to queries that are likely to have an EU-wide impact on market participants or end users, and therefore on the smooth functioning of the Single Market. Some of the agreements aim at facilitating the correct functioning of cross-border offers (for example, information from the issuers to Host CAs or passport of the supplements). The rest are responses to questions on the application of the legislation that have been arising frequently in most Member States (MS) (for example, how to treat employee share option schemes, free offers or interpretation on the historical financial information to include in the prospectus).
29. The document does not contain standards, guidelines or recommendations on prospectuses as its purpose is to provide quick answers to the questions market participants channel to the relevant CESR members and/or to CESR secretariat (CESR has set up a specific email address to receive these questions: prospectus@cesr.eu). Therefore, it is a flexible document, where the common approaches reached are not set in stone. Rather, the Group operates in a way that will enable it to react efficiently if any aspects of the published 'common positions' needs to be modified or adapted for greater clarity.

Usefulness of CESR's 'Q&A' on prospectuses

30. In order to seek market participants views on the usefulness of this 'Q&A' exercise, CESR expressly invited all interested parties to provide their comments on this issue in the call for evidence published in September. Both during the open hearing and in the written responses, there was an overwhelming positive response from the market to CESR's initiative.
31. Most market participants specifically mentioned the 'Q&A' published in CESR's website as a very useful tool in achieving a reduction of diverging practices in Member States as they provided responses to market participants' queries in a quick, flexible and efficient manner.
32. Some of the respondents considered that it would be desirable to avoid the divergent views from specific CAs included in certain responses as this implies that the "common approaches" do not always eliminate the problems that arise for issuers from divergent interpretation or application. However, even those that raised concerns about the fact that there were diverging views on some questions, considered the transparency provided in the 'Q&A' as a positive aspect.

33. CESR understands these concerns and considers that it would be desirable to not to have any dissenting views. However, it is CESR's opinion that the fact that CESR's 'Q&A' reflects the diverging views in a clear and transparent way is very positive since it provides market participants with a clear picture of the position of the different CAs. This will foster a wider debate among market participants which the CESR members with the diverging views might find it useful in reconsidering their previous positions.
34. CESR however acknowledges that its members have put in a great effort to achieve more convergence since the publication of the first set of questions. The additional material included in the last update of the 'Q&A' published in February did not have any dissenting or diverging position. CESR is confident that this good trend will continue. Besides, CESR is aware that some of its members are already working to solve some of the dissenting views included in the first publication and, hopefully, some of these will be removed in the future.

C) CESR's internal cooperation agreements to facilitate the functioning of the passport

35. In a parallel manner, CESR members have been co-ordinating the notification procedures in order to achieve a seamless operation of the passport. As an example, CESR members have set out a specific communication procedure and have agreed a standardised certificate of approval which has proven to be successful in facilitating the functioning of the passport mechanism.
36. Also, a contact list of representatives of each CESR member has been posted in the members' area of the CESR's website to ease the bilateral discussions between CAs and to promote a constant exchange of information on prospectuses.
37. CESR has also compiled the translation requirements of the summary of the prospectus for each CA. A list is accessible to all CESR members in the non-public area of CESR's website.

D) CESR's on going review of the implementation of the EU legislation on prospectuses

38. CESR established in March 2003 a Review Panel mandated to review the implementation of EU legislation and CESR standards and guidelines into national rules. The Panel gives its opinion on the overall process of implementation, provides common understanding and expresses views on specific problems encountered by individual Members in the implementation process. The CESR's Review Panel is currently reviewing the implementation of the PD in the Member States.

III. STATISTICAL DATA PROVIDED BY THE MEMBERS

39. As part of this assessment on the functioning of the new prospectus regime, CESR has undertaken a survey among its members to seek some data in relation to the number of prospectuses passported during the first year of functioning of the new regime (with a quarterly disclosure). A comparison with the previous year has also been provided.
40. In addition, CESR has requested from its members information on the option envisaged in Article 13.5 PD whereby CAs might decide to transfer the approval of prospectuses to another CA.

41. CESR members have also provided information on the number of prospectuses approved during the first year of functioning of the new regime with a comparison with the previous year. This information is provided in Annex A. The different powers of CAs and types of transactions approved before and after the new prospectus regime became effective make it very difficult to draw meaningful conclusions as the data before and after 1 July 2005 are not comparable. Also, the Member States completed the transposition of the new prospectus regime at different moments, which causes additional difficulties to compare data among countries.

A) PASSPORT FUNCTIONING

42. When looking at the data included in the tables below, the following factors must be taken into account:
- The tables reflect the information and notes as provided by CESR members. It is important to note that the CAs have different internal databases in place that might lead to some divergences in the data provided.
 - Some CESR members were unable to provide the information due to the unavailability of the data. Therefore, the tables do not include data on their respective countries.
 - Although Bulgaria and Romania have been members of CESR since 1 January 2007, data on these countries has not been included since they were not subject to the Prospectus Directive and Regulation obligations during the period covered by the questionnaire.
 - Not all the Member States were able to implement the PD by 1 July 2005. Thus, the time period is not always the same for all countries and it is not always possible to have an annual comparison. In most cases this different period is explained in the footnotes.
 - As some of the members were not the CA for the approval of prospectuses prior to the PD, it has not always been possible to have access to the data for the prior year.
 - The information for the period 1 July 2004 - 30 June 2005 refers to mutual recognition processes following the Admission Directive 2001/34.
 - The information on the number of prospectuses passported sent refers to number of prospectuses passported (without including supplements), regardless the number of Member States to which the prospectus has been passported (ie. a prospectus that has been passported to 4 different Member States is reflected in the table as 1 and not 4).
43. All these difficulties in obtaining comparable information led CESR to restrict the scope of its survey to the minimum information that most of its members were able to provide. Otherwise the number of caveats would have been even greater. Still, CESR is aware of all the limitations inherent to the data provided and, therefore, it is not CESR's intention to assess through this information the impact of the new legislation in the EU markets or to extract relevant conclusions. However, CESR considers that, despite all the limitations and differences, these tables still contain some useful indications and therefore it is worthwhile to publish them.
44. In particular, the tables show that there has been a marked increase in the number of passports notified when compared to the same period in the previous year albeit it was the mutual recognition regime in place prior to 1 July 2005. This is a significant and positive achievement of the introduction of the PD. However, it is important to note that it can not be concluded that the good functioning of the passport mechanism has necessarily led to an increase in the number of pan-European offers as, in some cases, issuers have requested the passport of a prospectus into a host Member State where no public offer has taken place afterwards.

A.1. Total number of prospectuses passported SENT

	1 July 04 - 30 June 05	1 July 05 - 30 June 06	1 July 05 - 30 Sept. 05	1 Oct. 05 - 31 Dec. 05	1 Jan. 06 - 31 Mar. 06	1 April 06 - 30 June 06
AUSTRIA	() ¹	52 ²	5	11	13	23
BELGIUM	5	23	6	7	3	7
CYPRUS	0	3	0	1	1	1
CZECH REPUBLIC	0	0				
DENMARK	0	2	0	1	0	1
ESTONIA	0	2	1	0	0	1
FINLAND	1	2	0	1	1	0
FRANCE	16	36	1	15	12	8
GERMANY	0	331	46	60	107	118
GREECE	0	1	0	0	0	1
HUNGARY	0	0	0	0	0	0
ICELAND	0	2	0	0	0	2
IRELAND	50	76	20	14	19	23
ITALY	2	2	1	0	0	1
LATVIA	0	0	0	0	0	0
LUXEMBOURG	128	318	45	78	92	103
NETHERLANDS	() ³	() ⁴	208	139	127	148
NORWAY ⁵	3	2	0	0	1	1
POLAND	1	0	0	0	0	0
PORTUGAL	0	0	0	0	0	0
SLOVAKIA	0	1	0	0	0	1
SLOVENIA	0	0	0	0	0	0
SPAIN	0	3	0	0	1	2
SWEDEN	0	9	0	3	1	5
UK	() ⁶	285	45	71	76	93
TOTAL	206	1150				

A.2. Total number of prospectuses passported RECEIVED

	1 July 04 - 30 June 05	1 July 05 - 30 June 06	1 July 05 - 30 Sept. 05	1 Oct. 05 - 31 Dec. 05	1 Jan. 06 - 31 Mar. 06	1 April 06 - 30 June 06
AUSTRIA	() ⁷	264	41	64	69	90
BELGIUM	57	206	25	51	72	58
CYPRUS	0	4	2	0	1	1
CZECH REPUBLIC	1	22	4	4	5	9
DENMARK	4	89	10	29	28	22

¹ For this period no data can be provided because the FMA was not the CA for approving prospectuses and does not have access to former statistical data.

² The data is from 10 August 2005, date in which the PD was implemented in Austria. The first quarter includes information from 10/08/05 to 30/09/05.

³ For this period no data can be provided because the Netherlands Authority for the Financial Markets was not the CA for approving prospectuses.

⁴ The figure provided by The Netherlands (622) has not been incorporated to the table as it includes the number of countries to which a prospectus has been passported to (ie. a prospectus that has been passported to 4 different Member States has been included in the figure provided by The Netherlands as 4) and is, therefore, not comparable with the information provided by the rest of MS.

⁵ The Norwegian Stock Exchange did not prior to the PD compile a separate list of prospectuses passported from or received by Norway, thus the data may omit some prospectuses for the period 1 July 04 to 1 January 06. The number is, however very low in respect of the mutual recognition processes following Directive 2001/34.

⁶ Data unavailable but probably minimal.

⁷ For this period no data can be provided because the FMA was not the CA for approving prospectuses and does not have access to former statistical data.

ESTONIA	0	3	0	0	1	2
FINLAND	5	40	4	15	6	15
FRANCE	() ⁸	107	23	36	22	26
GERMANY	() ⁹	382	94	101	79	108
GREECE	0	23	5	8	4	6
HUNGARY	0	21	3	5	10	3
ICELAND	0	1	0	0	0	1
IRELAND	5	160	45	41	32	42
ITALY	3	121	23	8	31	59
LATVIA	0	1	0	1	0	0
LUXEMBOURG	2	280	51	81	71	77
NETHERLANDS	() ¹⁰	353	52	93	103	105
NORWAY	() ¹¹	70	() ¹²	5	28	37
POLAND	2	19	5	6	3	5
PORTUGAL	2	52	13	18	14	7
SLOVAKIA	0	12	1	2	5	4
SLOVENIA	0	5	0	1	2	2
SPAIN	0	96	15	24	24	33
SWEDEN	0	127	11	35	46	35
UK	() ¹³	379	118	97	71	93
TOTAL	81	2837				

B) DELEGATION OF POWERS: TRANSFER OF THE APPROVAL OF PROSPECTUSES (Article 13.5 of PD):

45. The European Commission included in its White Paper on Financial Services 2005-2010 (SEC (2005) 1574) as one of the supervisory challenges for this period “the need to explore delegation of tasks and responsibilities, while ensuring that supervisors have the necessary information and mutual trust”, in the context of a reinforced cooperation between supervisors. In this respect, the report specifically mentioned the possibility under the prospectus legislation for certain functions to be transferred between supervisors.

46. The Financial Services Committee (FSC) report on Financial Supervision published in February 2006 (FSC 4159/06), following the principle outline in the Commission’s White Paper, provided certain recommendations aimed at increasing supervisory convergence in the implementation of the Financial Services Action Plan and expressly included the “use on a voluntary basis of the delegation between supervisors” as a tool to achieve that goal. Annex I of this report provides an analysis of a number of issues which could be raised as regard the use of delegation between supervisors. This annex mentions the option foreseen in the PD as an example of the cases included in the EU legislation of delegation of tasks and of responsibilities.

47. Following the FSC report, the ECOFIN conclusions adopted on May 2006 underlined that the implementation of the options on delegation of powers envisaged in EU financial legislation was a pragmatic response to the main challenges the EU faces in the area of financial supervision. Moreover, the Europe’s Finance Ministers invited the three level 3

⁸ Data not available but the number of passports received should not be significant.

⁹ Very few (less than 5).

¹⁰ Data not available.

¹¹ Data not available.

¹² Data not available.

¹³ Data unavailable but probably minimal

committees (CESR, CEBS and CEIOPS) to “explore the preconditions for the use of a delegation mechanism especially through guidelines in each financial services sector and testing, where appropriate, such arrangements before the end of 2007”.

48. Following the ECOFIN conclusions, CESR informed in a press release published in May (CESR/06-198) that it would conduct in 2007 a pilot study on the delegation of powers under the PD.

49. As the analysis of the use of this option is a good measure of the cooperation between CAs, CESR has decided to include in this report such pilot study.

50. To this effect, CESR has requested from its members information on the option envisaged in Article 13.5 PD whereby the authority competent for the approval of a prospectus might decide to transfer the approval of that prospectus another CA.

51. Article 13.5 PD states that *“The competent authority of the Home Member State may transfer the approval of a prospectus to the competent authority of another Member State, subject to the agreement of that authority. Furthermore, this transfer shall be notified to the issuer, the offeror or the person asking for admission to trading on a regulated market within three working days from the date of the decision taken by the competent authority of the Home Member State. The time limit referred to in paragraph 2 shall apply from that date”*.

52. In addition, Article 22.2, when dealing with CAs’ obligation to render assistance to CAs of other Member States, includes a reference to the need to exchange information and cooperate where the approval of a prospectus has been transferred to the CA of another Member State pursuant to Article 13.5.

53. The information provided by CESR members in relation to the transfer of prospectus that have taken place since 1st July 2005 until the date of this report shows that the option envisaged in Article 13.5 has only been used in few cases as reflected in the table included below (each row reflects one transfer)¹⁴.

Country of authority that transferred approval	Country of authority that agreed to receive transfer	Type of security
Cyprus	Norway	Shares
Cyprus	Norway	Shares
Spain	France	Shares
Netherlands	Luxembourg	Debt securities denomination per unit ≤ EUR 1000
Spain	United Kingdom	Debt securities denomination per unit ≤ EUR 1000
Spain	United Kingdom	Debt securities denomination per unit ≤ EUR 1000
Spain	United Kingdom	Debt securities denomination per unit ≤ EUR 1000
United Kingdom	Spain	Shares
United Kingdom	France	Debt securities denomination per unit ≤ EUR 1000

¹⁴ BaFin, the German competent authority, has informed CESR that Article 13.5 PD has not been transformed into national German law.

Sweden	Norway	Shares
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54. The experience in these cases has proved satisfactory for issuers and CAs involved. As common aspects to all the cases, the following can be mentioned:

- The process was initiated at request of the issuer
- There was an initial informal contact between CAs involved to ease the process and speed the procedure
- A communication was made from Home CA to the other CA of the decision to transfer the approval of the prospectus, including an explanation of the factors taken into consideration when deciding on the transfer of the approval
- There was a communication of the CA that received the request of transfer to the Home CA informing of its decision to agree to the transfer
- The CA that decided on the transfer of the prospectus notified the issuer its decision.
- The transfer of the prospectus has not lead to an increase in the time for the approval of the prospectus.
- The feedback from the issuers involved has been positive.

IV. SUMMARY OF THE COMMENTS RECEIVED TO THE CALL FOR EVIDENCE AND IN THE OPEN HEARING

A. Methodology

55. In order to ease the analysis of the responses provided and facilitate the reading of this section, CESR has decided to structure the comments made by market participants by including them under common headings that refer to specific articles in the PD or to the PR. The subsection on specific comments, has been organised following the order of the articles of the PD first (including the issues relating to each article in the order of the PD) and including at the end the comments referring to the PR. However, an exception has been made in relation to the comments on the functioning of the passport. As these comments are often related to other comments provided under the different headings, the analysis of the responses in relation to the passport has been left for the end as it is a summary of the main comments made.

56. In addition, CESR has tried to follow a similar structure when summarising the responses and has included in each heading the following 3 subsections:

- Description of the issue: under this heading, CESR has only provided a summary of the comments made by respondents. This does not imply that CESR endorses the respondents' observations, including alleged practices of the individual competent authorities mentioned in their responses. In particular, in some cases, market participants mention when describing specific practices or providing examples some countries or competent authorities. In this respect, CESR would like to clarify that the fact that these names are reproduced in the report does not imply that CESR members endorse such comments or even consider them to be accurate reflection of real practices. CESR will respond to such comments through its regular updates of its Q&A on prospectuses but would also like to clarify at this stage that, at least in some cases, the examples provided by respondents do not reflect the competent authorities' actual practices¹⁵ or are practices that are actually in compliance with the provisions of the PD.
- Relevant legislation and/or guidance: under this section CESR has included a brief reference to the relevant legislative provision and in those cases where some kind of guidance or public statement has been made in relation to the issue, a mention to the relevant document has been included. To ease the accessibility of these documents, they have been included as an annex in this report.
- Next steps: under this title CESR does not provide an answer to the questions raised by market participants. CESR is only suggesting at this stage which is the most likely procedure to address the issues (coordination work among its members or legislative action). CESR also indicates when it does not consider necessary to do further work.

B. General remarks

¹⁵ For example, the CA of Germany has informed CESR that it has not adopted the practice described in paragraph 169 and the CAs of Luxembourg and France have informed CESR that they have not adopted the practice described in paragraph 211.

Prospectuses are considered burdensome

57. Description of the issue: Some respondents indicated that prospectuses are very burdensome documents to produce and very difficult to read. Firstly due to their size and the details required and secondly due to the fact that for every offer of securities made to the public a new prospectus needs to be drawn up.
58. According to some respondents prospectuses have become extremely long documents – with sometimes up to 1000 pages. One of the reasons stated is that prospectuses are nowadays used as a means of keeping potential future litigation at bay. Another reason is that each chapter of the prospectus is conceived as an independent module. On a positive note, respondents point out that the requirement to provide a summary of the prospectus is a welcome initiative.
59. They have also complained about the obligation to publish a prospectus for every offer of securities made to the public especially taking into account the other reporting obligations issuers have to comply with. This involves conducting a new due diligence process for each prospectus and preparing new ad hoc information for the subsequent offers, such as a working capital statement. One respondent suggests limiting the scope of the obligation to produce a prospectus to certain circumstances for example in cases where there is a change in the market where the securities are offered or admitted to trading.
60. Relevant legislation and/or guidance: Regarding the fact that prospectuses are considered burdensome by some of the respondents, the PD is very clear regarding the fact that a prospectus is needed for every offer of securities (Article 3.1 of the PD). However, it can be mentioned that Article 12 PD has eased the process of producing prospectuses allowing issuers to have a registration document approved at an earlier stage that will be completed with different securities notes and summaries at a later stage.
61. Next steps: CESR will assess whether legislative action would be necessary.

Fees for approval of the prospectus

62. Description of the issue: Regarding fees, according to a respondent each CA has determined a fee schedule for the filing of a prospectus. In addition to the fees required where a prospectus is filed, some MS require fees when a prospectus is passported. Regarding the nature of the Employee Share Plans (ESP) (e.g. ESP offerings are often ongoing), there has been some confusion as to how to calculate the fees and when the fees should be due.
63. In addition, some CA (for example Belgium) have required a special fee guarantee letter before a prospectus is being approved. This practice can delay the prospectus approval process because the issuer has to work with a related-company to obtain the necessary guarantee.
64. Relevant legislation and/or guidance: Fees for approval of prospectuses fall outside the scope of the PD.
65. Next steps: No further action is necessary at this stage.

Need for more people in CA for approval of prospectuses

66. Description of the issue: Some respondents expressed the view that more staff at the CA should be dedicated to scrutinize prospectuses. Although they feel that the requirements ex-ante on financial intermediaries appear to be sufficient to provide clear information and adequate protection of investors, the scrutiny of prospectuses before their publication should be reinforced at the supervisory level.
67. Since the preparation of prospectuses imposes very heavy duties on financial services providers, respondents observed that CA should allocate more time and resources on an efficient scrutiny of prospectuses.
68. In addition, some respondents mentioned the different level of scrutiny between CA when approving prospectuses. They consider that there are some differences regarding the efficiency, method and timing of the checking of the information included in the prospectus.
69. Relevant legislation and/or guidance: Article 2.1 q) of the PD harmonizes the task CAs have to carry out in order to approve a prospectus and therefore the level of its scrutiny.
70. Next steps: No further action is necessary at this stage.

Coordination between CA

71. Description of the issue: Some respondents indicated that the coordination between CA is not sufficient and also the fact that CA have different interpretations regarding the provisions of the PD and PR, is frustrating the European single market. Also it was indicated that if issuers make the efforts necessary to publish a prospectus of quality, the CA must, themselves, be held to the same standards and offer the issuers all the professionalism to which they are entitled in return.
72. Relevant legislation and/or guidance: The Commission Decision 2001/527/EC establishing the Committee of European Securities Regulators envisages that CESR should contribute to the consistent and timely implementation of Community legislation in the MS by securing more effective cooperation between its members. In addition, Article 22 PD expressly requires CA to cooperate with each other when necessary.
73. Next steps: As discussed in the introductory section of this report CESR has created a Prospectus Contact Group with experts from CESR members to discuss specific implementation and application issues. The outcome of the discussions of the Prospectus Contact Group are published at the CESR website (Q&A) on a regular basis.

Filing of prospectuses by e-mail and electronic database

74. Description of the issue: Filing of a prospectus by e-mail is not accepted in all MS. One of the respondents suggested that filing by e-mail should be possible.
75. In addition one of the respondents indicated the usefulness of an electronic database containing all the prospectuses approved in the European Economic Area (EEA) together with information on where they were approved and where they have been passported into. This would enhance the access of retail investors to prospectuses and the awareness of all parties involved in cross-border distribution of which prospectuses may legally be used in the EEA. This concept should be in accordance with pan-EEA network of

“officially appointed mechanisms” (OAM) for storage of information according to the Transparency Directive and Market Abuse Directive.

76. Relevant legislation and/or guidance: Article 22 of the Transparency Directive envisages the creation of a European network of the officially appointed mechanisms that store regulated information. This network would cover as well information to be disclosed under the PD.
77. Next steps: CESR is currently working with the European Commission and the Member States in order to facilitate the setting up of the electronic network of OAMs at European level. This electronic network could include prospectuses according to Article 22.1 b) of the Transparency Directive.

Range of investment opportunities, level of disclosure and protection.

78. Range of investment opportunities: One market participant observed that the introduction of the passport which has enabled public offerings in other Member States has been positive for investors in that they now have a range of choices for investment. whilst two answers stated that due to the problems described in other areas as inherent in the PD, investment opportunities for retail investors have been or may have been reduced.
79. Level of disclosure: It was stated that the PD has raised standards of disclosure thereby improving investor protection and market efficiency but there would still be an element of 'caveat emptor' as it is impossible to eliminate erroneous judgment which can only be reduced by investor skill and judgement.
80. Other respondents mentioned that there are divergent interpretations of the provisions of the PD and therefore the requisite level of disclosure and the exact meaning of specific information requirements included in the Annexes. As an example, it was stated that some issuers find it useful for instance to include pro-forma financial information where such information is not strictly required under the PR. Some regulators allow such additional information but others do not. Issuers should be free to include additional information which they consider might be relevant for investors subject to the information making the prospectus misleading. Guidance from CESR would be welcome.
81. The introduction of the summary has made it easier for retail investors in particular to understand the information in prospectuses.
82. One respondent observed that the level of disclosure and protection in prospectuses has not been affected substantially by the PD since the general duty of disclosure in Article 5.1 of the PD existed in the previous legislation. The introduction of the PR together with the switch to IFRS has however improved the comparability of prospectuses in the EU.
83. In particular it was noted that the conduct of business rules are intended to ensure that an investor is sold a suitable investment product in knowledge of all relevant facts. This is particularly important in the case of retail investors who in practice are unlikely to read or fully understand complex prospectuses. It is vital to appreciate the parallel existence of the conduct of business rules and their link with the prospectus regime. Excessive emphasis on the prospectus regime – whether by market participants themselves or CAs – leads to extensive generic prospectus disclosure which is quite often not useful for a particular investor or his/her specific circumstances. The conduct of business rules of most Member States would have changed substantially following the implementation of MiFID and the CAs of Member States and the Commission should work together to ensure an efficient alignment of the two directives to better enhance investor protection.

84. Furthermore, it was noted that the access of retail investors to prospectuses and the awareness of all parties involved in cross-border distribution of prospectuses would be greatly enhanced if there was a centralised, publicly accessible electronic database containing all prospectuses approved in the EEA, like the 'officially appointed mechanisms'.
85. Level of Protection: In respect of the level of protection, with the exception of the introduction of withdrawal rights, it was stated that the level of protection has not really changed since the PD.
86. Relevant legislation and/or guidance: Recital 10 of the PD states that the aim of the Directive and its implementing measures is to ensure investors protection and market efficiency.
87. Next steps: CESR will address the general comments made under this heading when reacting to the more specific comments described below.

C. Specific comments

C. 1. Comments referring to the Prospectus Directive

Definitions in the Prospectus Directive (Article 2.1)

Definition of public offer

88. Description of the issue: Market participants expressed concerns that the definition of 'public offer' is not harmonised. In particular, they stated that the definition of 'public offer' is critical to the PD since the rule that a public offer may not be made without the publication of a prospectus is an elementary pillar of the prospectus regime both in terms of investor protection, capital market efficiency and a level-playing field in the EU. The use, definition and interpretation of the definition of public offer and related terms like "qualified investors" should therefore be harmonised as much as possible. Whilst respondents recognise that it would be a challenging exercise to come to a full convergence on this issue, they have asked CESR to provide some guidance.
89. It was stated that the notion of a 'public offer' should be consistent across the Member States in order to ensure a harmonized implementation of the PD, otherwise there is a lack of clarity and this potentially creates disparities of treatment for issuers among the various countries.
90. Relevant legislation and/or guidance: Article 2.1 d) of the PD.

Definition of Transferable Securities

91. Description of the issue: Other examples of the lack of harmonisation provided in this area include the definition of 'transferable securities' where some CAs interpret the PD so that some securities are characterised as 'transferable securities' and others do not. This was particularly stated to be problematic in view of the fact that this determines whether a prospectus is required especially in the case of employee share schemes.

92. Relevant legislation and/or guidance: Article 2.1a) of the PD. Some of the issues raised by respondents have been addressed by the CESR Q&A on prospectuses (see question 5)

Qualified investors

93. Description of the issue: It was also observed that some Member States still require offers addressed solely to qualified investors to be subject to the publication of a prospectus, contrary to the provisions of the PD. It was stated that one MS requires the prospectus to be made available in such circumstances six days before the admission to trading. Such offers are typically marketed on the basis of a preliminary prospectus which includes a price range.
94. Another respondent stated that some competent authorities require a prospectus for the issue of non-equity securities with a denomination of €50,000 even where it has been expressed as being addressed to qualified investors. . CESR has been asked to clarify that a prospectus in these circumstances could be published upon the admission to trading.
95. The fact that the definition of qualified investors included in the PD is not coincident with the definition of ‘professional investors’ of the MIFID, was also mentioned by some respondents as causing some practical difficulties.
96. Relevant legislation and/or guidance: Article 2.1 e) of the PD. The comments made under this heading are connected with the “retail cascade” issue described below (i.e. some CAs might require a prospectus if the qualified investors pass on the securities to retail investors, according to Article 3.2 of the PD).
97. Next steps: CESR will assess whether further Level 3 work is appropriate.

Retail Cascade (Article 2.1 d) and Annex V PR)

98. Description of the issue: Respondents highlighted a particular element of the definition of 'public offer' which was proving to be problematic. They stated that there is a lack of clarity when a 'public offer' which requires a prospectus has occurred in the context of a retail offering of debt securities. Secondly where a public offer has occurred and a prospectus has been produced, the disclosure requirements in the Annex V of the PR relating to the retail debt is said to be unsuitable and inappropriate for the distribution mechanism of such products.
99. They described the distribution mechanism in some markets for retail debt offerings (retail cascade) which typically involves an initial sale by the issuer to a bank or group of banks (normally the lead managers). These banks distribute the securities to other banks (sub-distributors) who may then further distribute them to more banks or to the final retail purchasers. Market participants therefore question the point at which a prospectus should be produced as they argue that it would go against the objective of the PD to expect or require a prospectus to be produced at each level of the cascade. Furthermore, they stated that it would go against the objectives of the exemptions provisions of the PD to insist that the issuer should produce a prospectus for its initial sale to the banks. They expressed that there was a lack of clarity in respect of the interaction between the definition of a public offer and the 're-sale' provisions in Article 3.2 of the PD in the context of a retail cascade.

100. Furthermore, market participants question where a prospectus has been produced by the issuer, the information that is required to be captured by that prospectus in the context of a retail cascade. They state that it is unrealistic due to the timing and nature of the cascade to expect the prospectus to contain all the information relating to the terms and conditions of every 'sub-offer' in each level of the cascade. As such the disclosure requirements in Annex V, in particular paragraph 5 are unsuitable for retail debt offerings but more suitable for equity offerings.
101. Examples provided include:
- Items 5.1.3 and 5.1.6 – the time period during which the offer will be open (5.1.3) method and time limits for paying up the securities (5.1.6);
 - Item 5.2.1 –the various categories of potential investors to which the securities are offered;
 - Item 5.4.1 – placers in the various countries where the offer takes place - to the extent that the disclosure requirements in this paragraph require the identification of the intermediate purchases in the chain of distribution, respondents consider that such information is highly confidential business information and revealing the identity of such banks could result in a reduced take-up of the bonds by the banks and
 - Item 5.3.1 – Offer price – the price will vary in accordance with market conditions as the securities are offered through the cascade and it is therefore unrealistic to expect the initial prospectus to contain the each 'sub-offer' price at each level of the cascade. Market participants question the usefulness of publishing prices of secondary market sale of listed bonds when investors can see the market price when the bonds are listed.
102. Furthermore, they state that it is unclear whether the issuer remains responsible for the prospectus throughout the cascade process and expressed doubts as to whether this could have been the intention of the PD given that there is no on-going obligation to update the prospectus.
103. Respondents stated that their expectation was that the PD would bring about a single market for debt securities within the EU and so would provide both protection for investors and make the process of debt issuance easier and cheaper for companies and market participants but this has not materialised. Other respondents stated that the effect of this is that the PD excludes private investors. This is said to be compounded by the fact that there are varying practices in different member states, the consequence of which is anti-competitive situations as some issuers are more conservative and others are not.
104. It was suggested by one respondent that “offer” in Annex V item 5 should be interpreted as meaning only the offer by the issuer to private banks in case of cascade distributions. Another suggestion was that the information provided in to satisfy Annex V item 5 should be less extensive or more generic.
105. Relevant legislation and/or guidance: Article 3.2 of the PD.
106. Next steps: CESR will assess whether further Level 3 work is appropriate and will also assess whether legislative action would be necessary.

Exemptions (Article 4 PD)

107. Description of the issue: Market participants further stated that there is no harmonisation of the exemptions provisions and they considered this to be important because the exemptions determine whether the obligation to produce a prospectus exists.
108. For instance, in Article 4 where the obligation to produce a prospectus does not exist provided an equivalent document is required to be produced in relation to a merger or a takeover rather than a full prospectus. They stated that there should be the same level of protection for investors and Member States should not be allowed to assess equivalence on a 'case-by-case' basis.
109. Other examples provided of the lack of harmonisation include the absence of clarity as to whether the offering of shares resulting from the exercise of stock options should be taken into consideration in the calculation of the 'less than 10% of shares of the same class already admitted to trading' exemption of which there are different interpretations by Member States. It was stated that this could have important implications on the costs of raising additional capital. It was however noted that some authorities have stated that offers to employees should be discounted when calculating the 10% exemption and that CESR should endorse this approach.
110. Furthermore, some respondents commented that some authorities apply the 10% exemption only to shares but a wider view should be taken, for instance it should also apply to common units in limited partnerships. The discrimination between legal structures cannot be justified as the PD does not define share but refers to transferable securities which include other securities equivalent to shares.
111. Relevant legislation and/or guidance: Article 4.1b) and c), Article 4.2 a), c) and d) of the PD
112. Next steps: CESR will consider whether Level 2 implementing measures should be recommended to the Commission in relation to documents equivalent to a prospectus and will also assess whether further Level 3 work is appropriate.

Securities offered to employees (Article 4)

113. Description of the issue: Most of the respondents indicated that the PD causes difficulties regarding the offering of securities to employees. They stated that the reasons for employees offer programs (i.e. the promotion of the interests of employees with those of their employer and the motivation for employees to perform better and to provide benefits to employees) should lead legislators to remove any existing obstacles to these types of offers.

Types of Employee Offer Programs (EOP)

114. The respondents identified the following Employee Offer Programs (EOP): Share plans, option plans, offers of restricted share units or performance shares, Employee Stock Purchase Plans, Contributory Share Awards and Stock Appreciation Rights. This classification is useful to assess whether or not the PD is applicable to the various types of these programs.

Impact of the PD on Employee Offer Programs

Non transferability of EOP

115. Although CESR provided an answer in CESR's Q&A on prospectuses on how to deal with non-transferable options offered to employees, one respondent indicated that the Netherlands Authority for the Financial Markets, due to national legislation, could not follow the interpretation of CESR given in its Q&A. Furthermore some respondents feel it is unclear why some CA (Poland, Italy and Germany) have a dissenting or caveat opinion regarding non-transferable options. Also it was indicated that it is also unclear why CESR has not recognised that EOP may offer other types of non-transferable share based awards apart from non-transferable share options.

Non-EU issuers of EOP

116. One of the main problems raised by the respondents is the offering of EOP by third country issuers. Usually those issuers do not have securities listed on a regulated market of a MS. Therefore, they cannot use the exemption (Article 4.1e) PD) provided by the PD. According to the respondents, the exclusion of all non-EU exchanges has created unnecessary market distorting difficulties for multinational companies operating in the EU.

EU issuers of EOP

117. Offerors of EOP who fall within the scope of the PD have to draw up a prospectus in case no exemption is applicable. In case that a prospectus had to be drawn up, it was noticed by the respondents that the different CA of the MS have different practices regarding the approval process of prospectuses regarding Employee Share Plans. Also the respondents are of the opinion that drawing up a prospectus is generating considerable additional costs. The cost of compliance is driven by a range of factors including: legal, audit and accounting services, printing, design, distribution, advertising and linguistic translation. Some respondents indicated that this is also the case for issuers who have their securities listed on a non-regulated market in Europe such as AIM in London or Alternext in Paris. According to this respondent it is unclear whether employees must be offered a class of securities which is listed on a regulated market in order for the exemption to apply or is a listing of another class of securities of another company within the same group sufficient.

Possible solutions

118. Some of the respondents also provided some potential solutions regarding the EOP. A few respondents indicated that it would be very helpful if the scope of the exemption provided in Article 4.1e) PD would be broadened to securities which are listed on one of the major international stock exchanges outside the EU. According to the respondents the standards of these exchanges may differ in some respects to those required by the PD, but in general, these exchanges provide a sufficiently high standard of disclosure to protect participants in EOP.
119. Relevant legislation and/or guidance: The PD exempts issuers from the obligation to publish a prospectus in case of offers of securities to employees (Article 4.1 e)) and the admission to trading on a regulated market of such securities (Article 4.2 f)), provided that certain conditions are met.
120. Some of the issues raised by respondents have been addressed by the CESR Q&A on prospectuses.

121. Next steps: CESR will assess whether further Level 3 work is appropriate and will also assess whether legislative action would be necessary. CESR also notes the work of the Commission Services in this area. In December 2006 the Commission services presented a paper to the European Securities Committee explaining the difficulties the PD is causing in relation to employee share schemes and setting out possible options for addressing this issue. This was followed by a survey of the views of ESC members, and the Commission Services are currently reviewing the responses to that survey.

Summary of the prospectus (Article 5.2 PD)

Translations of the summary

122. Description of the issue: Some market participants complained about the fact that there is no information in respect to the requirements relating to the translation of the summary in each MS.
123. A German association reported that most MS that do not have English as official language do not accept English summaries. However, the preparation of translations is considered as time consuming and producing additional costs. A French association complained that a translation of the summary is required regardless the specifics of the offering without being actually necessary for the purposes of investor's protection: For example, the offering of complex financial products are often not intended to be addressed to retail investors, but only to institutional investors. In case of an equity capital increase with pre-emptive rights shareholders are adequately informed by their banks (by acting as a custodian) of the conditions of the offer.
124. An international lawyer's association reported that issuers were experiencing divergent views of Host CA concerning the publication of the translation of a summary. In particular, there is no common approach among CA as to whether the translation of the summary is part of the prospectus or a separate document. Provisions of PD and PR are considered as silent to this respect.
125. Relevant legislation and/or guidance: The requirement to prepare a translation of the summary upon the request of a MS is in compliance with the language regime as stipulated by Article 19 PD. CESR has develop for internal use a list of requirements in relation to the translation of the summary in each MS.
126. Next steps: CESR will assess whether further Level 3 work is appropriate. In addition, CESR will make available on its website the internal compilation of information concerning translation requirements in relation to the summary imposed by the MS.

Guidance on content

127. Description of the issue: Some respondents reported that CA often refer too closely to the word limit (of 2500 words according to recital 21 of the PD) when reviewing the summary of a prospectus. This is regarded as an approach too inflexible to comply with the investor's needs for receiving adequate information.
128. Legislation and/or guidance: Concerning the content of the summary Article 5.2 PD explicitly provides that the investor receives all material information contained in the prospectus. Article 24 PR stipulates the issuer's sole responsibility for the content of the

summary. In this respect it should be made clear that the word limit according to recital 21 of the PD does not constitute a binding provision.

129. Next steps: CESR will assess whether further Level 3 work is appropriate.

Use of registration document (Articles 5.3, 9.4 and 12 PD; Recital 23 PD)

130. Some respondents commented on the use of registration document. Their comments mainly related to the cross-border use of an approved registration document. The concept possibility of drafting a prospectus consisting of separate documents (registration document, securities note and summary) was introduced in the PD for the first time in EU legislation.

Use of registration document approved in another Member State

131. Description of the issue: Some respondents expressed problems encountered with the use of registration documents in connection with cross-border cases. According to them a registration document approved in one MS cannot be used for prospectuses in another MS.
132. Relevant legislation and/or guidance: CESR has already discussed the matter internally and concluded that under the PD there is no scope for granting a passport for a registration document approved in another MS. Nevertheless, the Home CAs, if so wish, might use the work previously carried out by another CA that has approved the registration document. To that effect, the issuer might file with the Home CA a registration document already approved by another CA (Article 11.1 of the PD). This filing, if accepted by the Home CA, would enable an issuer to incorporate by reference a previously approved registration into a new prospectus. However, if the above procedure is followed, the Home CA still has the duty to scrutinize and approve the whole prospectus (including information incorporated by reference) and therefore it will have to request additional information if the registration document incorporated by reference does not meet the information requirements of the applicable annex of the PR. It will be up to the Home CA to assess to what extent the fact that the information incorporated by reference has previously been approved by another CA might justify a less intense scrutiny of said information.
133. Next steps: The above conclusion will be included in the next update of CESR's Q&A on prospectuses. In addition, CESR will assess whether legislative action would be necessary.

Supplementing the registration document

134. Description of the issue: Some respondents also stated that interpretations on whether it is possible to publish a supplement to a registration document vary among the CAs. According to them, this would have huge practical implications for issuers with a large number of prospectuses referring to a registration document.
135. Relevant legislation and/or guidance: Article 16 refers to supplements to a prospectus. In addition, Articles 9.4 and 12 of the PD anticipate that the registration document is updated through the securities note. The matter has also been discussed in the third PD

transposition workshop. Also the conclusions of the workshop seem to indicate that the registration document cannot be supplemented.

136. Next steps: CESR will assess whether further Level 3 work is appropriate and will also assess whether legislative action would be necessary.

Base Prospectus and Final Terms (Article 5.4 PD; Article 22 PR; Recital 24 PD; Recitals 21, 25, 26 and 27 PR)

137. Several respondents commented on the regime of base prospectus and final terms. Their comments related mainly to the content and publication of final terms.

Contents of the final terms

138. Description of the issue: Several respondents commented on the division of information between base prospectus and final terms. The issue was also discussed at the open hearing. One trade association commented that the relationship between provisions on the use of final terms and the rule to produce a supplement is not clear. Consequently, the line between the final terms and a prospectus is not clear. According to the respondent, market practices are not always consistent and neither is the approach of the CAs. Some take a cautious view and produce a new full prospectus for each drawdown, which alters the terms of the base prospectus. This increases costs and adds complications in operating an offering programme which the PD was intended to facilitate. Others include a wide range of information in the final terms provided that the base prospectus contains a template of the final terms which clearly indicate which new information may be included (usually by filling in blanks or choosing among several options). In principle, the latter seems to be a prevailing market practice. Inconsistent practices appear in particular in case of more complex products where the range of drawdown-specific information unforeseen in the base prospectus is much wider.

139. According to the respondent the inconsistent approach has a profound impact on cross-border public offers and admissions to trading. When passporting out of a “liberal” MS into a “conservative” one, the final terms may comply with the practices and CA expectations in the “liberal” Home MS but the “conservative” Host MS may consider them to be not final terms but a prospectus – which should have been approved by a CA but was not. Thus, cross-border admissions to trading and public offers are being disadvantaged because of additional legal risk.

140. The respondent was of the opinion that it would not be feasible or desirable for CESR to attempt to prepare guidance listing what can and cannot be included in final terms. It is improbable that such guidance could be accepted by CAs and market participants across the EEA, that it would cover all relevant products in sufficient detail and that it would not shortly become obsolete. Instead, the respondent considers it being the responsibility of market participants to achieve consensus on best practices. The respondent recommended the CAs to be aware of the fact that there are currently genuine differences in the approach across the EEA and encouraged the CAs to exchange information about their experience with final terms to better appreciate this situation.

141. Some respondents asked CESR to clarify that the final terms may also include other information items required by the applicable securities note schedule than those under heading "Terms and conditions of the offer".

142. One respondent pointed out that the Italian CA requires quantitative examples or the algorithms related to yields accompanied by appropriate examples to be disclosed wherever possible in the base prospectus and in any event the risks associated with the financial product to be described in the base prospectus. The respondent requested CESR to evaluate possibilities for more harmonised approach.
143. Relevant legislation and/or guidance: Pursuant to Article 22.2 of the PR, those information items which are not known when the base prospectus is approved and which can only be determined at the time of the individual issue may be omitted in the base prospectus. Article 22.4 of the PR provides that the final terms may only contain information items from the various securities note schedules according to which the base prospectus is drawn up. Pursuant to Article 22.5 of the PR, the base prospectus should include an indication on the information that will be included in the final terms (i.e. pro forma final terms).
144. Next steps: CESR will assess whether further Level 3 work is appropriate.

Publication of final terms

145. Description of the issue: As for the publication of the final terms the respondents pointed out several issues. Some respondents stated that some competent authorities review the final terms before they can be published. This was seen as problematic notably if it leads to requesting changes to the contents of the final terms or to rejecting them. It was also mentioned that the review may cause unnecessary delays, as the review may take as long as five days.
146. Some respondents also commented on additional publication requirements for final terms for example in Germany and France. In Germany, a publication of a notice relating to publication of final terms is required irrespective whether Germany is the Home MS or the Host MS. This was seen to be inconsistent with the wording of the PD and the PR and to lead to substantial additional costs for the issuers and to limit the flexibility in timing of the offerings because of the newspaper deadlines. In France, the CA requires the final terms to be published on its official website, which include the requirement to formally enter into a legal agreement with the CA.
147. Respondents also pointed out that some Host CAs require filing of final terms or translation of final terms
148. Relevant legislation and/or guidance: Article 5.4 of the PD does not require prior approval of the final terms. Instead, they shall be filed with the CA. According to the summary record of the fourth PD transposition workshop, Article 14.3 of the PD does not prevent Home MS from requiring the publication of a notice stating how the final terms, where published separately and in a different manner from the base prospectus, have been made available. Also CESR has discussed the publication of final terms. According to the answer to question 1 in CESR's Q&A on prospectuses, the issuer is obliged to file the final terms with the CA of the Home MS. The PD does not specifically require the final terms to be filed with all the Host CAs. However, the Host CAs would expect to receive the final terms from the issuer and the Home CA will inform the issuer during the approval process or generally by any other means of that fact. Such CESR guidance does not impose an obligation for issuers to submit their final terms to the Host CAs. Should this be done by issuers on a voluntary basis, this submission would not give the basis for a review of the final terms by the Host CAs.
149. Next steps: CESR will assess whether further Level 3 work is appropriate.

Other comments

150. Description of the issue: One trade association commented on the applicability of the definition of the Home Member State (Article 2.1 m)(ii) of the PD) in case of base prospectuses. The provision has given rise to difficulties where a CA in another MS which is not the country of the issuer's registered office has approved a base prospectus under which different issues are made. According to the respondent, there is no harmonised interpretation on whether non-equity securities with denomination of less than 1.000 € are allowed to be issued under the base prospectus approved. If they were not, the issuer would be required to submit the same prospectus to another CA (the one of the country of the registered office). The respondent is of the view that this interpretation would undermine the functioning of the EU passport in general as well as the particular intention of the base prospectus concept to facilitate issues for frequent issuers.
151. One respondent also pointed out that there is uncertainty whether there is a need for a supplement if the final terms need to be modified after the publication of the final terms.
152. Relevant legislation and/or guidance: The Home Member State is defined in Article 2.1 m) of the PD. CESR has already discussed the matter of modification of the final terms and the outcome of the discussion will be published in the next update of the Q&A.
153. Next steps: CESR will assess whether further Level 3 work is appropriate.

Liability: responsibility attaching to the prospectus (Article 6 PD)

154. Description of the issue: Market participants further noted that the liability regime has not been harmonised by the PD and remains the responsibility of Member States. This therefore gives rise to liability arbitrage.
155. One respondent urged CESR to highlight the fact that issuers have the primary responsibility for all the information provided in the prospectus so that CAs do not impose additional obligations on intermediaries or arrangers. Arrangers have contractual obligations towards issuers and they exercise their professional duties as service providers in the course of the due diligence in respect of each transactions and imposing additional obligations would mean that the intermediaries are providing a guarantee in respect of the information in the prospectus.
156. Relevant legislation and/or guidance: Article 6 of the PD.
157. Next steps: CESR will assess whether legislative action would be necessary although it doesn't seem feasible to harmonize the prospectus liability regime through an amendment of the Prospectus Directive.

Omission of information (Article 8.2 PD)

158. Description of the issue: A respondent asked CESR to study how often the possibility of omission of information under Article 8.2 PD is used and whether the application is consistent across Europe to determine if there is need for further CESR guidance. Divergences in this matter would be unhelpful and confusing. According to this respondent it would undermine the notification of a prospectus if certain information that is explicitly required in the PR is omitted pursuant to Article 8.2 PD. Furthermore the

respondent is of the opinion that the omission of information should not apply to items that are explicitly required in the PD and the PR.

159. Relevant legislation and/or guidance: Article 8.2 of the PD states that the CA of the Home MS may authorize the omission from the prospectus of certain information provided for in the PD or in the PR if it considers that any of the conditions set out in said Article is met.
160. Next steps: CESR will assess whether further Level 3 work is appropriate.

Validity of the prospectus (Article 9 PD)

161. Description of the issue: Few respondents were of the opinion that offers which have started during the validity period of the prospectus should be able to continue after the 12 months validity period without the need to publish a new prospectus. One respondent was in the opinion that the requirement to keep the prospectus up to date during the validity of the prospectus in case of any later issues leads to a lengthy due diligence process. One respondent pointed out that the validity of the prospectus is also linked to the age of the financial statements as provided e.g. in Annex I, Item 20.5.1 of the PR.
162. Relevant legislation and/or guidance: The validity of the prospectus has been discussed in the third PD transposition workshop. CESR has also discussed the validity of the prospectus (see questions 25 and 28 in CESR's Q&A on prospectuses).
163. Next steps: No further action is necessary at this stage.

Annual document (Article 10 PD)

164. Description of the issue: Some respondents on various grounds criticized the information requirements imposed on issuers by Article 10 PD (annual document) as burdensome for issuers and of only limited value, if at all, for the investor. After the implementation of the Transparency Directive issuers whose securities are already admitted to trading on a regulated market are confronted with an overlapping flow of information, as they have to file in great parts the same historic information with different authorities/information facilities. A German issuers' association doubted the real benefit of the annual document for the investor: Apart from financial information, the investor usually is more interested in current information about the issuer than historic information from a certain period of time in the past. The respondents proposed to delete Article 10 PD, as, in their view, Article 10 PD contains superfluous information and is poorly adjusted to the provisions of the Transparency Directive.
165. An international law firm reported of additional annual reporting requirements on the basis of national laws maintained by some MS (Italy, Hungary, Poland) that overlap with the information provided by the annual document.
166. A German banking association expressed concerns about the special impact the annual document has on issuers of non-equity securities. In case such issuers have elected several MS as Home MS they have to file a separate annual document with the CA each of these MS. To facilitate the filing for the issuer it was proposed that the issuer should at least be allowed to prepare and file one annual document with the CA of one Home MS only and to inform the other Home MS of such filing .

- 167. Relevant legislation and/or guidance: Article 10 PD
- 168. Next steps: CESR will assess whether legislative action would be necessary.

Incorporation by reference (Article 11 PD)

- 169. Description of the issue: Two respondents are of the opinion that it should be spelled out explicitly that financial statements may be incorporated by reference in order to avoid differing interpretations among CA. An example is given that the CA of Germany is currently taking a very restricted approach and does not allow for incorporation of financial statements by reference unless they are contained themselves in a prospectus approved by the CA of Germany.
- 170. One respondent would welcome if CESR could recommend that also documents may be incorporated by reference into the prospectus without filing the report with the CA.
- 171. Another respondent remarked that some Host CA require filing of the documents incorporated into the prospectus by reference.
- 172. Relevant legislation and/or guidance: Article 28.1 PR expresses explicitly that financial statements may be incorporated by reference.
- 173. According to Article 11 PD, information incorporated by reference into the prospectus should either be approved by the CA of the Home MS or filed with it in accordance with the PD.
- 174. In relation to the fact that some Host CA require filing of the documents incorporated into the prospectus by reference, CESR has discussed the matter internally and concluded that:
- 175. *“It is the duty of the Home CA to ensure that issuers do not endanger investors protection in terms of comprehensibility and accessibility of the documents incorporated by reference (Article 28.5 PR). If this provision is respected, investors and other interested parties, such as Host CAs, will have an easy access to the documents incorporated by reference and therefore, there would be no need for Home CAs to send these to Host CAs.*
- 176. *Notwithstanding, when a Host CA is obliged by its national legislation to require documents incorporated by reference, the Home CA shall endeavour to deliver such documents as soon as practicable.*
- 177. *The Commission Services took the view that it is inconsistent with the passporting regime under the Directive, and consequently unlawful, for the CA of a Host MS to require the issuer to supply hard copies of documents incorporated by reference, and to block the passport if those hard copies are not supplied (either by the issuer or by the Home CA).”*
- 178. Next steps: No further action is necessary at this stage. The above conclusion in respect to the filing of documents incorporated by reference with the Host CA will be included in the next update of CESR’s Q&A on prospectuses. In relation to the rest of the issues described no further action is necessary at this stage.

Approval of Prospectus – Deadlines (Article 13 PD)

179. Description of the issue: There were various observations in respect of the adherence to the time limits set out by the PD in respect of the approval of prospectuses and these include:
- The success of an offer, in particular a cross-border offer, would often depend on the adherence to a tight timetable. CAs do not respect the review period set out in the directive and would encourage regulatory arbitrage where possible by issuers. The ten day period is often seen by some CAs as the date by which the first comments should be provided.
 - Some MS apply a 'tick box' approach to vetting prospectuses whereas others perform a full check on consistency, clarity and completeness of information. The time period for approval therefore varies. Issuers therefore sometimes choose their Home MS when they can based on timing considerations. This should not be a criteria as there should be consistency.
 - It was stated that one MS (Italy) makes a distinction in respect of a 'listing' and 'offering' prospectus and sets different time periods for approval on this basis. The former takes longer to approve than the latter, contrary to the provisions of Article 13 of the PD.
180. Relevant legislation and/or guidance: Article 2.1 q) of the PD and Article 13 of the PD
181. Next steps: CESR will assess whether further Level 3 work is appropriate.

Publication of prospectus/additional requirements (Article 14 PD)

Additional publication of prospectus

182. Description of the issue: Some MS when acting as Host MS were reported to require the additional publication of a passported prospectus or final terms of a passported base prospectus as they do not consider all methods of publication in the Home MS as sufficient. For example, one MS (Germany) did not recognise the publication of a prospectus on the official website of the CA of the Home MS. This practice is regarded as inconsistent with Article 14 PD. Comments referring to the additional publication of final terms have been summarized under the heading Base Prospectus and Final Terms.
183. Relevant legislation and/or guidance: In CESR's Q&A on prospectuses (question 3), CESR outlines its position to the publication of a prospectus in Host MS. CESR considers that if the issuer complies with the publication requirements set out in Article 14.2 PD, the Host CA is not entitled to intervene in the publication procedure. All means of publishing a prospectus as provided by Article 14.2 PD are equally valid for all the investors across the EU and have to be accepted by Home and Host MS alike.
184. Next steps: No further action is necessary at this stage. If relevant, CA when acting as Host CA should be encouraged by CESR to adjust their practice to CESR position.

Notice of publication (Article 14.3 PD)

185. Description of the issue: Many respondents to the call for evidence reported that the CA of some MS require a notice pursuant to Article 14.3 PD to be published- often within a specified deadline (Germany was reported to require notice within two days after notification) - even in cases where they act as Host CA with respect to prospectuses that are passported into the respective MS (Germany, Austria, France and Norway;. Some respondents reported that the notice had to be published before the offering could be launched by the issuer. All respondents considered this practice not to be consistent with Articles 14.3 and 17 PD. The respondents noted that such notice - usually to be published in local newspapers - is an effort too costly and time consuming for the issuer to be proportionate to the investor's information benefit. Another respondent even proposed to delete Article 14.3 PD in an amendment of the PD for the purposes of equal competition among the issuers, as this provision is considered to allow a discrimination of issuers for which the MS that has adopted this option is the Home MS.
186. In addition, some comments were received in relation to the publication of a notice in relation to final terms. These have been summarized under the heading Base Prospectus and Final Terms
187. As pertains to the notice of publication, all responses strongly emphasized the need for a common interpretation of the provisions of the PD and expressly addressed CESR for guidance in this issue.
188. Relevant legislation and/or guidance by CESR: Article 14.3 PD provides MS the option to require the publication of a notice stating how the prospectus has been made available and where it can be obtained by the public". In its Q&A on prospectuses (question 2) CESR outlines its position to the publication of a notice. CESR considers that the option according to Article 14.3. PD applies to MS when acting as Home MS only. However, CESR in this context explicitly refers to certain MS that have dissenting views to CESR's position on various legal grounds.
189. Next steps: CESR has addressed this issue in its Q&A on prospectuses, but also acknowledges that there are still diverging legal options on the publication requirement among the MS. However, CESR will assess whether legislative action would be necessary.

Content of the notice

190. Description of the issue: One international issuers' association reported of divergent practices as to the content of a notice according to Article 14 PD. This is considered as inconsistent with PD and PR.
191. Relevant legislation and/or guidance: Article 31.2 PR in clear wording stipulates the content of the notice according to Article 14.3 PD.
192. Next steps: No further action is necessary at this stage. If relevant, CA should be encouraged by CESR to adjust their practice to the clear wording of Article 31 PR.

Advertising (Article 15 of the PD; Recital 33 of the PD)

193. Description of the issue: Several respondents commented that the rules on advertising should not form an obstacle to the functioning of the passport. According to some of the respondents certain Host CAs make reference to the rules on advertising to hinder the distribution of certain securities. These rules may require prior approval of the advertisements or labelling (i.e. inclusion of certain risk warnings or requiring the

product to be named according to the type of the securities) of certain types of securities. One association noted that while the advertising was not fully harmonised by the PD, the practical inconsistencies in the application of the advertising rules could be minimised through CESR's work. One respondent commented that the lack of regulation governing advertising may produce a divergence in criteria in practice.

194. Relevant legislation and/or guidance: Pursuant to Article 15.6 of the PD the Home CA has the power to exercise control over the compliance of advertising activity, relating to a public offer of securities or an admission to trading on a regulated market, with the principles referred to in paragraphs 2 to 5 of the said article. However, the PD does not facilitate any passport for advertising activities. In addition, advertising is closely linked with the conduct of business rules under the Directive on Markets and Financial Instruments (MiFID).
195. Next steps: No further action is necessary at this stage.

Supplements (Article 16 of the PD; Recital 34 of the PD)

196. Many respondents commented on the requirement to publish a supplement. The comments related mainly to the triggers for obligation to supplement a prospectus, the uncertainty of the time when the obligation to supplement a prospectus ends, the relationship between supplements and ad-hoc releases under the Market Abuse Directive and the withdrawal right of the investors.

Triggers for obligation to supplement a prospectus

197. Description of the issue: Many respondents commented on the triggers for obligation to supplement a prospectus. Many of the comments were linked to the fact the publication of a supplement also triggers the withdrawal right for the investors. Some of the respondents commented that the market practices seem to be inconsistent and asked CESR to produce guidance on the situations when the obligation arises or examples of insignificant factors that do not trigger the obligation. One respondent proposed that the provisions were interpreted in a way that no supplements are necessary if a disclosure of inside information isn't either.
198. Some respondents were of the opinion that for non-equity securities the triggers for obligation to supplement a prospectus should be different than for equity securities. According to one respondent, while a change in the management of the issuer can affect the share price, the assessment of debt securities is dependent on other factors. For debt securities, the company-related risk factors that have to be taken into account for the investment decision are rather linked to the probability of punctual interest payments and repayment of the principal (i.e. the issuer's insolvency risk).
199. Some respondents were in the opinion that positive news should not trigger the obligation to supplement a prospectus. They were in the opinion that the criterion "capable of affecting the assessment of securities" should be interpreted in such a way that a supplement were necessary only in a case where the news were also – from the perspective of a reasonable and sensitive investor – causal for a change of an investment decision.
200. Relevant legislation and/or guidance: According to Article 16.1 of the PD, every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities

shall be mentioned in the supplement to the prospectus.. CESR has discussed certain aspects relating to the triggers for the obligation to supplement a prospectus (see questions 16-18 in CESR's Q&A on prospectuses).

201. Next steps: CESR will assess whether further Level 3 work is appropriate and will also assess whether legislative action would be necessary.

Uncertainty of the time when the obligation to supplement a prospectus ends

202. Description of the issue: Some respondents commented on the uncertainty of the time when the obligation to supplement a prospectus ends. Two different aspects were raised. Firstly, it was pointed out that the wording of Article 16.1 creates some uncertainty as to whether the requirement to publish a supplement ends with the start of trading on a regulated market, even if public offer still continues. This was seen relevant especially in case of derivative securities. Secondly, the same problem was raised in connection with cascaded offers. One respondent also commented that it should be clarified that the withdrawal right exists only prior to the settlement of a transaction. One respondent was in the opinion that the obligation to produce a supplement should end at the time when the allotment certificates are listed.

203. Relevant legislation and/or guidance: According to Article 16.1 of the PD, a supplement is required when a new factor material mistake or inaccuracy triggering the need to publish a supplement arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins.

204. Next steps: CESR will assess whether further Level 3 work is appropriate.

Relationship between supplements and ad-hoc releases under the Market Abuse Directive

205. Description of the issue: Some respondents pointed out that the requirement to publish a supplement and have it approved before publication is not in line with the requirement imposed by the Market Abuse Directive to publish inside information as soon as possible. Therefore, in case of listed companies the information contained in a supplement is usually already published before the supplement is published. One respondent also pointed out that the parallel requirements may lead to abuse, because of the delay of maximum seven working days in the approval process. Investors who have subscribed the securities have a possibility to withdraw their acceptances even though they had subscribed the securities after the ad-hoc information has been published. One respondent also pointed out that there are divergent practices as regards the content of the summary in cases of ad hoc releases. Some authorities (e.g. France) require the issuers to include in the prospectus all information having been made public in a press release whereas others (e.g. Germany) allow the press release to be summarised in the prospectus.

206. Relevant legislation and/or guidance: Article 16 of the PD requires that the supplement is approved before it can be published. Article 11 of the PD does not allow future information to be incorporated by reference when the prospectus is initially approved.

207. Next steps: CESR will assess whether further Level 3 work is appropriate and will also assess whether legislative action would be necessary.

The investors' right to withdraw their acceptances

208. Description of the issue: Some respondents were of the opinion that the investors' right to withdraw their acceptances should be reconsidered. They commented that the right to withdraw acceptance should not be triggered by positive news. According to one of the respondents, the issuers issuing debt securities will stop launching the offer immediately when a new factor occurs due to the additional risks provided in Article 16 of the PD and the possible consequences of Article 16 may deter issuers from taking advantage of good near-term market conditions. According to the respondents' view, the right to withdraw should be excluded at least in the following circumstances: when the securities have not been acquired on the basis of the prospectus; when the new factors have not had any negative effect on the investment or; when because of the dissemination of the information according to the Transparency Directive, the investor knew or should have known about the new factors when acquiring the securities.
209. Relevant legislation and/or guidance: Article 16.2 of the PD provides investors who have agreed to purchase or subscribe for the securities before the supplement is published with the right to withdraw their acceptances.
210. Next steps: CESR will assess whether further Level 3 work is appropriate and will also assess whether legislative action would be necessary.

Language of the prospectus/translations (Article 19 PD)

211. Description of the issue: As a general comment, an international banking association complained that the national implementation of the language and translation requirements varies widely and is perceived as particularly strict among the MS. As pertains to the act of approving a prospectus some respondents reported that Home CA often are reluctant to accept a language that is neither officially accepted in the respective MS nor customary in the sphere of international finance (i.e. English). In such case, the CA only submit these translations along with the notification but without approval. This problem may arise when the issuer intends to make an offer in different MS and prepares translations of the prospectus into the respective languages (either on a voluntary basis for the investor's convenience or because of additional requirements imposed by the Host CA). Both respondents consider this practice as inconsistent with Article 19.2 PD. According to the wording of this provision, the Home CA, in their view, may request the prospectus be drawn up in the CA's official language or in English for the purposes of reviewing the prospectus only. However, for the purposes of approving the prospectus the Home CA is required to accept also other languages. One respondent complained about diverging views of the MS about the use of different languages in a prospectus that in some cases may lead to paradox results. To illustrate this he gave the following example: Whereas the reference to certain documents in French in the English version of the Prospectus is accepted by Luxembourg France feels that this practice is contrary to the PD. Thus, a prospectus approved by Luxembourg cannot obtain the required passport for an offer or admission. Paradoxically, this option is offered to the issuers who are only using English in their prospectus provided that they submit the French version of the summary.
212. Relevant legislation and/or guidance: The interpretation of Article 19.2 PD as described above is not in line with the meaning of said provision. The respondents' approach that distinguishes between the review of the prospectus and its approval seems to be artificial, as the reviewing of a prospectus may be considered as an integral part of

the approval procedure. In CESR's Q&A on prospectuses (question 24), CESR outlines its position to the quality of translations. As the PD does not have any provision dealing with this issue, CESR clearly states that any translation of a prospectus should be left entirely to the issuer's responsibility and recommends issuers to include a respective statement in any translation used.

213. In its Q&A on prospectuses (question 7), CESR refers to languages of documents that are incorporated by reference. CESR states that any translation of a document may be incorporated by reference as long as it complies with Articles 11 and 19 PD.

214. Next steps: CESR has already produced Level 3 work on this issues and will assess whether further work is appropriate.

Eligibility criteria for admission to trading

215. Description of the issue: One respondent reported that eligibility criteria for listing are not harmonized by PD. Thus, in addition to passporting a prospectus, issuers have to comply with divergent national listing requirements.

216. Relevant legislation and/or guidance: the eligibility criteria for admission to trading are not in the scope of the PD.

217. Next steps: No further action is necessary at this stage.

Competing Products (UCITS /Structured Products /Insurance products)

218. Description of the issue: A number of market participants expressed concerns that the disclosure regime under the PD is less stringent than that under UCITS thereby offering investors less protection. They stated that given the significant increase in the market for structured products and certificates which utilise actively managed fund portfolios and financial indices as the underlying asset, the lack of detailed disclosure requirements was a major concern in particular as such products are being marketed to retail investors who are informed that such products are adequate for their pension savings. For instance, it was stated that UCITS offered greater transparency and high disclosure in respect of costs, investment objectives and risks, as well as performance but the closest the PD gets to this high level of disclosure is the disclosure of risk factors which would not necessarily provide the same level of detail. They observed that under UCITS, there are disclosure requirements relating to costs, for instance, Total Expense Ratio (TER), entry and exit commissions, and the Portfolio Turnover Rate and in respect of the suitability of the product, detailed descriptions of the investment objectives/policy and of the investment risks together with extensive disclosure of holdings and performance. Although UCITS and structured products are competing products, the latter are offered more cheaply to investors due to the less onerous disclosure. Furthermore, UCITS require an ongoing disclosure of financial information whereas the PD does not and MiFID does not necessarily deal with this anomaly because advisers are only obliged to provide existing information to investors under MiFID and not ongoing information.

219. Relevant legislation and/or guidance: Article 2.1 a) on the definition of securities and Article 18 of the PR and Annex XV of the PR.

220. Next steps: CESR is currently discussing this issue with the other Level 3 committees (CEBS and CEIOPS). CAs might use the CESR mediation mechanism to solve any differences of interpretation as regards the applicable legislation.

C. 2. Comments referring to the Prospectus Regulation

221. Regarding the items of the Annexes of the PR one respondent made a general remark namely, given the fact that the requirements of Annexes I-XVII are very detailed there is a strong need to reduce different interpretations between CA about form and contents of a prospectus. The respondent indicated that there could be a concrete risk for issuers to be liable to an investor if prospectuses do not provide consistent information.

222. Some of the respondents indicated difficulties regarding the interpretation of the following items of the Annexes of the PR:

- Tax disclosure (Annex III, item 4.11)
- Principal Markets (Annex I item 6.2, Annex IV item 6.2, Annex X item 6.2, Annex XI item 5.1.3)[
- Related party transactions (Annex I item 19, Annex X item 19)[
- Historical financial information (Annex I item 20.1)
- Material Contracts (Annex I item 22, Annex IV item 15, Annex IX item 12, Annex X item 22, Annex XI item 12)
- Capitalisation and indebtedness (Annex III item 3.2)
- Reasons for the offer and use of Proceeds (Annex III item 3.4, Annex V item 3.2, Annex X item 31.1, Annex XII item 3.2)
- Pricing of securities (Annex III item 5.3.1, Annex V item 5.3.1, Annex X item 29.3.1, Annex XII 5.3)
- Name and address of the coordinators (Annex III item 5.4.1, Annex V item 5.4.1, Annex X item 29.4.1, Annex XII item 5.4.1)
- Name and address of any paying agents and depository agents (Annex III item 5.4.2, Annex V item 5.4.2, Annex 10 item 29.4.2, Annex XII item 5.4.2);
- Application of Annex V for cascade distribution;
- Equivalence of third country financial reporting standards.

Statement of non applicability

223. Some items in a schedule or building block might not be applicable to each and every issuer or issue. For some of these cases, the PR deems it necessary that an explicit statement of non-applicability or non existence of the information is made (e.g. Annex I, Item 14.2). The respondent is of the opinion that the PR does not require an explicit statement of inapplicability on those items where no specific statement is required.

224. One CA was reported to require additional explicit statement of inapplicability regarding items where this is not required by the PR. This practice bloats prospectuses and makes them much harder to read, thus affecting the comprehensibility, which enhances the risk for readers overlooking material items.

225. The respondent suggests that if CAs fear that drafters might have overlooked items, one should at the most require that a statement is inserted at the end of the prospectus or as a footnote that items not specifically addressed in the prospectus are not applicable to the specific issuer and/or issue. This would relieve prospectuses of being cluttered with immaterial details.

226. Relevant legislation and/or guidance: Recital 24 PR states the following: certain information items required in the schedules and building blocks or equivalent information items are not relevant to a particular security and thus may be inapplicable in some specific cases; in those cases the issuer should have the possibility to omit this information. If an item of the Annexes is not applicable, this could be indicated by the drafter of the prospectus in the cross reference list.

227. Next steps: CESR will assess whether further Level 3 work is appropriate.

Profit forecast or estimates; Annex I item 13, Annex IV item 9, Annex IX item 8, Annex X item 13, Annex XI item 8, Annex XV item 13

228. Some respondents indicated that the interpretation of terms as profit forecasts and estimates has been difficult in the context of the presentation of information. Some concerns are expressed by the respondents as to the range of statements that could be construed as constituting a profit forecast (or estimate).

229. Given the disclosure consequences, including reporting by auditors, it is suggested by the respondents that CESR should consider sharing best practices and publishing these. This could assist companies in understanding when they wish to make statements which might constitute a profit forecast in case a prospectus should be required to be prepared. Another respondent suggests that the disclosure of forecasts should be made a mandatory feature of the prospectus.

230. Some respondents indicated that in France regarding profit forecast and estimates in a number of instances national practices go beyond the Recommendations of CESR (Ref: CESR/05-054b).

231. Few respondents state that the requirement of the letter from the statutory auditors is one of the most burdensome requirements of the PD as far as its implementation is concerned has to do with the provision of financial information, especially in the case of IPOs.

232. Next steps: Although CESR provided in its Recommendations (ref: CESR/05-054b), paragraphs 87-94) clarification about when profit forecasts and estimates should be included in a prospectus CESR will assess whether further Level 3 work is appropriate.

Pro forma financial information, Annex I item 20.2 and Annex II

Inclusion of Pro forma financial information in the prospectus, voluntarily or mandatory?

233. The main question regarding inclusion of Pro forma financial information is whether pro forma financial information may be included voluntarily in a prospectus and if so, whether Annex II should be followed as to content. A respondent indicated that some regulators may take the view that Annex II is not mandatory, and that it is up to the issuer to choose whether to include pro forma information.

234. Also according to a few respondents, some issuers may find it useful to include pro forma financial information where such information is not strictly required under the PR. In particular, a change may be deemed significant by the issuer even though the PR's definition of significant change is not met. It was indicated by a respondent that certain

regulators allow for voluntary inclusion of pro forma financial information in the prospectus but require that Annex II is strictly followed as to content.

235. Also the suggestion was made that CESR should work on the adoption of specific, limited exemptions to the requirement to provide Pro forma financial information similar to the one that exists in the US for certain significant acquisitions. Such an exemption recognizes the difficulties an issuer may face in obtaining reliable financial information or forming final views on appropriate accounting adjustments and would apply when the prospectus is published either before completion of the acquisition or a short time thereafter.

236. Furthermore it was suggested that CESR should consider other types of exemptions, such as in the case of an acquisition of particular types of businesses for which certain financial information is either not regularly produced and/or is not considered relevant to investors. For example, real estate companies may not have full financial information available and cannot produce it without undue burden.

Which financial period should Pro forma financial information cover?

237. Another uncertainty indicated by a respondent is for which financial period pro forma information should cover since Annex II item 5 provides for three possible periods. It seems to be unclear whether Annex II item 5 provides a choice for the issuer on whether to produce the pro forma financial information on the basis of current, most recently completed or interim information. One respondent suggested that issuers should be able to choose other periods than those set out in item 5 of Annex II.

238. Next steps: CESR is already discussing these issues and will publish the conclusions through its Q&A on prospectuses.

C. 3. Comments referring to the passport functioning (Articles 17 and 18 PD)

239. Description of the issue: Most of the respondents acknowledged the passporting mechanism as a useful means to create a single market for securities. However, all of them also expressed their concerns about the widespread experience about the efficiency of the passporting mechanism being hampered in practice by various obstacles. Due to the lack of harmonised practical implementation many CAs tend to impose additional requirements on the passporting procedure that derive from existing national legislation, administrative practices or conduct of business rules. Another main obstacle is that many CAs have divergent interpretations of unclear provisions of the PD and PR. These difficulties were reported to often lead to delay of the offering and in some, exceptional, cases even to the refusal of a passported prospectus.

Additional requirements imposed by Host CA

240. For the purposes of illustration many of the respondents gave a great number of examples for additional requirements raised by Host CAs that market participants are confronted with when passporting a prospectus:

Translation requirements

- translation of entire prospectus or its significant parts (Germany,)

- translations of the summary into different languages required by the same MS (Belgium, Dutch and French)

Filing requirements

- filing of additional documents with the Host CA (usually documents that are incorporated by reference)
- filing of complete prospectus and other passported documents in hard copies with Host CA
- filing with and/or approval by Host CA of advertising/marketing materials (Belgium, France, Portugal, Spain). Sometimes substantive comments on the nature of the securities are requested (Belgium, France). In some cases specific characteristics of securities have to be mentioned in these materials (Host CA give instructions as to the content of these materials).
- filing of the prospectus in the Host MS with an authority different than the CA for the approval of prospectuses before launching the offering (Austria).

Publication/reporting/other requirements

- notice of publication published in Host MS (Austria, France, Norway, Germany)
- additional publication of prospectus, if prospectus is published on official website of Home CA (Germany)
- registration of the issuer with local commercial register/court, filing of a translation of the issuer's articles of association and the prospectus (Belgium) with the local commercial register/court and publishing a notice of their filing (Belgium, France), translation and filing of issuer's last audited balance sheet with commercial register/court (France)
- publication of prospectus and summary on Host CA's website (France)
- ongoing reporting obligations with respect to material information that affects issuer's share price. Reporting includes publications in newspapers and postings on the Host CA's website (France)

Examples for additional requirements with respect to the handling of final terms of a base prospectus were reported as well:

- translation of final terms
- filing of final terms with Host CA (Germany, Austria)
- posting of final terms on the Host CA's website before launching the offering. Posting on website requires issuer to enter into a legal agreement with Host CA (France)
- in some cases review of final terms by Host CA (that may lead to changes of content or even rejection)

241. Relevant legislation and/or guidance: According to the passporting mechanism as defined by Articles 17 and 18 PD a prospectus approved in the issuer's Home MS is deemed valid throughout the EU without the need for further approvals or administrative procedures imposed by any Host MS.
242. Next steps: CESR will assess whether further Level 3 work is appropriate. CESR also notes, however, that in case market participants' allegations proved to be true and the alleged additional requirements deemed inconsistent with the PD, the Commission's enforcement role may be relevant. The Commission Services have raised the issue of such requirements in the European Securities Committee, and has indicated publicly that it will launch infringement proceedings in appropriate cases.

Confirmation to issuers that passport notification has been sent/received

243. Description of the issue: Some respondents criticized that no uniform practice has been established by the MS with respect to the technical handling of the notification procedure. These concerns focus on the efficient flow of information between the parties involved in the passporting procedure (i.e the Home CA, Host CA and the issuer). A french association reported of the lack of coordination between Home and Host CA that often cause delay of the offering, especially if the issuer has to wait for confirmation of reception of the passporting documents before launching the offer. An international banking association considered such practice as inconsistent with Articles 17.1 and 18.1 PD. For the purposes of transparency and to ensure a speedy notification some respondents proposed to provide the issuer with information about the status of the notification procedure: The Home CA should inform the issuer as soon as the passporting documents have been sent to the Host CA, whereby - from a legal point of view - the sending should already be considered as completion of the passporting procedure, and the Host CA should notify the issuer of the reception of said documents.
244. With respect to the timing of the notification an international issuers' association complained that, according to Article 18.1 PD, the Home CA is obliged to send the passporting documents on short term notice (i.e. within one working day) only, if the issuer submits its request for notification together with the initial prospectus to the CA. He raised concerns about potential delay in the offering (extension of submission period to three working days), if the issuer is not able to cope with this procedure.
245. Relevant legislation and/or guidance: CESR members have set out a specific communication procedure, setting a clear guidance on the technical handling. They have agreed a standardised certificate of approval and have agreed on standard emails both for the notification of the passport and for the confirmation of receipt of the passport notification. Through this system, CESR members, when acting as Home CAs, are aware of the moment when the Host CA receives the email. In addition, were Host CAs consider that the notification is missing some information (for example, if the translation of the summary has not been provided), they contact the Home CA also by email (and if necessary by phone) and try to solve the difficulties encountered in a fast way.
246. Next steps: No further action is necessary at this stage. If relevant, CA involved in the notification procedure should be encouraged by CESR to adjust their practice to the internal system implemented by CESR.

V. CONCLUSIONS

247. In general it seems that most market participants are satisfied with the new European legislation on prospectuses. They consider the Prospectus Directive and Regulation to be a step in the right direction to achieve a single market and they especially mention the passport mechanism as a useful tool in this respect.
248. Although they have highlighted a few obstacles in the practical application of the passport, they consider that the mechanism envisaged in the PD is working much better than the previous mutual recognition process and has led to an increase in the number of pan-European offers. In addition, they have highlighted as positive aspects of the new legislative framework the possibility of using prospectuses drafted in a 'language customary in the sphere of international finance' as it has reduced considerably the costs of translations for issuers. The obligation to produce a summary has also been pointed out as a useful tool as it is considered as a good mean of conveying the most relevant information to investors in a straightforward way and in their own investors' language.
249. Nevertheless, they have also identified certain provisions in the PD and PR that are causing some practical difficulties and they expect CESR to advise the European Commission to work on the necessary amendments. CESR has summarised all these concerns in section IV and has provided an initial identification of those aspects where CESR considers there is a need to further assess whether legislative action would be necessary. Among others, concerns have been raised in respect to the limited scope of the exemption of publishing a prospectus for offers or admissions to trading on regulated markets of securities to employees; the lack of specific regulation in relation to the registration document (passport, supplements, etc.); the need to assess the usefulness of the annual document to be published in accordance with Article 10 of the PD; the circumstances when a supplement should be published (linked to the withdrawal right granted for investors in such cases); the delineation of information between the base prospectus and the final terms and the interpretation of the "re-sale" provisions in Article 3.2 of the PD.
250. Although respondents have mentioned the need to improve certain aspects of the legislative framework, their main concerns focus not on the legislation as such but on the diverging practices of the different CAs that they have identified in a number of areas. Therefore, they consider that in order to achieve the single EU market for public offers and admissions to trading on regulated market, CESR has an important role to play. In this respect, they expressly commended CESR's work on the prospectus area and consider the Q&A on prospectuses published in CESR's website as a very useful tool in achieving a reduction of diverging practices in Member States as it provides responses to market participants' queries in a quick, flexible and efficient manner.
251. Nevertheless, respondents consider that CESR should increase its coordination activities at level three. In particular, on those areas that have been identified in the report as being the most conflicting ones they consider that the lack of harmonization at CESR level could hamper the good functioning of the passport and diminish the range of investment opportunities. Thus they strongly encourage CESR to keep working on the development of common practices at EU level.
252. CESR expects this report to be a useful input for its future level 3 agenda on those areas where CESR can positively act. It could also form a basis for CESR's contribution to the review of the PD by the European Commission in 2008. On issues where harmonisation could be achieved by CESR, those issues will be published through the



regular updates of CESR's Q&A on prospectuses on its website. On other issues where only legislative action can address the problem, CESR will inform the Commission.



ANNEX A

TOTAL NUMBER OF PROSPECTUS APPROVED

When looking at the data included in the table below in relation to the total number of prospectuses approved, the following factors must be taken into account:

- The table reflects the information and notes as provided by CESR members. It is important to note that the competent authorities have different internal databases in place that might lead to some divergences in the data provided.
- Some CESR members were unable to provide the information due to the unavailability of the data. Therefore, the table does not include data on their respective countries.
- Although Bulgaria and Romania have been members of CESR since 1 January 2007, data on these countries has not been included since they were not subject to the Prospectus Directive and Regulation obligations during the period covered by the questionnaire.
- Not all the Member States were able to implement the Prospectus Directive by 1 July 2005. Thus, the time period is not always the same for all countries and it is not always possible to have an annual comparison. In most cases this different period is explained in the footnotes.
- As some of the members were not the CA for the approval of prospectuses prior to the Prospectus Directive, it has not always been possible to have access to the data for the prior year.
- The information on prospectuses approved included in the table does not contain the number of supplements approved.
- One further caveat that should be taken into account when comparing the figures of the years before and after 1 July 2005 is the fact that before the implementation of the Prospectus Directive final terms were approved in a number of countries and counted separately from base prospectuses. After 1 July 2005 final terms are not approved by competent authorities, therefore the numbers might have decreased without a reduction in the actual number of transactions.

	1 July 04 – 30 June 05	1 July 05 – 30 June 06	1 July 05 – 30 Sept. 05	1 Oct. 05 – 31 Dec. 05	1 Jan. 06 – 31 Mar. 06	1 April 06 – 30 June 06
AUSTRIA	() ¹⁶	71 ¹⁷	8	25	12	26
BELGIUM ¹⁸	181	155	43	37	29	46
CYPRUS	8	11	1	4	2	4
CZECH REPUBLIC	52	54 ¹⁹	16	25	6	7
DENMARK	12	43	3	12	11	17
ESTONIA	10 ²⁰	6 ²¹	1	2	0	3
FINLAND	82	54	6	14	12	22
FRANCE	419	296 ²²	42	93	70	91

¹⁶ For this period no data can be provided because the FMA was not the CA for approving prospectuses and does not have access to former statistical data.

¹⁷ The data is from 10 August 2005, date in which the PD was implemented in Austria. The first quarter includes information from 10/08/05 to 30/09/05.

¹⁸ Although the PD was not completely transposed in Belgium until June 2006, the Regulation and the provisions of the PD relating to the passport of prospectuses were applicable since 1 July 2005.

¹⁹ Transposition of the PD took place in March 2006 in Czech Republic.

²⁰ Data is given from 1 Nov 04 to 31 Oct. 05.

²¹ Data is given from 1 Nov 05 to 31 Oct. 06 and subsequent division by quarters.

²² The decrease is also due to the fact that before the implementation of the PD, final terms were approved and counted separately from base prospectuses.

GERMANY	1.050 ²³	680	142	159	141	238
GREECE	19 ²⁴	20 ²⁵	2	8	3	7
HUNGARY	25	38	3	12	7	16
ICELAND ²⁶	73	93	11	39	8	35
IRELAND	2.113 ²⁷	1793 ²⁸	265	523	469	536
ITALY	63	88	21	22	10	35
LATVIA	21	10	3	0	5	2
LUXEMBOURG	() ²⁹	1234	134	359	332	409
NETHERLANDS	() ³⁰	285	77	68	64	76
NORWAY	41	221 ³¹	51	60	68	42
POLAND	112	37	4	4	13	16
PORTUGAL	79	50	12	12	16	10
SLOVAKIA	22	33 ³²	5	13	10	5
SLOVENIA	26 ³³	23	4	9	6	4
SPAIN ³⁴	305	292	35	94	74	89
SWEDEN	236	300	68	99	55	78
UK	1.189	1.690				

²³ In this period BaFin was responsible only for the approval of public offer prospectuses.

²⁴ In this period the HCMC only approved prospectuses for the initial and secondary public offerings whereas for rights issues the approval was responsibility of Athens Stock Exchange so the number contains prospectuses approved by Stock Exchange.

²⁵ Transposition of the PD took place in October 2005 in Greece.

²⁶ Implementation of the PD and Regulation was not fully completed until 1 July 2006 in Iceland.

²⁷ This figure includes collective investment undertakings of both open and closed end types. Therefore this figure is not comparable to those from other countries, which do not include open collective investment undertakings.

²⁸ This figure includes collective investment undertakings of closed end type only.

²⁹ For this period no data can be provided because the Luxembourg Commission de Surveillance du Secteur Financier was not the CA for approving prospectuses. Developments of the activity of admission to trading on a regulated market in Luxembourg under the different prospectus regimes may however be measured by comparing statistics on quotation lines published on a quarterly basis by the Luxembourg Stock Exchange.

³⁰ For this period no data can be provided because the Netherlands Authority for the Financial Markets was not the CA for approving prospectuses.

³¹ The PD entered into force on 1 January 2006 in Norway

³² Only 21 out of these 33 prospectuses were approved in accordance with the PD.

³³ The PD was transposed into the Slovene national law in April 2006 while the Regulation has been in force directly from July 1, 2005 on. The number of prospectuses approved before April 1, 2006 does not mean approval under the PD regime, neither were some prospectuses approved after April 1, 2006 approved in accordance with the new law. Later is due to the fact that prospectuses filed before the new law entered into force have been approved in accordance with the previous Securities Market Act.

³⁴ Although the PD was not completely transposed in Spain until November 2005, the Regulation and the provisions of the PD relating to the passport of prospectuses were applicable since 1 July 2005.



ANNEX B

CESR's Q&A on prospectuses

Date: February 2007

Ref. CESR/07-110

Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members **Updated version February 2007**

INTRODUCTION ~ The context and status of this 'Q and A':

EU Legislation:

The Prospectus Directive 2003/71/EC and the Commission's Regulation on Prospectuses (EC 809/2004) became effective on 1 July 2005. The Prospectus Directive and accompanying Regulation establishes a harmonised format for Prospectus in Europe and allows companies to use this Prospectus to list on all European markets without having to re-apply for approval from the local regulator and by doing so, it is intended to help companies avoid the inherent delays and cost that this may involve. As a result of this new legislation, consumers can also be assured of more consistent and standardised information which will enable them to compare more effectively the various securities offers available from a wider number of European companies.

Level 3 work to provide supervisory convergence in day-to day implementation across the EU and clarity for market participants:

As a result of the Directive and Regulation, the scope for interaction between competent authorities has increased because of the passport and it is therefore essential that supervisors achieve convergence across the EU in their approach to handling the day-to-day implementation of this legislation.

To this end, CESR has developed, at the request of market participants, a number of clarifications which may prove useful to market participants. These are:

- **CESR Recommendations** (Ref.CESR/05-054b) to provide greater clarity for issuing companies regarding the provision to disclose information on a range of areas and to promote greater transparency in the way in which supervisors will apply the Regulation, without imposing further obligations on issuers. CESR consulted market participants in the development of this and the responses and feedback statement can be accessed on the website under 'Consultations' and 'Expert Groups/Prospectus Level 3'.
- **This consolidated 'Q and A' publication (Ref.CESR/07-110) which is intended** to provide market participants with responses in a quick and efficient manner, to 'everyday' questions which are commonly posed to the CESR secretariat or CESR Members. CESR responses do not contain standards, guidelines or recommendations, and therefore no prior consultation process has been followed. It is CESR's intention to operate in a way that will enable its Members to react quickly and efficiently if any aspect of the common positions published need to be modified or the

responses clarified further. The views of the Commission Services on some of the issues discussed were sought. However, the Commission Services note that only the European Court of Justice can give a legally binding interpretation of provisions of EU legislation. Moreover, the views expressed in the paper do not bind the European Commission as an institution, and the Commission would be entitled to take a position different to that set out in this 'Q and A' guide in any future judicial proceedings concerning the relevant provisions.

This paper adds new Q&A to those included in the document CESR published on 18 July 2006 (CESR/06-296d). After each question an indication of the date of its first publication has been included to ease the identification of the new Q&A.

The CESR group meets regularly to discuss the questions that might be raised by market participants. Please send these directly to the relevant competent authority you are dealing with including the CESR secretariat (prospectus@cesr.eu). The pace of the future publications will depend on the amount of new questions identified and how long it takes to analyse the issues raised and to develop common positions.

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1. Information from issuers to host competent authorities

July 2006

Q) Should the issuer notify/file with the host competent authorities the following information:

- a)** The price and/or amount of the securities omitted in stand alone prospectuses as permitted by Article 8.1 of the Directive ³⁵?
- b)** Final terms of base prospectuses once they are filed with the home competent authority pursuant to the last paragraph of Article 5.4 of the Directive³⁶?

A) The issuer is obliged by the Prospectus Directive to file the above mentioned information (a and b) with the home competent authority (Articles 8.1 and 5.4 of the Directive).

The Directive does not specifically require that the above information is filed with all the host competent authorities.

Notwithstanding the above, the host authorities would expect to receive the said information from the issuer and the home competent authority will inform the issuer during the approval process or generally by any other means of that fact.

c) Should the issuer notify/file with the host competent authorities the means of publication of the prospectus chosen by the issuer?

A) The Directive does not require the issuer to inform the host authorities of the means of publication it has chosen.

The competent authority of Germany is of the opinion that the legislation in relation to the notice of the host Member State also applies to prospectuses approved and passported by competent authorities from other Member States.

2. Notice

July 2006

Q) Can a host Member State require the issuer to publish a notice in its jurisdiction in relation to a prospectus that has been passported into its jurisdiction?

A) No. A Member State might require in its national legislation that issuers have to publish a notice stating how the prospectus has been made available and where it can be obtained by the public (Article 14.3 of the Directive). If a Member State has made use of this option, the obligation will apply to the public offers or admissions to trading where its competent authority has acted in its capacity of home competent authority.

³⁵ Article 8.1 of the Directive allows issuers to omit in the prospectus the final offer price and amount of the securities where they cannot be included in the prospectus. The final offer price and amount of securities shall be filed with the home competent authority and published in accordance with the arrangements provided for in Article 14.2.

³⁶ If the final terms of the offer are not included in either the base prospectus or a supplement, the final terms shall be provided to investors and filed with the competent authority when each public offer is made as soon as practicable and if possible in advance of the beginning of the offer. The provisions of Article 8.1 a) shall be applicable in any such case.

The competent authorities of Austria and Germany consider that the legislation in relation to the notice of the host Member State also applies to prospectuses approved and passported by competent authorities from other Member States.

The Commission Services consider that requirements imposed by Member States under Article 14.3 of the Prospectus Directive on the notice can apply only in relation to issuers for which it is the home State, and it is not possible to extend those requirements to prospectuses that have been passported from another Member State.

3. Publication of a prospectus in the host Member states

February 2007

Q) Is the host competent authority entitled to intervene in the publication of the prospectus?

A) CESR considers that if the issuer complies with the publication requirements set out in Article 14.2 of the Prospectus Directive, the host authority is not entitled to intervene in the publication of the prospectus.

Article 14 of the Directive sets a list of means of publication of the prospectus all of which are valid for all the investors across the EU (in the home member state and in the host member states).

Article 30 of the Regulation sets a specific rule for publication in newspapers, meaning that the specific needs of investors in the host member states have to be taken into account. According to the second paragraph of this Article, the home competent authority shall determine a newspaper whose circulation is deemed appropriate if it is of the opinion that the newspaper chosen by the issuer does not comply with the requirements of paragraph 1 in relation to the circulation of the newspaper. In particular, CESR considers that in such a case, the home competent authority might require the publication of the prospectus (or any translations thereof) in a newspaper of the host member state.

Finally, the home competent authority has to publish on its website either all the prospectuses approved or, at least, the list of prospectus approved. In the latter case, if applicable, it would include a hyperlink to the website of the issuer or of the regulated market where the prospectus has been published. In addition, article 32 of the Regulation requires the home competent authority to mention in the list how the prospectuses have been made available and where they can be obtained.

4. Prospectuses published on the Competent Authority's website - disclaimer

February 2007

Q) In case that the competent authority decides to publish on its website all the prospectuses approved, is it obliged to take measures to avoid targeting residents in Member States or third countries where the offer of securities to the public does not take place, for example insertion of a disclaimer³⁷?

A) CESR considers that in the case described the competent authority is not making a public offer and therefore it does not need to post any disclaimer.

5. Employee share option schemes

July 2006

³⁷ Please note that according to article 29.2 of the Regulation 809/2004 the issuers, financial intermediaries and regulated markets must take measures such as the insertion of the above disclaimer in order to avoid targeting residents in Member States or third countries where the offer of securities to the public does not take place, if the prospectus is made available on their websites.

Q) Are non-transferable options covered by the Prospectus Directive? Even if they are not, would the exercise of those options constitute an offer of the underlying shares?

A) CESR Members agreed that non-transferable options granted to employees do not fall under the Prospectus Directive as the Directive only applies to transferable securities (Article 2.1 a)).

Concerning the exercise of non-transferable options in relation to employee share schemes, at the time of the conversion or exercise there is no public offer within the meaning of Article 2.1 d) of the Prospectus Directive since it is just the execution of a previous offer.

The competent authority of Germany considers it is possible to structure non-transferable options granted to employees in a way that they do not fall under the Prospectus Directive. However, this does not mean that there is no public offer within the meaning of Article 2.1 d) of the Prospectus Directive with respect to the securities granted by these options. It rather depends on the circumstances of the case at what time the public offer of the securities granted by these options starts.

The competent authority of Italy does not agree with the opinion expressed in the first two paragraphs of this item. It considers that such transactions (the offer of non-transferable options and the exercise of such options) should be assessed as part of a single financial operation. When the offer of non-transferable share options is launched there is a simultaneous announcement of an offering (whose execution will be deferred) of the shares which the person entitled will acquire when the options are exercised. Such shares are in fact, securities which are freely transferable and fall within the scope of the Directive. Therefore, where this type of offer reflects the requirements provided for by Article 4.1 e), a document containing the relevant information on the securities offered and the details of the offer must be provided. Otherwise a prospectus should be submitted for the approval of the competent authority.

The competent authority of Poland considers that such transactions (the offer of non-transferable options and the exercise of such options) should be assessed as part of a single financial operation. When the offer of non-transferable share options is launched there is a simultaneous announcement of an offering (whose execution will be deferred) of the shares which the person entitled will acquire when the options are exercised. Therefore, where this type of offer reflects the requirements provided for by Article 4.1 e), a document containing the relevant information on the securities offered and the details of the offer must be provided. Otherwise a prospectus should be submitted for the approval of the competent authority.

6. Free offers

July 2006

Q) Can free offers be considered outside the definition of public offer (for example options granted to employees for no consideration)? If they fall under the definition, could it be considered that they have a total consideration of zero and, therefore, fall outside the scope of the Prospectus Directive? (see Article 1.2 h) offers where the total consideration is less than 2.500.000 EUR).

A) CESR considers that where securities are generally allotted free of charge no prospectus should be required and has sought the views of the Commission Services on the correct legal basis for this conclusion. The views of the Commission Services are included in the following three paragraphs:

In the case of allocations of securities (almost invariably free of charge) where there is no element of choice on the part of the recipient, including no right to repudiate the allocation, there is no "offer of securities to the public" within the meaning of Article 2.1 d) PD. This is because the definition refers to a communication containing sufficient information "to enable an investor to decide to" purchase or subscribe for the securities. Where no decision is made by the recipient of the securities, there is no offer for the purposes of the Directive. Such allocations will therefore fall outside the scope of PD.

Offers of free shares, where the recipient decides whether to accept the offer, are properly regarded as an offer for zero consideration. As such, they would fall within the excluded offers under Article 1.2 h), but are also subject to the exemption for offers of less than 100.000 EUR so no prospectus can be required.

This analysis does not prevent competent authorities from assessing whether an offer presented as an offer of free shares in fact disguises a "hidden" consideration. However, the Commission Services take the view that in most cases where free shares are offered in the context of an employee share scheme, where shares are not offered in lieu of remuneration that the employee would otherwise receive, it would be incorrect to find "hidden" consideration in the employment relationship, for example by claiming that the employees would have a higher salary if an equity participation scheme were not available to them. Such reasoning would be speculative, and the "hidden" consideration difficult to prove, let alone quantify. However, if the shares are expressly offered in the place of quantifiable financial benefits in another form, then it might be appropriate to identify consideration to the value of the benefits that the employee would otherwise have been entitled to receive.

7. Languages of the documents incorporated by reference⁴

July 2006

Q) Is it possible to incorporate by reference the translation of a document that has been approved or filed with the competent authority in a different language? For instance, a Spanish issuer has drawn up its prospectus in English, can it have its annual report translated into English and incorporate it by reference into the prospectus?

A) *The translation of a document may be incorporated by reference as long as it complies with Article 11 and 19 of the Directive.*

8. Order of the information in the prospectus

July 2006

Q) Articles 25 and 26 of the Prospectus Regulation provide that the elements of a prospectus shall be structured in the following order 1) a table of contents, 2) the summary, 3) the risk factors and 4) the other information items included in the schedules and building blocks according to which the prospectus is drawn up. Would be possible to have certain items not following this order ?

For example, issuers are asking whether the responsibility statement could be inserted before the table of contents; whether the section "general description of the programme" could be inserted between the table of contents and the summary or whether disclaimers may be inserted before the table of contents.

Also the question arises in relation to issuers that are using their annual report as registration document. The annual report as approved by the shareholders does not necessarily follow the order prescribed by these Articles.

A) *The order prescribed by Articles 25 and 26 is mandatory. This does not mean that the issuer may not include a cover note which has general information about the issuer before the items prescribed in Articles 25 and 26 are stated in the prospectus.*

9. Prospectus composed of separate documents: duplication of information

2007

February

⁴ Article 28.8 of the Regulation provides that the documents containing information that may be incorporated by reference in a prospectus shall be drawn up following the provisions of article 19 of the Directive (use of languages).

Q) Can cross-references be made between the different documents which compose a prospectus (registration document and securities note), even if these documents are published separately, when there is duplication of information⁵?

A) Theoretically, duplication between information in the securities note and information in the registration document shouldn't happen as the Commissions Regulation clearly separates the information that has to be provided in each of these documents so there are no duplicated items. However, if this duplication occurs, a cross-reference list can be provided.

10. Risk factors section 2006	July
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Q) Is it possible to omit the risk factors section from the prospectus on the basis of Article 23.4 of the Prospectus Regulation?

A) No, the prospectus must always include a description of the risk factors.

11. Notification which third country issuers are required to make under Article 30.1 of the Directive July 2006
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Q) This provision applies to third country issuers who already have securities admitted to trading on a regulated market as at 1st July 2005. Such issuers are required to choose their home Member State in accordance with Article 2.1 m) (iii) of the Prospectus Directive, and to notify the CA of that chosen State by 31st December 2005.

One of the questions that market participants have raised is what are the consequences if a third country issuer who falls within Article 30.1 fails to make the required notification. The most important practical question is how the home MS is then assigned to that issuer. The Directive is entirely silent on this point, both as to the possible penalties for a failure to notify (enforcement being a matter for Member States) and as to what happens when such an issuer subsequently needs to deal with a home CA - for example, to make a filing under Article 10 of the Directive, or when it wishes to offer or admit to trading equity securities or low denomination debt at some point in the future.

A) If the third country issuer that hasn't chosen its competent authority by 31st December 2005 fulfils the following two conditions:

- *it has not made any public offer after the Prospectus Directive entered into force, and*
- *it has its securities admitted to trading only in a regulated market from one Member State, then the competent authority of that Member State will automatically be its home CA.*

If a third country issuer that has not notified its choice of home MS to the competent authority by 31st December has either:

- *securities admitted to trading on regulated markets in more than one MS; or*
- *securities admitted to trading on a regulated market in only one MS, but has made an offer to the public which is capable of determining its home MS between the date when the PD entered into force and 31st December 2005, then that issuer should notify its choice to the chosen CA. That CA will accept and give effect to a notification made after the deadline set out in Article 30.1 of the Directive provided that the choice would have been valid if made in time. This does not affect any penalty to which the issuer might be subject as a result of that late notification. It was also accepted that, in case where an issuer had not notified a choice of home Member State*

⁵ Recital 4 of the Regulation: "Care should be taken that, in those cases where a prospectus is composed of separate documents, duplication of information is avoided".

before 31st December in accordance with Article 30.1 but subsequently made a filing under Article 10.1 with a particular competent authority, that filing would be treated as notification of the choice of home MS.

12. Nearly equivalence of Euro 1.000 (Article 2.1m)(ii) of the Directive)

July 2006

Q) When determining the home CA, the figure 1.000 euros is a key element. CESR Members discussed how the second sentence of Article 2.1m)(ii) of the Directive, in particularly the term "nearly equivalent to EUR 1.000", is applied in practice to cases where the securities are denominated in a currency other than euro.

A) The decision regarding which CA should approve the prospectus on the basis of the denomination of the non equity securities according to Article 2.1 m)(ii) of the Directive should be made at the time of the submission of the draft prospectus. At that time, "nearly equivalent" doesn't mean exactly 1.000 euros.

13. Item 20.1 of Annex I of the Regulation

July 2006

Q1) The 1st paragraph of item 20.1 requires issuers to disclose audited historical financial information covering the latest 3 financial years and the audit report in respect of each year. If historical information has not been restated and the issuer decides to present the historical financial information for the last 3 years in a columnar format and an accountants report is provided for the purposes of the prospectus, would this meet the requirements of the Regulation?

A) The issuer has the right to choose the format of the historical financial information as far as the minimum information required by item 20.1 is included.

Q2) If the statutory financial information has been reviewed by a competent authority and the competent authority has requested additional disclosures or even a restatement of the accounts, how should this additional information be included in the prospectus? Should an audit report be requested on the new information?

A) It is necessary to distinguish between:

- *A restatement made by the issuer according to item 20.1 of the Annex: in this case, CESR's recommendations for the consistent implementation of EC Regulation 809/2004 (CESR/05-054b)) apply.*
- *A restatement made by the issuer following an enforcement procedure: in this case, the restated information should be included along with the original accounts, except if the original accounts are officially corrected. The restated information doesn't necessarily have to be audited as this would depend on the circumstances of the case.*

Q3) How should last paragraph of item 20.1 be applied? Should this statement/ declaration by the auditor be given for all prospectuses even if historical financial information has been incorporated by reference? What is the difference of this statement and that required by item 20.4.1 of Annex I?

A) The audit report may be incorporated by reference. Last paragraph of item 20.1 of Annex I contains a requirement on the historical financial information whilst item 20.4.1 of Annex I requires the issuer to make a statement in the prospectus.

14. Item 20.1 Annex I of the Regulation: historical financial information of issuers that have been operating in its current sphere of economic activity for less than one year

February 2007

Qa) How should the expression "that period" included in the third paragraph of item 20.1 of Annex I be interpreted?

A) According to section 20.1 third paragraph of Annex I, an issuer which has been operating in its current sphere of economic activity for less than one year has to prepare audited historical financial information in accordance with the standards applicable to annual financial statements for the issuer covering that period.

To answer this question CESR analyzed the case of an issuer that started up its operations in 1 November 2005 and prepared audited historical financial information as of 31 December 2005 (as required by national accounting legislation). In June 2006 the issuer produces a prospectus.

Theoretically it would be possible to understand the expression “that period” (which is less than one year) included in the third paragraph of item 20.1 of Annex I in two ways:

- 1. From the date of incorporation of the issuer (or the date where it started its operations in its current sphere of economic activity, if different from the date of incorporation) until the end of the financial year chosen by the issuer according to its national accounting legislation. In the example of question a), the financial year of the issuer is from January to December, so the period referred to in paragraph 3 of item 20.1 would be two months: from 1 November 2005 until 31 December 2005.*
- 2. From the date of incorporation of the issuer (or the date where it started its operations in its current sphere of economic activity, if different from the date of incorporation) until the most practicable date before the publication of the prospectus. This means that the historical financial information should be prepared by the issuer just for the purposes of the prospectus and the period it would cover would not be consistent with the future reports produced according to the accounting legislation. For example, in the case described the period could be from 1 November 2005 until 31 March 2006.*

As regards interim financial information, in the example described above, the issuer would not be obliged by the Prospectus Regulation to include it:

- i) as it would not have elapsed more than 9 months since the end of the last audited financial year until the date of the prospectus or the registration document (item 20.6.2 of Annex I of the Regulation);*
- ii) as the issuer would not have published yet the half-yearly financial report, the draft prospectus being submitted for approval in June (item 20.6.1 of Annex I of the Regulation).*

Concerning quarterly information, the issuer would have published the interim management statement for the first quarter if allowed or required by national legislation (Article 6.2 of the Transparency Directive).

Interpretation 1 has the advantage of keeping consistency between the historical financial information required by the accounting and the prospectus rules whilst interpretation 2 would oblige the issuer to produce financial statements just for the purposes of the prospectus and having a closing date that would not be consistent with future reports or with those from other companies.

CESR considers that when the issuer has already published the historical financial information required by national legislation, this should be normally the only one required to comply with item 20.1, third paragraph, of Annex I of the Prospectus Regulation (interpretation 1 above). CESR considers that inclusion of the historical financial information required by national legislation together with requirements under item 20.9 of Annex I⁶ and the recommendations published for start-up companies by CESR (see paragraphs 135 to 139 of CESR/05-054b) will normally provide investors with the relevant information in the prospectus and enable issuers to comply with

⁶ *Significant change in the issuer’s financial or trading position*

A description of any significant change in the financial or trading position of the group which has occurred since the end of the last financial period for which either the audited financial information or the interim financial information have been published, or provide an appropriate negative statement.

Article 5.1 of the Prospectus Directive. This treatment would be the most appropriate to the example described above.

However, CESR thinks that in exceptional circumstances (such as the absence of interim financial information in the prospectus combined with a significant amount of months elapsed since the end of the last audited financial statements) interpretation 2 would be more appropriate to comply with Article 5.1 of the Prospectus Directive.

Qb) Further, if an issuer being incorporated in January 2006 produces a prospectus in June 2006 (no 1) and a new prospectus in November 2006 (no 2), should audited historical financial information be prepared both for the period from January to the most recent practicable date before publication of prospectus no 1 and for an additional period in connection with prospectus no 2?

A) *In this example the issuer has not yet produced financial statements according to its national accounting legislation. Therefore, the prospectus number 1 should include audited financial statements for the current period (from the date of incorporation to the most recent practicable date before publication of the prospectus) prepared for the purpose of the prospectus according to item 20.1 of Annex I of the Prospectus Regulation (interpretation 2 to the previous question).*

Regarding the second prospectus, CESR considers that the audited historical financial information produced for the first prospectus (together with the half yearly report that the issuer will have published by the end of August) would be sufficient under normal circumstances.

Qc) Does this requirement apply in all cases where the issuing entity has been operating in its current sphere of economic activity for less than one year, i.e. also in cases where the issuer is a newly incorporated holding company inserted over an established business? Or is the requirement applicable only if the business considered as a whole has less than one year of history?

A) *Item 20.1, first paragraph, of the Prospectus Regulation applies where the issuer has been operating in its current sphere of economic activity for one year or more.*

Item 20.1, third paragraph, of the Prospectus Regulation applies where the issuer has been operating in its current sphere of economic activity for less than one year.

The information that has to be provided in these two cases applies to the legal group of the issuer.

Additionally, when the entire business undertaking at the time of the prospectus is not accurately represented in the historical financial information required under item 20.1, then the issuer will have to assess whether pro-forma information or complex financial histories information (once the adopted amendment of the Regulation on this last area becomes effective) is needed.

15. Application of the different schedules of the Regulation

July 2006

Q) Which schedule should be applicable to public offers of securities named “real estate certificates”, being debt securities that give right to the income, proceeds and realisation value of one or more real estate properties that are identified at the time of the public offer? At the moment of the public offer, no mortgage is granted on the real properties in favour of the holders of the real estate certificates, but a mandate to take a mortgage in their favour is, in some cases, given to a third party:

- Can these debt securities be defined as ABS? This question implies an interpretation of the words “are secured by assets”, laid down in Article 2.5 b) of the Commission Regulation: are securities secured by assets if an underlying asset that generates proceeds exists or is it necessary to have a legal guarantee/security on the underlying asset (like a mortgage (or a mandate to take a mortgage?) or a pledge).

- If these debt securities cannot be defined as ABS, would it nevertheless be acceptable to apply the schedules/building blocks applicable to ABS, interpreted in function of, or adapted to, the deviating characteristics of real estate certificates.

A) Where the security to which the prospectus refers is not the same but comparable to the various types of securities mentioned in the table of combinations set out in Annex XVIII of the Commission Regulation, the issuer shall add the relevant information items from another securities note schedule, taking into account the relevant characteristics of the securities being offered (Article 23.2 of the Commission Regulation).

16. Supplement of a prospectus: interim financial information

July 2006

Q) Is the publication of interim financial statements considered as a significant new factor that requires the publication of a supplement in accordance with Article 16 of the Directive?

A) There is no systematic requirement to supplement the prospectus when interim financial statements are produced. This will depend on the circumstances of the case, in particular the relevance of the information included in the interim financial statements (such as any significant deviation in relation to previous financial information) or the type of securities to which the prospectus refers. In case of doubt CESR Members recommend issuers to produce the supplement.

17. Supplement to the prospectus: profit forecast

2007

February

Q) Is the publication of a profit forecast before the final closing of the offer, a significant new factor that requires the publication of a supplement in accordance with Article 16, given that, under the Regulation, the insertion of a profit forecast in a prospectus is optional?

A) Paragraph 44 of CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses n° 809/2004 states:

"CESR considers that there is a presumption that an outstanding forecast made other than in a previous prospectus will be material in the case of shares issues (especially in the context of an IPO). This is not necessarily the presumption in case of non-equity securities".

Although it is up to the issuer to decide when a supplement is needed, according to that statement, there would be a presumption in the case described in the CESR's recommendations that the publication of a profit forecast before the final closing of the offer would constitute material information. Therefore, in such a case a supplement should be prepared including the profit forecast and complying with item 13 of Annex I of the Regulation.

18. Non relevant information in relation to a published prospectus that doesn't trigger the obligation to publish a supplement

July 2006

Q) CESR Members considered how to deal with information that arises after the publication of the prospectus which is not significant in the Prospectus Directive meaning (is not capable of affecting significantly the assessment of the securities and therefore do not requires a supplement), but could be useful for investors.

A) The PD states that the text and the format of the prospectus, and/or the supplements to the prospectus, published or made available to the public, shall at all times be identical to the original version approved by the home CA (Art. 14.6). Moreover, according to Article 16.1, every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities shall be published

through a supplement to the prospectus. There are cases when the information is not significant in the PD meaning, however could be useful for investors. For example, where the prospectus contains mistakes or inaccuracies which are not material.

As prescribed by Article 14, the prospectus approved by the competent authority can not be subsequently modified (apart from the supplement procedure). However, in case the prospectus contains a mistake or inaccuracy that is not material or significant pursuant to Article 16 of the Directive, the issuer should be entitled to make an announcement to the market explaining the mistake or inaccuracy.

The above comments are without prejudice to the obligations imposed to issuers having their securities admitted to trading on a regulated market by other Directives, in particular Directive 2003/6/EC on Market Abuse.

The competent authority of Poland considers that also in case of new factors that refer only to the organisation of the subscription or admission to trading of the securities, that are not material or significant pursuant to Article 16 of the Directive, the issuer is entitled to make an announcement to the market explaining that new factor.

19. Interim financial information included in the prospectus

July 2006

Q) According to Article 20.6.1 of Annex I of Commission Regulation “If the issuer has published quarterly or half yearly financial information since the date of its last audited financial statements, these must be included in the registration document”. In case the issuer has published quarterly and half yearly financial information since the date of its last audited financial statements should the registration document include both quarterly and half yearly financial information or is the latest published interim financial information sufficient?

A) Two different situations can be envisaged:

a) An issuer files a prospectus on July 30th. The issuer has published half-yearly financial information (30 June) and information on the first quarter: In that case the latest interim financial information is sufficient (half-yearly).

b) An issuer files a prospectus on October 30th. The issuer has published information on the third quarter and half-yearly financial information (30 June): In that case the latest interim financial information is not sufficient and the issuer should include in its prospectus both quarterly (Q3) and half-yearly financial information provided that there is no duplication of information.

20. Profit forecasts

July 2006

Q) The combination of paragraph 13.1 of Annex I and paragraph 44 of the CESR's Recommendations for the consistent application of EC Regulation (CESR/05-054b) means that equity issuers are always required to include any outstanding forecast on the record in a prospectus and report on it or disclaim such forecast in accordance with paragraph 13.4 on Annex I.

CESR Members discussed whether there could ever be circumstances where this approach was not followed so that an issuer of shares was not required to reproduce an outstanding forecast in a prospectus or disclaim such forecast (for example, because a Stock Exchange required such forecasts to be published).

A) Paragraphs 43 and 44 of CESR's Recommendations (CESR/05-054b) state that there is a presumption that an outstanding forecast made in another document than in a previous prospectus will be material in the case of share issues.

When the rules applicable to the issuer require the publication of profit forecasts, CESR Members consider that they will be open to discuss the interpretation of paragraphs 43 and 44 of CESR's Recommendations on a case by case basis.

21. Way of calculation of the limit in Article 1.2 h) of the Directive.

July 2006

Q) The limit of 2.500.000 EUR set in Article 1.2 h) of the Directive; should the total consideration of the offer be calculated on EEA-wide basis or country by country basis?

A) The Commission Services consider that the limit should be calculated on EEA-wide basis.

22. Convertible or exchangeable securities.

July 2006

Q) CESR Members discussed the correct interpretation of the exemption under Article 4.2 g) of the Directive. Under this rule it would appear that an issuer who issues a convertible security, which is not admitted to a regulated market, could admit the underlying securities without producing a prospectus for either the convertible or the shares (even if they represent more than 10% of the number of shares of the same class already admitted to trading on the same regulated market). Potentially, this means that any issuer could structure a transaction in such a way that a prospectus would never be required for a further issue of shares simply by the interposition of an artificial convertible security. This seems to sit uncomfortably with Article 4.2 a) and in effect potentially could result in this rule being redundant.

For the case described in the previous paragraph to happen all the following conditions should be met:

- Offer of the convertible/exchangeable securities without a prospectus
- Subsequently not admitted to a regulated market: without prospectus
- Admission of more than 10% of the shares without prospectus

The possibility that more than 10% of the capital of the issuer is admitted without a prospectus is theoretically also accepted by the Directive under other exemptions of Article 4.2 such as shares free of charge (4.2 e) or shares allotted to employees (4.2 f).

A) CESR Members agreed that no restrictions should be applied to Article 4.2 g) in the case described above. However, they intend to monitor the market developments relying on the national regulations and laws in order to avoid any circumvention of the Directive. If an issuer should abuse this exemption, then competent authorities are free to take enforcement actions, were appropriate, or cancel the transactions.

23. Exemption provided for in article 4.2 g)

February 2007

Q) Does the exemption provided for in article 4.2 g) of the Directive⁷ includes cases where non-transferable securities are converted into shares?

A) CESR considers that the exemption in article 4.2 g) of the Directive does not apply to cases of non-transferable securities converted into shares. The Prospectus Directive specifically defines "securities" as "transferable securities" and does not give room to consider that article 4.2 g)

⁷ According to Article 4.2 g) of the PD the obligation to publish a prospectus shall not apply to trading on a regulated market of "shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market."

applies to the conversion of non-transferable securities (especially taking into consideration that this relates to an exemption of publishing a prospectus).

24. Quality of translations of passported prospectuses

February

2007

There is no provision in the Prospectus Directive dealing with the quality of the translation of a prospectus. Therefore, the following practical aspects have to be tackled:

Qa) Should the quality of the translations be left entirely to the responsibility of the issuer?

A) Yes. CESR considers that the person responsible for the prospectus is also responsible for any translation of the approved prospectus.

Qb) Notwithstanding last sentence of Article 17.1 of the Prospectus Directive, would it be possible or desirable that host competent authority scrutinises the quality of the translation of a prospectus to its own language?

A) No.

Qc) If the host authority decided to undertake that task voluntarily, would it mean that the offer cannot proceed until the translation has been accepted or checked by the host competent authority?

A) No, the passport process may not be stopped. However, if the host competent authority finds that a translation is not accurate, it could refer its findings to the competent authority of the home member state as envisaged in article 23 of the Directive (precautionary measures).

CESR recommends issuers to insert in any translation of a prospectus a statement that clarifies that the document is a translation of the approved prospectus made under the sole responsibility of the person responsible for the approved prospectus.

25. Updating of the prospectus

February

2007

Q) What are the updating obligations of a prospectus? Is the issuer entitled to use its prospectus drawn up as a single document to make several offers?

A) CESR discussed the updating of a prospectus different than a base prospectus, distinguishing between a prospectus drawn up as a single document and prospectus consisting of separate documents.

- Article 9.1: a prospectus drawn up as a single document has to be updated through a supplement if any of the situations described under article 16 arises or is noted before the final closing of the offer.*
- Article 9.4: a prospectus consisting of separate documents. The registration document is updated through the securities note published each time the issuer wishes to offer securities.*

The following example illustrates CESR's position. In October 2005 the issuer had a prospectus drawn up as a single document approved in order to make a public offer of securities at that time. Subsequently, in June 2006 it decides to make another offer of securities. For this new offer, the issuer would have to produce a new prospectus in June 2006. This could be done by producing a prospectus to which the information related to the issuer included in the October 2005 prospectus

could be incorporated by reference. Any necessary updates of the information related to the issuer should be included in the prospectus produced in June 2006.

Issuers having an outstanding prospectus published as a single document and wishing to make a subsequent offer without the need to publish a new prospectus have to consider whether the published prospectus contains the information required by the Regulation in relation to the second offer. In particular, if the terms and conditions disclosed in the published prospectus under item 5 of Annex III of the Regulation change for the new offer, this seems to imply that that prospectus may not be used for the second offer as it does not contain the relevant information for investors.

Article 16 of the Directive envisages the update of a prospectus in case of a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public.

According to Article 16, the supplement doesn't seem to be the appropriate way to convey the information on the new offer to investors. The supplement may only be published in respect of an offer whose offering period is open, which is not the case for the second offer whose offering period has not commenced yet.

Notwithstanding, even if the issuer has to publish a new prospectus for the second offer, incorporation by reference of all the information in the previous prospectus (except the details on the offer) will ease this process.

26. Precautionary measures (Article 23 Prospectus Directive)

February 2007

Q) Do the irregularities and breaches referred to in article 23 of the Directive⁸ relate to obligations under the Prospectus Directive (as implemented into the national legislation of the host member state) or do they refer to any other legislation or regulation of the host?

A) CESR agreed that as the Prospectus Directive only harmonises the aspects included in it, the irregularities and breaches mentioned in article 23 refer only to obligations under the Prospectus Directive as transposed into the host national legislation.

27. Offering programmes

February 2007

Q) Is it mandatory for issuers to set in a base prospectus a fixed amount for the programme?

A) CESR considers that it is not mandatory to include the amount of the programme in the base prospectus.

28. Validity of prospectuses under Article 9.3 of the Prospectus Directive

February 2007

Q) Can under Article 9.3 a prospectus be valid for more than 12 months if the securities concerned are issued in a continuous or repeated manner during a period longer than 12 months?

A) Yes the prospectus will be valid until the securities concerned are no longer issued in a continuous or repeated manner. Issuers should bear in mind that in these cases the updating requirements in the Directive apply during the whole period of the validity of the prospectus.

⁸ According to article 23 of the Directive the host competent authority is to refer to the home CA any findings on "irregularities" or "breaches of the obligations attaching to the issuer by reason of the fact that the securities are admitted to trading on a regulated market".

29. Scope of Article 1.2 j) of the Prospectus Directive

February 2007

Q) Do redeemable debt securities - cases where the issuer has the right to redeem the security before maturity⁹ - fall under the scope of Article 1.2 j) of the Directive?

A) CESR considers that Article 1.2 j) of the Prospectus Directive includes offers of redeemable debt securities (as defined above) whose total consideration is less than EUR 50.000.000 issued by credit institutions and whose characteristics comply with other conditions provided by this article.

CESR's view is that the reference to a derivative instrument in the last subparagraph of letter j) of article 1.2 refers only to a derivative component that affects the right of the investor and not to the coverage of the issuer. Therefore, the fact that in this type of securities the issuer enters into a derivative contract in order to cover its risk does not exclude them from the scope of article 1.2 j).

30. Depository Receipts over shares: applicable annex and determination of home Member State

February 2007

Qa) Which is the annex applicable to Depository Receipts over shares?

A) Article 13 of the Prospectus Regulation expressly states that Annex X is applicable for Depository Receipts over shares. For the determination of the applicable annex there is no need to determine whether said Depository Receipts are equity or non-equity securities.

Qb) How should the home Member State be determined in the following situation: a company with its registered office in Germany is issuing shares which will be the underlying of the Depository Receipts and offers them to a Trust. The Trust has its registered office in another Member State than Germany and will issue and offer the Depository Receipts.

A) The rules for determining the Home Member State set in article 2.1 m) of the Prospectus Directive should apply to this situation. For the specific case of Depository Receipts, the following aspects should be taken into account:

- According to recital 12 of the Prospectus Directive, Depository Receipts "fall within the definition of non-equity securities set out in this Directive".
- The "issuer" is the issuer of the Depository Receipts (in the abovementioned case, the trust) and not the issuer of the underlying shares.¹⁰

In the specific case mentioned above, the German competent authority will be the home competent authority if the Depository Receipts have a denomination over 1.000 euros and if the issuer chooses Germany as home Member State provided that a public offer or and admission to trading on a regulated market takes place in Germany (according to Article 2.1 m) (ii)). Otherwise, the home competent authority will be the authority of the Member state where the trust has its registered office. If the competent authorities involved consider that the authority of the Member State where the issuer of the underlying shares is incorporated is the best placed to approve the prospectus, they could agree the transfer of the prospectus to this latter authority according to Article 13.5 of the Prospectus Directive.

31. Total consideration in warrants

February 2007

Q) In cases of offers of warrants (and other derivative securities) how should 'total consideration' be calculated in respect to the EUR 50.000 (article 3.2 c)) and EUR 2.500.000

⁹ In this type of securities the issuer normally enters into a derivative contract in order to cover its risk.

¹⁰ Although the issuer of the underlying shares is the person responsible for the continuing obligations under the Transparency Directive (Article 2.1 d of the TD).

(article 1.2 h)) limits? Should only the consideration for the warrants (if any) be counted, or should the strike price for the underlying securities be added?

A) Total consideration relates only to the consideration for the warrants, and not to the strike price for the underlying securities.

32. Inclusion of a summary in the prospectus on a voluntary basis

February 2007

Q) Although for prospectuses that relate to the admission to trading on a regulated market of non-equity securities having a denomination of at least EUR 50.000 there is no requirement to provide a summary, can an issuer provide such a summary on a voluntary basis? If yes, should such a summary be vetted as a summary in a normal prospectus?

A) The issuer can include voluntary information in the prospectus. This voluntary information must comply with the Prospectus Directive and Regulation and, in particular, it must be vetted in the same way as the rest of the prospectus.

If the issuer wants to name this voluntary information as "summary" (as referred to under the Prospectus Directive), it will have to comply with the specific provisions of the Prospectus Directive and Regulation that deal with the summary.

33. Rights issue: communication by a custodian to its clients in one member state about pre-emption rights in relation to a public offer of new shares taking place in another EEA member state

February 2007

Q) Is the communication made by a custodian to its clients (normally under its contractual duty to inform them) in respect of a rights issue in another EEA member state (where a prospectus has been approved) in itself an "offer of securities to the public" and therefore would not be permitted unless a passport had been obtained in order to make public offers into the EEA member state of the clients of the custodian?

A) The minutes of the 4th Informal Meeting on the Transposition of the Prospectus Directive deal with this issue including the following:

"The group discussed whether it constitutes an offer of securities to the public, within the meaning of the Directive, where a custodian bank informs shareholders in one Member State about pre-emption rights in relation to a public offer of new shares taking place in another Member State (which would almost certainly trigger the obligation to publish a prospectus in this latter Member State). The Commission did not take a definite view on this question but indicated that it might issue further guidance after having consulted its Legal Service. However, the Commission recognised that the Directive should not operate as an instrument to limit cross-border share ownership, or effectively to restrict shareholders' ability to exercise pre-emption rights; but noted that where a prospectus is published in connection with an offer of securities in one Member State, it may be used to offer those securities in any other Member State (subject only to a translation of the summary if that is required by the CA of the host State)."

CESR agrees with the Commission that the Directive should not be interpreted in a way that limits cross-border share ownership or restricts the ability of custodians to comply with their contractual duties.

CESR considers that a communication of a custodian bank informing its clients in one Member State about their pre-emption rights in relation to a public offer of new shares taking place in another Member State or in a third country does not mean that the custodian is making a public offer in the former Member State.



Such a communication would constitute a public offer by the custodian only if it meets the following two conditions:

- It provides to the shareholders with the terms of the offer and the shares that would enable them to decide to subscribe the shares **and**
- It acts on behalf of the offeror or issuer when making such a communication.



ANNEX C

LIST OF RESPONDENTS TO CESR CALL FOR EVIDENCE

ABI
Advisory Committee of the Spanish Securities Regulator
AFG
Association of Corporate Treasurers (ACT)
Association of Foreign Banks in Germany
Association of Stock Exchange Issuers
Assogestioni
Baker&McKenzie
BNP Paribas Group
Borsa italiana
BVI Bundesverband Investment und Asset Management e.V.
CFA Institute
Deutsche Börse AG
DAI-BDI
Deutsches Derivate Institut e.V.
EFAMA
Employee Share Ownership Centre (ESOP)
Euronext
Euronext
European Association of Listed Companies (EALIC)
European Banking Federation (EBF)
Federation Bancaire Francaise (FBF)
Federation of European Securities Exchanges (FESE)
FEE
Ifs ProShare
International Bar Association (IBA)
International Capital Market Association (ICMA)
Irish ProShare Association
Linklaters (LL)
Movement de Entreprises de France (MEDEF)
Netherlands Bankers' Association
Norwegian Financial Services Association
Quoted Companies Alliance (QCA)
Sullivan&Cromwell
VFI Verband der Finanzdienstleistungsinstitute e.V
Warsaw Stock Exchange
White & Case on behalf of the IAFF
Zentraler Kreditausschuss