THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Date: September 2007
Ref. CESR/07-651

Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members

3rd Version - Updated September 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/07-651)** 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 February 2007 (CESR/07-110). After each question an indication of the date of its first publication (or amendment) has been included to ease the identification of the new Q&A.

11-13 avenue de Friedland - 75008 PARIS - FRANCE - Tel.: 33.(0).1.58.36.43.21 - Fax: 33.(0).1.58.36.43.30
Web site: www.cesr.eu

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.

INDEX

43 NEW	24	Use of the term "prospectus"
44 NEW	25	Pro forma financial information: clarification of certain terms used in item 20.2 of Annex I and in Annex II Regulation
45 NEW	27	Pro forma financial information: illustrative examples of the application of the requirements on pro forma
46 NEW	30	Pro forma financial information in cases where several transactions have taken place and only one of them is significant
47 NEW	30	Pro forma financial information included in a prospectus on a voluntary basis

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[1]?

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 Directive[2]?

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.*

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,

[1] 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.

[2] 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.

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 disclaimer[3]?

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 *(Modifies Q5 CESR/07-110 . The only change is the removal of Italy's dissenting view)*	*September 2007*

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.

[3] 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.

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 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. Incorporation by reference[4]: language requirements — *September 2007*

[4] Article 28.2 of Regulation 809/2004: *"The documents containing information that may be incorporated by reference in a prospectus or base prospectus or in the documents composing it shall be drawn up following the provisions of Article 19 of Directive 2003/71/EC.*

(Includes former Q7 CESR/07-110 plus new guidance)

Qa) Is it possible to incorporate by reference information in a language different than the language in which the prospectus is drafted?

Aa) *Yes, the issuer can incorporate a document drawn up in a different language than that of the prospectus provided that the language of the incorporated document complies with the language rules of the Directive.*

For example: the competent authority of Poland approves a prospectus drawn up in English that incorporates by reference the annual financial statements drawn up in Polish. However, if the issuer wishes to passport this prospectus it could do so only to countries where Polish is accepted by the host competent authorities.

Qb) 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?

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

8. Incorporation by reference of information contained in a former base prospectus that is no longer valid

September 2007

Q) Is it possible to incorporate by reference information contained in a former base prospectus that is no longer valid into a new base prospectus?

In this context, issuers have explicitly asked how to proceed if a tranche of an issue of securities which has been issued under a base prospectus no longer valid is being increased.

This issue may be illustrated by the following example:

- A tranche under a base prospectus dated September 2005 is issued in November 2005 and shall be increased in January 2007 (16 months later). There is a new base prospectus as of September 2006 the terms and conditions of which differ slightly from those contained in the base prospectus of September 2005.

- At the date where the increase takes place, the base prospectus of September 2005 is no longer valid. Therefore it is not possible to draw up "new" final terms relating to the Base Prospectus of September 2005, as this base prospectus is no longer valid. Neither is it possible to draw up "new" final terms referring to the base prospectus as of September 2006 as its terms and conditions differ from the terms and conditions contained in the base prospectus as of September 2005.

A) *CESR considers that according to Article 28.1.5 of the Prospectus Regulation an issuer could incorporate by reference information from a prior base prospectus that is no longer valid into the new base prospectus as long as the requirements included in this Article 28 are followed. Therefore, in the above example the issuer could incorporate by reference information from the 2005 base prospectus (i.e. terms and conditions of the issue the issuer wishes to increase) into the new 2006 base prospectus.*

9. Order of the information in the prospectus

September 2007

(Modifies answer to Q8 CESR/07-110 to provide additional clarification)

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 (table of contents, summary, risk factors and the other information items included in the schedules and building blocks). This does not mean that the issuer may not include in addition a brief cover note which has general information about the issuer and the issue before the items prescribed in Articles 25 and 26 are stated in the prospectus. However, the cover note is not a substitute for the summary or the disclosure requirements under the Regulation.*

10. Prospectus composed of separate documents: duplication of information *February 2007*

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 information[5]?

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.

11. Risk factors section *July 2006*

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.

12. Notification which third country issuers are required to make under Article 30.1 Directive *July 2006*

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.

[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".*

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 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.

13. Nearly equivalence of Euro 1.000 (Article 2.1m)(ii) 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 that 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.

14. 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 has 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.*

15. 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 I[6] 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 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.

16. 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,

[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.

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).

17. Supplement to prospectuses: 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.

18. Supplement to prospectuses: profit forecast — *February 2007*

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 nº 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.

19. Supplement to prospectuses: right of withdrawal — *September 2007*

Q) Should the right of withdrawal and the actual period for the right be mentioned in the supplement?

A) Yes, the group considered this would be necessary information for investors according to Article 5 of the PD. [7]

20. 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.

21. 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

[7] For equity securities this mention is expressly required in item 5.1.7 of Annex III that states: *"The prospectus must include an indication of the period during which an application may be withdrawn, provided that investors are allowed to withdraw their subscription".*

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.

22. 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.

23. Way of calculation of limit of 2.500.000 EUR set in Article 1.2 h)[8] Directive *September 2007*
(Includes former Q21 CESR/07-110 plus new guidance)

Qa) Should the total consideration of the offer be calculated on EEA-wide basis or country by country basis?

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

Qb) Should the limit be calculated per type of security or should all types of securities be taken into account as a whole? For example, if a company makes a debt issue in January of EUR 2 million and an equity issue in March of EUR 1 million, should the issuer draw up a prospectus for the second issue?

Ab) *According to the minutes of the 4th Informal meeting on the Transposition of the Prospectus Directive (8 March 2005), "The Article 1.2 h) exclusion applies separately to offers of different kinds of securities within a 12 month period. Accordingly if in the same 12 month period an issuer offers shares with a total consideration of EUR 2.000.000 and debt with a total consideration of EUR 2.000.000 both offers will fall within the exclusion because they must be considered separately".*

CESR agrees with this view and considers that equity securities and debt securities should be considered separately for the calculation of the limit.

Competent authorities have the power to take enforcement actions if they consider that a transaction has been structured to circumvent the provisions of the Directive.

Qc) Should offers during the twelve month period where other exemptions are applicable (for example offers to qualified investors) be included for the calculation of the limit?

[8] The Directive shall not apply to securities included in an offer where the total consideration of the offer is less than EUR 2.500.000, which limit shall be calculated over a period of 12 months.

Ac) No. Only offers where the issuer has previously used the exclusion in Article 1.2 h) should be included for the calculation of the limit.

Qd) Should offers where a prospectus has been registered be included for the calculation of the limit?

Ad) No. Since the information about the previous offers has already been disclosed to the public through the prospectus these offers should not be taken into account for the calculation of the limit.

24. 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.

25. Exemption provided for in Article 4.2 g)	*February 2007*

Q) Does the exemption provided for in Article 4.2 g) of the Directive[9] 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) applies to the conversion of non-transferable securities (especially taking into consideration that this relates to an exemption of publishing a prospectus).

[9] 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."*

26. Exemptions provided for in Articles 4.1 c) and 4.2 d) Directive in case of mergers *September 2007*

Qa) Should the exemption specified in Article 4.1 c) apply to all types of mergers where a public offer is made according to the Prospectus Directive?

Aa) *The Commission stated in the minutes of the 4th Informal meeting on the Transposition of the Prospectus Directive that there is scope for flexibility in interpreting the meaning of merger and invited Member States to consult national experts on company law in this issue. The summary record also states that "where company law requires the provision of the same information in the case of de-merger that is required in the case of a merger, then that would suggest the two kinds of transaction should be treated in the same way for this purpose."*

CESR considers that the exemptions provided in Article 4.1 c) of the PD can be applied to any type of merger or de-merger where a public offer is made according to the Prospectus Directive and about which provision of similar information is required by national legislation.

Qb) Could a document already assessed by a competent authority as equivalent to the prospectus be used by the issuers in other EU jurisdictions as well?

Ab) *The Directive passport regime does not apply to the exemptions in Article 4. Therefore, the evaluation of equivalence will have to be undertaken in each Member State where the exemption is to be used. Nevertheless, the competent authorities, if so wish, might use the work previously carried out by another authority when assessing equivalence. Where the assessment is to be undertaken by several competent authorities at the same time, these authorities are encouraged to cooperate in assessing equivalence.*

27. Exemption for admission to trading provided for in Article 4.2 a) Directive *September 2007*

Qa) How is the exemption provided for in Article 4.2 a) applied in practice?

Aa) *Admissions under this exemption must not exceed 10% of the issuer's shares of the same class already admitted to trading on the same regulated market over a 12 month period.*

To calculate whether the issuer is exceeding this percentage it should include in the numerator the shares that have benefited from this exemption during the previous 12 months. However, it should not include shares admitted without prospectus due to other types of exemptions.

In the denominator the issuer should include the number of shares of the same class already admitted to trading on the same regulated market at the time it is applying for the new admission (therefore, the CA should not calculate for the denominator the 12 month average of the shares admitted to trading).

For example:

- *January 2007: total number of shares admitted to trading is 100. The issuer applies for a further admission of 5 shares (5%). No prospectus is required.*
- *March 2007: total number of shares admitted to trading is 105. The issuer applies for a further admission of 4 shares resulting from an offer addressed to the employees. No prospectus is required because the employees exemption applies (Article 4.2 f) PD).*
- *September 2007: total number of shares admitted to trading is 109. The issuer applies for a further admission of 4 shares. No prospectus is required as it amounts to 8% (9/109).*
- *February 2008: total number of shares admitted to trading is 113. The issuer applies for a further admission of 9 shares. The January 2007 admission of 5 shares is disregarded because since then more than 12 months have elapsed. Also the March 2007 admission is disregarded*

because it was subject to another exemption. However, the September 007 admission does count and therefore the issuer has to add 4 shares to the new application of 9 shares and a prospectus is required as it amounts to 12% (13/113).

Qb) Should the basis for the 10 percent calculation be adjusted for legal measures affecting the number of shares admitted to trading, for example a share split 1 to 2 or a similar reversed split?

Ab) *Yes. For example:*

- *Shares admitted to trading in January are 100.*
- *In January the issuer applies for the admission of 8 additional shares: the exemption applies as the new admission only represents 8%.*
- *In June the company splits its capital exchanging the existing 108 shares for 216 new shares (1 x 2).*
- *In December the issuer applies for the admission of 9 new shares. These new shares plus the previous exempted 8 shares (=17) represent only 8% of the total number of shares (17/216). However, taken into consideration the split that took place in June, the previous 8 shares should be adjusted to 16 (8x2). Therefore to determine whether this further admission in December could benefit from the exemption, the numerator should be 25 adjusted shares (16+9). Consequently 25 shares divided by the number of shares already admitted (216) amount to 12% and therefore the issuer should produce a prospectus in December for the admission of the new 9 shares.*

28. 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?

Aa) *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?

Ab) *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?

Ac) *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.

29. 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.

30. Precautionary measures (Article 23 Directive) *February 2007*

Q) Do the irregularities and breaches referred to in Article 23 of the Directive[10] 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.*

31. Offering programmes *February 2007*

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

[10] 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".

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

32. Validity of prospectuses under Article 9.3 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.

33. Scope of Article 1.2 j) Directive — *February 2007*

Q) Do redeemable debt securities - cases where the issuer has the right to redeem the security before maturity[11] - fall under the scope of Article 1.2 j) of the Directive?

A) CESR considers that Article1.2 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).

34. Depository Receipts over shares: applicable annex and determination of home Member State — *February 2007*

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

Aa) 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.

Ab) 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, Depositary 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.[12]

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

[11] In this type of securities the issuer normally enters into a derivative contract in order to cover its risk.
[12] 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).

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.

35. 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 (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.*

36. 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.

37. 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.*

38. Subscription of securities by residents of a country where the public offer is not taking place *September 2007*

Q) Is it possible for residents in a Member State "A" where a public offer does not take place to subscribe for securities in the Member State "B" where the public offer takes place directly or through their financial intermediaries acting on behalf of these investors[13]?

A) *Yes. There is no need for the offeror to publish a prospectus in Member State "A" as no public offer is made in such a country. But this does not prevent investors in that country to subscribe or buy the securities which are subject of a public offer in another Member State. What is relevant in this case is that a prospectus is published in Member State "B" where the public offer takes place.*

39. Obligation to publish a prospectus for admission of securities to trading on a regulated market (Article 3.3 Directive) *September 2007*

Q) Are the exemptions listed in Article 3.2 of the Directive applicable in case of an admission to trading?

A) *The minutes of the 3rd Informal Meeting on the Transposition of the Prospectus Directive (26 January 2005) deal with this issue including the following:*

"The exemptions listed in Article 3.2 are not applicable in case of an admission to trading (Article 3.3). Accordingly, if an offer of securities is exempt from the requirement to produce a prospectus by virtue of Article 3.2, a prospectus will never the less be required under Article 3.3 if the same securities are admitted to trading (unless an exemption in Article 4.2 applies)".

CESR agrees with the Commission's view expressed above.

40. Information on taxes on the income from the securities withheld at source *September 2007*

[13] There are different situations where investors in country A might find out that a public offer is taking place in country B even when there is no public offer in country A. For example, investors in country A find out about the offer in country B by their own means, without a communication to them in the sense of Article 2.1 (d) of the Directive; the offer in country A is not a public offer because it falls under one of the cases set out in Article 3 of the Directive; investors are informed of the public offer in country B by their financial intermediaries acting under their contractual duty of custodians to inform their clients.

Q) CESR Members discussed the interpretation of the wording *"information on taxes on the income from securities withheld at source"* included certain items of the Regulation (i.e. item 4.11 of Annex III)

A) *CESR considers that the wording "information on taxes on the income from securities withheld at source" refers to information on any amount withheld at source either at the country where the issuer has its registered office or at the countries where the offer takes place. This item seeks to give investors enough information so they know the "net" amount they will receive once the withholding taxes have been deducted .*

This item is not intended to require a full disclosure of the tax regime in each country where the offer takes place.

41. Definition of Home Member State in case of base prospectuses (Article 2.1 m) Directive) *September 2007*

Qa) Who is the Home Member State in cases of a base prospectus where non-equity securities with denomination of less than 1.000 euros are allowed to be issued under that prospectus?

Aa) *Pursuant to Article 2.1m)(i) and (iii) of the Directive, the issuer is not allowed to choose its Home Member State for issues of non-equity securities with denomination of less than 1.000 euros (or a sum nearly equivalent to 1.000 euros in another currency). The Prospectus Directive does not provide for any exemption for the determination of Home Member State in case of base prospectuses. Therefore, if the issuer's intention is to issue non-equity securities with denomination of less than 1.000 euros under the offering programme, it should seek the approval of the base prospectus in the Member State where it has its registered office (or, in case of third country issuers, in the Member State provided in Article 2.1m)(iii)).*

Qb) An issuer, following Article 2.1m)(ii) of the PD, chooses as Home Member State for the approval of its base prospectus a Member State different than that where it has its registered office. Is the base prospectus approved by the competent authority of the chosen Home Member State valid to make offers and/or admissions to trading exclusively in countries different than the Home (i.e. no offer or admission is made in the Home)?

For example: an issuer that has its registered office in Finland, following Article 2.1m)(ii), chooses Cyprus as Home Member State for the approval of its base prospectus. Is the base prospectus approved by Cyprus valid to make offers and/or admissions to trading exclusively in countries different than Cyprus (i.e. no offer or admission is made in Cyprus)?

Ab) *CESR believes that the issuer must have a reasonable expectation that it will make an issue under the programme which will be admitted to trading or offered to the public in the Home Member State that is has chosen (in the example, Cyprus) and it must do so within the time of validity of the prospectus.*

Once a base prospectus has been approved, it is valid for all issues made under it regardless whether such issues will be admitted to trading or offered to the public in the Home Member State.

However, if the issuer fails to do at least one offer or admission to trading in the chosen Home Member State (during the 12 months validity of the prospectus), the Competent Authorities of the Home and Host Member States may take appropriate action according to their national legislation (for example, sanctions under Article 25 of the Directive as transposed into their national legislation).

42. Responsibility statement: selling shareholders *September 2007*

Q) If a transaction is made as a combination of a sale from a shareholder and an issue of new shares, may also the selling shareholder be required to make a responsibility statement in the prospectus in addition to the issuer's responsibility statement?

A) *According to the minutes of the 4th Informal meeting on the Transposition of the Prospectus Directive (8 March 2005) "at least one of the persons mentioned in Article 6.1 must be responsible for the whole prospectus, notwithstanding that there might be different persons responsible separately for particular parts of the prospectus".*

Therefore the Directive only requires that at least one of these persons mentioned in Article 6 is responsible for the whole prospectus. It is up to national legislation to determine whether another person (therefore, more than one person) should be also responsible for the whole or part of the prospectus.

43. Use of the term "prospectus" *September 2007*

Q) May an issuer call a document "Prospectus", even though this document does not fulfill the requirements set out in the Prospectus Directive? For example, if an issuer is exempted from making a prospectus, but decides to create some document with an explanation of the securities to be offered may he call such a document a prospectus?

A) *CESR recommends issuers not to use the term "prospectus" for documents that have not been approved according to the Prospectus Diractive or according to any EU legislation where the term "prospectus" is used. Should issuers use this term, they are encouraged to provide a clear statement in the document indicating that it has not been approved in accordance with the Prospectus Directive. Otherwise the use of the term "prospectus" could be misleading.*

44. Pro forma financial information: clarification of certain terms used in item 20.2 of Annex I and in Annex II Regulation *September 2007*

Qa) CESR Members discussed the interpretation of certain terms used in item 20.2 of Annex I (those highlighted below in bold letters)

20.2. Pro forma financial information (Annex I)
In the case of a significant gross change, a description of how the **transaction** might have affected the assets and liabilities and earnings of the issuer, had the transaction been undertaken at the **commencement of the period being reported on or at the date reported**.

This requirement will **normally** be satisfied by the inclusion of pro forma financial information.

This pro forma financial information is to be presented as set out in Annex II and must include the information indicated therein.

Pro forma financial information must be accompanied by a report prepared by independent accountants or auditors.

Aa) *CESR Members agreed on the following clarifications:*

Transaction: *The reference made to "transaction" under item 20.2 covers both the case of a transaction that has already occurred and the situations, as stated in Article 4a.1 second paragraph of the Regulation[14], where the transaction has not yet taken place but where the issuer has made a significant firm commitment (i.e. a transaction that the issuer has agreed to undertake).*

At the commencement of the period being reported on or at the date reported: *when preparing pro forma information, in order to describe the effect of the transaction, issuers make the assumption the transaction has taken place at a certain date. Item 20.2 refers to two different dates:*

- *The commencement of the period being reported (first day of the period): this is the hypothetical date of the transaction when preparing a pro forma profit and loss account.*
- *The date reported (last day of the period): this is the hypothetical date of the transaction when preparing a pro forma balance sheet. This date is independent from the date of the Prospectus.*

Normally: *paragraph 2 of item 20.2 considers that in most cases the best way to describe the effect of a significant gross change is by providing pro forma information, that will be included in the prospectus following the requirements set in Annex II. However, the wording of the Regulation, when stating that "this requirement will* ***normally*** *be satisfied by the inclusion of pro forma financial information", acknowledges the fact that there might be certain circumstances where the inclusion of pro forma information in the prospectus is not feasible or might not be a fair way to describe the effect of the transaction. In these cases, issuers would still have to comply with the requirement under 20.2 (i.e. by providing a narrative description) but would not have to follow Annex II. This might be the case when pro forma information cannot be prepared because the issuer with reasonable effort cannot gain access to the relevant information because, for example, it cannot obtain financial information relating to another entity (this consideration is likely to be relevant, in particular, in the context of a hostile takeover)[15].*

Qb) CESR Members discussed the interpretation of letter (a) of item 3 of Annex II (those highlighted below in bold letters)

Item 3 of Annex II
Pro forma financial information must normally be presented in columnar format, composed of: (a) **the historical unadjusted information;** (b) the pro forma adjustments; and (c) the resulting pro forma financial information in the final column. The sources of the pro forma financial information have to be stated and, if applicable, the financial statements of the acquired businesses or entities must be included in the prospectus.

Ab) *CESR Members agreed on the following clarification:*

Historical unadjusted information*: when presenting pro forma information in the prospectus, Annex II considers that issuers should normally follow a columnar presentation, being the first column that containing "the historical unadjusted information". CESR considers that the expression "historical unadjusted information" normally refers to the statutory historical financial information that has been prepared by the issuer normally to fulfil company law requirements or to statutory interim financial information prepared by the issuer. In most cases, the first column under the pro forma requirements will represent information extracted from that provided by the issuer under items 20.1 and/or 20.6 of Annex I.*

Qc) CESR Members discussed the interpretation of letters (a) to (c) of item 5 of Annex II (highlighted below)

[14] As inserted by Regulation (EC) Nº 211/2007.
[15] See recital 13 of Regulation (EC) Nº 211/2007.

Item 5 of Annex II

Pro forma information may only be published in respect of:
(a) the current financial period;
(b) the most recently completed financial period; and/or
(c) the most recent interim period for which relevant unadjusted information has been or will be published or is being published in the same document.

Ac) *CESR Members agreed on the following clarifications:*

(a) ***The current financial period:*** *CESR considers that this expression refers to a certain period in the current financial year for which interim information different from statutory interim information is prepared (for example, if an issuer who normally publishes half-yearly interim financial information decides to prepare and publish its financial information for the 4 first months of the year).*

(b) ***The most recently completed financial period:*** *CESR considers that this expression refers to the last full financial year (normally 12 months) and not an interim period.*

(c) ***The most recent interim period for which relevant unadjusted information has been or will be published or is being published in the same document:*** *CESR considers that the reference made to the relevant unadjusted information in this letter c) refers to the statutory interim financial information that will normally be half-yearly financial information (it could also refer to quarterly financial information as long as it has been prepared with the same level of quality and comfort as the half yearly information). This interim information will normally be the one that has already been published by the issuer (for example to comply with the requirements under the Transparency Directive) or is being published in the prospectus where the pro forma information is being provided.*

45. Pro forma financial information: illustrative examples of the application of the requirements on pro forma (special reference to item 5 of Annex II – letters (a) to (c)-) *September 2007*

Q) CESR Members discussed some illustrative examples of the practical of the application pro forma requirements and how item 5 of Annex II could be applied in these cases.

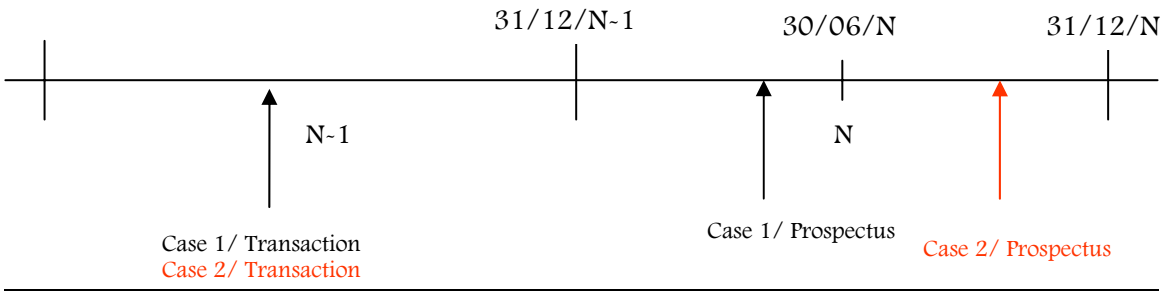
A) *CESR provides below an analysis of 4 typical cases where issuers may be confronted with the need to provide pro forma information in a prospectus and some views on how item 5 of Annex II (letters a to c) could be applied in these cases.*

According to item 2 of Annex II "In order to present pro forma financial information, a balance sheet and profit and loss account, and accompanying explanatory notes, depending on the circumstances may be included". Therefore, in its study CESR has analysed separately the requirement for pro forma balance sheet and for pro forma profit and loss account (P&L). As for the inclusion of "accompanying explanatory notes", CESR considers that the explanatory notes should be included in all cases where any kind of pro forma information (balance sheet and/or profit and loss account) is provided in the prospectus so that investors can understand the pro forma information that is being disclosed.

The following hypotheses are applicable in all cases:
- *There is only one transaction;*
- *The transaction is significant (that is to say that it implies a variation of more than 25% relative to one or more indicators of size);*
- *Only pro forma information, and not historical financial statements in the prospectus, is being considered.*
- *The issuer is obliged to publish half-yearly financial information. In case the issuer publishes, in addition, quarterly financial information (as long as it has been prepared with the same level of quality*

and comfort as the half year information) the conclusions made in the cases below could be applied in a similar way.

Diagram for cases 1 and 2



Case 1*: as illustrated above, case 1 is a case where:*

- *A significant transaction happened in N-1*
- *A prospectus is issued in year N, during first half-year.*

Balance sheet

The transaction is already integrated in the balance sheet of the most recent completed financial statements (as of 31/12/N-1). Therefore, no pro forma information is required on the balance sheet.

Profit and loss account

In this case, as the transaction is not reflected in the P&L for the full N-1 year, most competent authorities require a pro forma profit and loss account for N-1 (12 months) as if the transaction happened on 1 January N-1, according to letter b) of item 5 of Annex II. These competent authorities believe that a P&L should be included in the prospectus if there has been a significant transaction which is not fully (i.e. for the entire twelve months period) reflected in the historical financial information of the most recent financial period. The information according to Annex II compared with the disclosure required under paragraph 70 of IFRS 3 in the case of an acquisition provides additional material information to investors; i.e. notes on pro forma adjustments and an identification of which pro forma adjustments have a continuing impact on the issuer and those which have not.

According to other competent authorities, no pro forma P&L is needed in these circumstances because the real P&L impact of the transaction is already reflected in the financial information provided under Annex I and any information required concerning the theoretical full year P&L contribution of the acquired entity to the group is usually provided elsewhere in the prospectus, for example because the applicable GAAPs already request information on this impact of the transaction (i.e. paragraph 70 of IFRS 3 in the case of an acquisition, or paragraphs 33-36 of IFRS 5 in the case of a carve out).

All members agree that letters a) and c) of item 5 of Annex II are not applicable in this case.

Case 2*: as illustrated above, case 2 is a case where:*

- *A significant transaction happened in N-1*
- *A prospectus is issued in N, during second half-year.*
- *The prospectus contains half-yearly financial statements (as of 30/06/N)*

Balance sheet

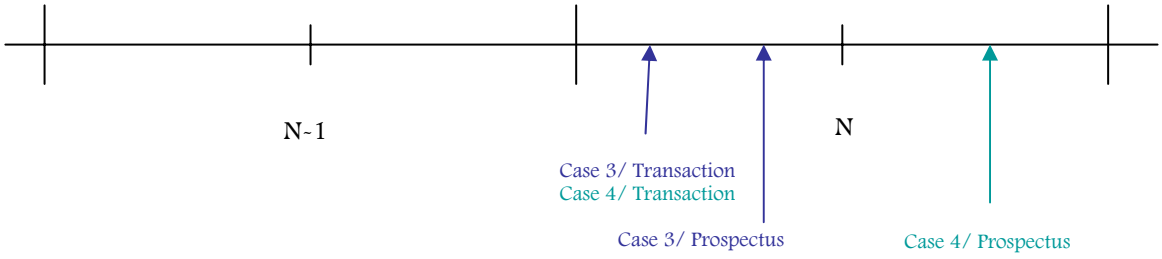
As in case 1, the transaction is already reflected in the balance sheet both of the annual information (as of 31/12/N-1) and of the half-yearly information (as of 30/06/N). Therefore, no pro forma information is required on the balance sheet.

Profit and loss account
In this case, as the transaction is not reflected in the P&L for the full N-1 year, most competent authorities require a pro forma profit and loss account for N-1 (12 months) as if the transaction happened on 1 January N-1, according to letter b) of item 5 of Annex II. The reasoning of these competent authorities is the same as the reasoning in Case 1.

According to other members, no pro forma information is necessary here either largely for the same reason as Case 1: the information is usually provided elsewhere in the prospectus; The true P&L effect of the transaction is already reflected in the N-1 accounts and fully reflected in the interim financial statements (here the N half-yearly financial statements) and applicable GAAPs generally request information on the impact of the transaction (i.e. paragraph 70 of IFRS 3).

All members agree that letters a) and c) of item 5 of Annex II are not applicable in this case.

Diagram for cases 3 and 4



Case 3*: as illustrated above, case 3 is a case where:*

- *a significant transaction happened in N (first half year)*
- *a prospectus is issued in N, during first half-year.*

Balance sheet
In this case, most competent authorities, require a pro forma balance sheet as if the transaction had happened on 31/12/N-1, according to letter b) of item 5 of Annex II.

All members agree that letter c) of item 5 of Annex II is not applicable in this case.

Profit and loss account
In this case, most competent authorities, require a pro forma profit and loss for N-1 (12 months) as if the transaction happened on 1 January N-1 according to letter b) of item 5 of Annex II.

In addition to the above, some members consider that, according to letter a) of item 5, the competent authority might assess on a case by case basis the need to provide pro forma P&L for the current financial period, conditional upon the available information. The reasoning of these competent authorities is the same as the reasoning in Case 1.

All members agree that letter c) of item 5 of Annex II is not applicable in this case.

Case 4*: Same situation as in case 3 but the prospectus is issued in the second half-year in N.*

Balance sheet

The transaction is already reflected in the balance sheet of the half-year information (as of 30/06/N). Therefore, no pro forma information is required on the balance sheet.

Profit and loss account

Regarding the pro forma P&L there are divergent practices among CESR members:

- *Some members do not require a pro forma P&L, for reasons analogous to Case 1 or 2 in that the necessary P&L effect of the transaction is already shown in the interim financial information.*
- *Other members require a pro forma P&L for N-1 (12 months) as if the transaction happened on 1 January N-1 (according to item 5 b)) **OR** a pro forma P&L for N half-yearly financial statements as if the transaction happened on 1 January N (according to item 5 c)).*
- *Finally, other members require a pro forma P&L for N-1 (12 months) as if the transaction happened on 1 January N-1 (according to item 5 b)) **AND** a pro forma P&L for N half-yearly financial statements as if the transaction happened on 1 January N (according to item 5 c)). The reasoning of these competent authorities is broadly the same reasoning as in Case 1.*

In addition to the above, some members consider that, according to letter a) of item 5, the competent authority might assess on a case by case basis the need to provide pro forma P&L for the current financial period, conditional upon the available information.

46. Pro forma financial information in cases where several transactions have taken place and only one of them is significant *September 2007*

Q) What kind of pro forma information should normally be provided in cases where there are several transactions and only one of them is significant (variation of more than 25%)?

***A)** If there are several transactions and only one of them is significant (i.e. implies a variation of more than 25% relative to one or more indicators of size), then generally, the pro forma financial information shall cover only the significant transaction and, therefore, there is no need to aggregate. Nevertheless, the situation should be assessed on a case by case basis to ensure that the information provided is not misleading.*

47. Pro forma financial information included in a prospectus on a voluntary basis *September 2007*

Q) Can pro forma information be included in a prospectus on a voluntary basis?

***A)** Yes. The issuer can voluntarily decide to include pro forma information in a prospectus. However, if pro forma information is provided on a voluntary basis, then this information needs to be prepared according to Annex II (including an auditor's opinion). The fact that the issuer voluntarily decides to provide pro forma information in a prospectus cannot imply that it is possible for this information to be provided with less care than when requested on a mandatory basis. As CESR clarified in its advice to the EC (paragraphs 38 to 40 of document CESR/03-208) pro forma information, if not prepared with due care, might confuse or even mislead investors. Therefore, for pro forma information, whether mandatory or voluntary, to be useful for investors it should be prepared and included in the prospectus following the requirements set in Annex II.*