



**COMMITTEE OF EUROPEAN SECURITIES REGULATORS**  
**THE CHAIRMAN**

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rue de la Loi, 200  
1040 Bruxelles

Date: 24<sup>th</sup> March 2009  
Ref.: CESR/09-240

**RE:** CESR's comments on the European Commission's background and consultation document on the review of Directive 2003/71/EC

Dear David,

CESR has been very active since the entry into force of the Prospectus Directive seeking to contribute in its level 3 capacity to promoting a harmonised and common approach in the area of prospectuses amongst securities supervisors.

In June 2007, following extensive consultation with market participants, CESR published its "Report on the supervisory functioning of the Prospectus Directive and Regulation (CESR/07-225)" which provided an analysis of how the European Prospectus regime was functioning after 2 years of application.

In addition, CESR has published common positions on questions raised by the market on prospectuses through its document "Questions and Answers on Prospectuses" (CESR/09-103) which is continuously updated.

CESR has worked together further with the Commission in providing data on prospectuses and responses from its members aimed at facilitating the impact assessment that the Commission has to prepare for its review of the Prospectus Directive.

CESR now welcomes the Commission's proposal to review the Prospectus Directive and the opportunity it represents to comment on the proposals presented.

CESR has considered all the issues included in the Commission's consultation paper and the accompanying background document in detail. However on the basis that there is not necessarily unanimity amongst its members on all of the issues presented, CESR has decided in its response to restrict itself only to those issues where CESR members are in common agreement. It has taken this decision on the basis that individual CESR members are not precluded from providing their own separate, individual responses to the Commission's consultation and that many have indicated their desire to do so.

CESR remains at the Commission's disposal to provide further clarification on the responses provided upon request.

Yours sincerely,

Eddy Wymeersch



## **CESR's comments to the European Commission's background and consultation document on the review of Directive 2003/71/EC**

CESR welcomes the Commission's proposal to review the Prospectus Directive and the opportunity to provide its comments on the proposals presented.

CESR has considered all the issues included in the Commission's consultation paper and the accompanying background document in detail. However CESR has decided in its response to restrict itself only to those issues where CESR members are in common agreement on the basis that individual CESR members are not precluded from providing their own separate, individual responses to the Commission's consultation.

CESR remains at the Commission's disposal to provide further clarification on the responses below.

### **Article 2 (1) (e) – Definition of Qualified Investors**

CESR welcomes the proposal of the European Commission (EC) to amend article 2(1) to include professional clients and eligible counterparties in the definition of qualified investors.

The Prospectus Directive (PD) and the Markets in Financial Instruments Directive (MiFID) pursue different objectives, one being product driven and the other services driven. However there is no rationale for maintaining two separate definitions.

In fact, although the definition of professional clients is wider than the definition of qualified investors, the differences between the two definitions are limited. More precisely, the following entities are *per se* professional clients but are not considered qualified investors under the PD:

- public bodies that manage public debts;
- other institutional investors whose main activity is to invest in financial instruments including entities dedicated to the securitisation of assets or other financing transactions;
- large companies which meet certain criteria.

Including these investors in the scope of article 2(1) of the PD does not raise any issue since a professional client is, by definition, "*a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs.*"

As regards eligible counterparties, based on the analysis carried out by the ESME Group, CESR considers that aligning the definitions does not create any gap or risk for investors.

However, CESR would like to draw the Commission's attention to the following elements:

- Annex II of Directive 2004/39/EC paragraph (1) does not require –as the current PD does- that **legal entities are** authorized or regulated to operate in the financial markets. Annex II of Directive 2004/39 paragraph 1 (1) merely states "Entities which are required to be authorize of regulated".
- Annex II paragraph (1) (2) defines what large undertakings are. However this definition appears to be in conflict with article 2(f) PD and should therefore be revised and the criteria harmonised.
- Furthermore, CESR suggests inserting in the new article 2 (1) (e) (ii) after "professional clients as defined in" and before "Annex II of Directive 2004/39/EC" the following specification: "*Section II*".

In addition, CESR would suggest that the EC reviews the use and functioning across the EU of the system of a central register of qualified investors mentioned in article 2(3) PD. If the usefulness of the register cannot be concluded from the outcome of this analysis, CESR would recommend that the EC considers the possibility of eliminating the need for a register of qualified investors.



### **Article 3 – Exempt Offers**

CESR is of the view that deleting the last indent in article 3 (2) PD, as proposed by the EC, would not clarify the responsibilities for publishing and updating the prospectus in a retail cascade scenario. Moreover, CESR considers that the deletion of the last indent of Art. 3 (2) PD could be considered to create a regulatory gap in so far as, for instance, it would then be possible to circumvent the obligation to publish a prospectus by approaching fewer than 100 persons at each stage of the cascade, even though ultimately a large number of people might subscribe for the securities concerned.

*CESR has considered the issue of retail cascade offers in the context of the current legislation in its Q&A on prospectuses (Q56 CESR/09-103). Although the analysis included in the Q&A is provided within the context of the current regulatory framework, CESR still considers that for those cases where financial intermediaries act in association with the issuer, those financial intermediaries should be able to rely on the issuer's prospectus for their own offers, as long as the prospectus is valid and updated. The EC might want to consider the possibility of clarifying this point in legislation.*

CESR would also suggest that the EC considers what impact the other FSAP Directives (i.e. the Transparency Directive, Market Abuse Directive and MiFID) could have on the placement of securities through a retail cascade offer.

### **Article 10 –Information**

CESR supports the deletion of article 10. In addition, all the references included in the Prospectus Directive to article 10 (for example articles 9.4 and 11.1) should be revised.

### **Article 16 –Supplement to the Prospectus**

CESR supports harmonization of the minimum time frame for the exercise of withdrawal rights and most CESR members consider that the 2 day period proposed by the EC is adequate.

However, CESR considers that the wording proposed does not achieve this objective.

### **Disclosure obligations-summary**

CESR agrees with the EC proposal to explore the possibility of having under the different directives, a document with similar information requirements (i.e. summary) to give to retail investors a fully understandable and useful representation of the products' main features. This would ensure equivalence of protection for retail investors under these directives.