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Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members
8th Updated Version - February 2009

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/09-103)** 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 previous document CESR published in December 2008 (CESR/08-1022). 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.

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). In particular, CESR would welcome feedback from market participants on those issues identified in the document as areas were CESR intends to continue working towards a common understanding among its members. The pace of the future publications will depend on the amount of new questions identified and how long it takes to analyse the issues raised and to develop common positions.

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1. Information from issuers to host competent authorities *February 2009*

(Modifies Q1 CESR/08-1022. The only change is the deletion of Germany's dissenting view)

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.*

2. Notice *February 2009*

(Modifies Q2 CESR/08-1022. The only change is the deletion of Germany's dissenting view)

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

3. Publication of a prospectus in the host Member States *February 2007*

[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.

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 *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.

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

[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.

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*

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.

[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.*

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*

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.

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.

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[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".*

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. Interaction between item 20.1 of Annex I Regulation and IAS 8 *December 2007*

Q) When an issuer changes an accounting policy in its financial statements (i.e. upon initial application of a new Standard or Interpretation issued by IASB or IFRIC) and following IAS 8, it applies the new policy to comparative information for prior periods, should this mean that the issuer has to restate in a prospectus the comparative figures affected by the retrospective application of the new accounting policy?

A) *The following example illustrates this situation:*

In 2008, an issuer prepares a prospectus in which it includes 3 years of complete sets of financial statements for 2005, 2006 and 2007, pursuant to item 20.1 of Annex I. For all 3 years, the sets of financial statements were prepared in accordance with IFRS.
In 2007, the issuer changed one of its accounting policies to start applying a new IFRS, according to IAS 8.

According to IAS 8, the issuer should present in its 2007 financial statements:
- *2007 figures according to the new standard*
- *2006 comparative figures restated according to the new standard.*

The 2006 comparative restated figures presented in 2007 financial statements are not separately re-audited by the statutory auditor whose audit opinion only refers to the set of financial statements for 2007 figures. On the 2006 restated figures, the auditor will normally only verify that the restatement is correct.

The question being analysed is how many years of financial statements presented in the prospectus is the issuer supposed to restate pursuant to IAS 8?
CESR considers that no additional requirements of IAS 8 should be applicable in a prospectus. Indeed, IAS 8 does not supersede the prospectus regulation. Thus, IAS 8 applies solely to the set of financial statements for the year 2007 (including the comparative information included therein) and no additional requirement of IAS 8 should be applicable to the other sets of financial statements (years 2006 and 2005) included in a prospectus in accordance with Annex I item 20.1.

Therefore, in the prospectus, according to Annex I item 20.1, the issuer should present the following financial statements:
- *2007 audited financial statements (including 2006 comparative figures restated according to the new standard);*
- *2006 audited financial statements;*
- *2005 audited financial statements.*

For 2006 and 2005 audited financial statements, there is no restatement. These financial statements are the financial statements which were approved by the Annual General Meeting and published.

16. 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.*

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[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.

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.

17. Item 20.1 of Annex I Prospectus Regulation: interpretation of "such shorter period that the issuer has been in operation" *May 2008*

Q) CESR members discussed the interpretation of the expression "such shorter period that the issuer has been in operation" in item 20.1 of Annex I (and related items of other annexes).

A) *The following example illustrates the question:*
- A company has been incorporated in February 2006 and is in operation since June 2006.
- Applicable Annex would be Annex I, so the company would need to provide audited historical financial information covering the latest 3 financial years (or such shorter period that the issuer has been in operation).
- The company presents audited financial information for the short period February-December 2006 and un-audited interim financial information for the first half-year period 2007.
-The company has submitted a prospectus for approval at the end January 2008.

CESR members agreed on the following clarification:

As the company has no audited historical financial information for a whole financial year it would need to cover the "shorter period that the issuer has been in operation". The audited financial information prepared by the issuer for the short period February-December 2006 is considered sufficient.

In addition, interim financial information would be provided in accordance with item 20.6 of Annex I (and related items of other annexes).

18. Application of the different schedules of the Regulation *July 2006*

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

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

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

A) *Where the security to which the prospectus refers is not the same but comparable to the various types of securities mentioned in the table of combinations set out in Annex XVIII of the Commission Regulation, the*

issuer shall add the relevant information items from another securities note schedule, taking into account the relevant characteristics of the securities being offered (Article 23.2 of the Commission Regulation).

19. 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.*

20. 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.

21.Supplement to prospectuses: right of withdrawal *May 2008*

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

A) *Yes, CESR considers that provided that investors are allowed to withdraw their subscription in accordance with Article 16 of the PD[7], this would be necessary information for investors according to Article 5 of the PD. [8]*

22. Supplement: Period for filing a supplement after a significant new factor has occurred *December 2008*

[7] The May 2008 amendment clarifies that the right of withdrawal should be mentioned in the supplement only when investors are allowed to withdraw their subscription in accordance with Article 16 of the PD. Base prospectuses, for example, may sometimes be supplemented even where there is no offer pending and therefore no acceptances to be withdrawn.

[8] 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".

Q) Within what timeframe during the offer period, after a significant new factor has occurred or material mistake or inaccuracy is discovered, shall an issuer draw up a supplement within the meaning of Article 16 of the Directive and file it with the competent authority for approval?

A) The issuer should draw up and file with the competent authority a supplement as soon as practicable after a significant new factor occurs or a material mistake or inaccuracy is discovered.

23. 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.

24. Interim financial information included in the prospectus *July 2006*

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

A) Two different situations can be envisaged:

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

b) An issuer files a prospectus on October 30th. The issuer has published information on the third quarter and half-yearly financial information (30 June): In that case the latest interim financial information is not

sufficient and the issuer should include in its prospectus both quarterly (Q3) and half-yearly financial information provided that there is no duplication of information.

25. 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.

26. Way of calculation of limit of 2.500.000 EUR set in Article 1.2 h)[9] Directive *September 2007*

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?

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?

[9] 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.

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.

27. 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.

28. Convertible bond falling in the definition of equity security	*December 2008*

Q) Does it influence the assessment of "convertible bonds" as "equity securities" if the conversion right is solely at the investor's discretion?

A) No. For the assessment of whether "convertible bonds" fall within the definition of "equity securities" under the Prospectus Directive it does not matter whether the conversion is solely at the investor's discretion or not.

The key element to distinguish "equity" convertible bonds from "non-equity" convertible bonds is to see if the issuer of the convertible bond is the issuer of the underlying shares or an entity belonging to the group of the said issuer ("equity" convertible bond) or not ("non-equity" convertible bond).

Although some confusion may arise due to the wording included in recital 12 PD ("(…) convertible notes, e.g. securities convertible at the option of the investor, fall within the definition of non-equity securities set out in this Directive) the definition under Article 2.1b for equity securities clearly includes bonds which give the investor the right to acquire shares as a consequence of their conversion by the investor. Recital 12 should be read as referring to convertible securities which fall outside the scope of the definition, i. e. which are not issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer.

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

Q) Does the exemption provided for in Article 4.2 g) of the Directive[10] 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).*

30. 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.*

31. 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.

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[10] 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."*

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.*

32. Exemptions from the obligation to publish a prospectus in Article 4 Directive as standalone exemptions *December 2007*

Q) An issuer issues new shares as a result of a merger. The new shares that the issuer wishes to admit to trading in a regulated market represent less than 10% of its total number of shares. Does the issuer need to make available the equivalent document refer to in Article 4.2 d) in order to avoid the obligation to publish a prospectus?

A) *No because exemption of Article 4.2 a) applies. All the exemptions in Article 4 are standalone and therefore if one of them applies there is no requirement to publish a prospectus.*

33. 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.

34. 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.

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

Q) Do the irregularities and breaches referred to in Article 23 of the Directive[11] 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.*

36. Offering programmes *February 2007*

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

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

37. 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.*

38. 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[12] - 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).

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

[11] 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".

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

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.[13]

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

40. 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.*

41. 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.*

[13] 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).

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.

42. 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.*

43. 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[14]?

[14] 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

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.

44. 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.

45. Information on taxes on the income from the securities withheld at source [15] *May 2008*

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, that is, by the issuer or by any agent appointed by it for the purpose of making payment on the securities[16]*. This item seeks to give investors enough information to know the "net" amount that they will receive when payment is collected from the issuer or its agent in accordance with the terms of the securities.*

In addition a statement in the tax section of the prospectus inviting investors to seek appropriate advice on their specific situation is strongly recommended.

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

46. 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

[15] CESR agreed with market participants' comments that the answer to this question, as drafted in question 42 CESR/07-852, should be clarified to make clearer that the disclosures required by item 4.11 concerns only taxes withheld by the issuer and by any agent appointed for making payment on the securities.

[16] I.e. when acting in its capacity as paying agent and not in other functions (e.g. as depositary or as custodian).

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).

47. 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.

48. Guarantor's responsibility for the content of a prospectus — *August 2008*

Q) Is the guarantor obliged to assume responsibility for the content of a prospectus or for certain parts if it?

A) *As already stated in the minutes of the 4th Informal meeting on the Transposition of the Prospectus Directive and in Question 45 of the CESR Q&A, at least one of the persons mentioned in Article 6.1 of the Prospectus Directive (the issuer, the offeror, the person asking for the admission to trading on a regulated market or the guarantor) 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, for instance also the guarantor) should be also responsible for the whole or part of the prospectus.*

Therefore, there is no provision in the Prospectus Regulation or the Prospectus Directive that would specifically require the guarantor to assume and declare responsibility for the contents of a prospectus or for certain parts of it. Nevertheless, subject to Article 6.1 of the Prospectus Directive, the guarantor is allowed to accept responsibility for the whole prospectus.

49. 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.*

50. 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*[17]*, 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.*

[17] As inserted by Regulation (EC) Nº 211/2007.

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)*[18].

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)

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*

[18] See recital 13 of Regulation (EC) Nº 211/2007.

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.*

51. 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.*

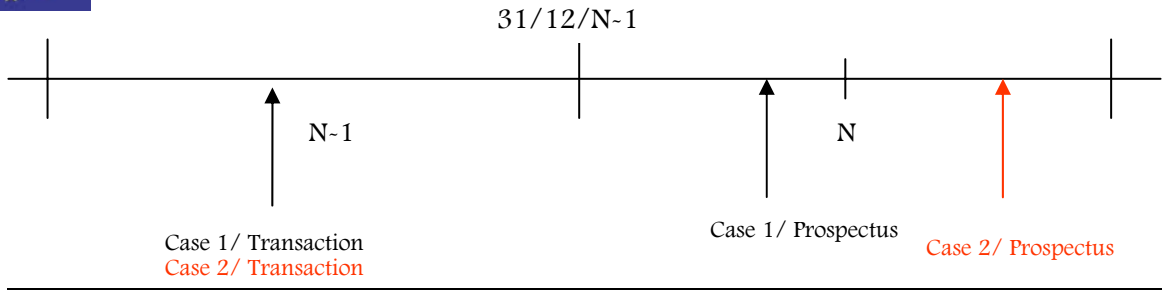
According to item 2 of Annex II "In order to present pro forma financial information, a balance sheet and profit and loss account, and accompanying explanatory notes, depending on the circumstances may be included". Therefore, in its study CESR has analysed separately the requirement for pro forma balance 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

30/06/N 31/12/N



***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.

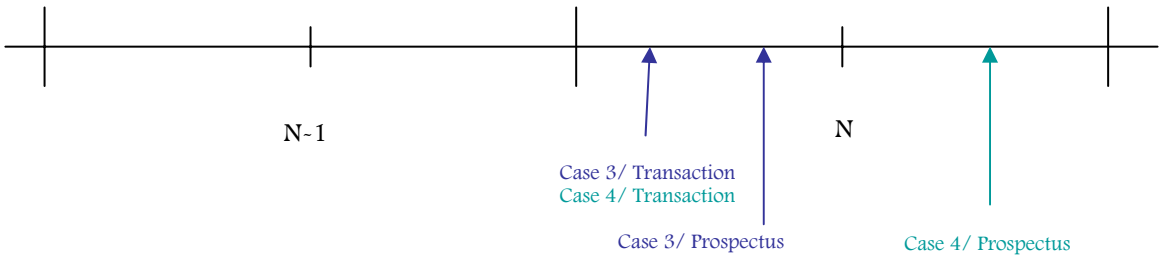
Profit and loss account

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.

52. Pro forma financial information in cases where several transactions have taken place *December 2007*

Qa) 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%)?

Aa) *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.*

Qb) What type of pro forma information should be provided in cases where an issuer undergoes several transactions none of which individually qualifies as significant but which when taken together could be considered to qualify as significant?

Ab) *If an issuer undergoes several transactions none of which individually qualifies as significant (i.e. implies a variation of more than 25% to one or more indicators of size) but which when taken together could be considered to qualify as significant, in general, CESR believes no pro forma information should be required. Nevertheless, the situation should be assessed on a case by case basis to ensure that the information provided is not misleading.*

53. Pro forma financial information: cases where issuers have already published pro forma financial information in a previous prospectus *December 2007*

Q) If an issuer has already published pro forma financial statements in a previous prospectus, which financial information must be taken into account in order to evaluate if there is a "significant gross change" (25%) in case of a new transaction?

In this case, the issuer has not published any other financial statements (annual or interim) between the two transactions.

A) *The following example illustrates this situation:*

- *Historical financial information: 100 (basis)*
- *Transaction No1: 40 => as transaction No1 amounts to 40% (40/100), pro forma information No1 (reflecting transaction 1) has to be included in prospectus No1 (pursuant to Annex II of Regulation 809/2004). After transaction No1 the "new group" is 140.*
- *Transaction No2: 30 => should pro forma information be provided in prospectus No2? If yes, what pro forma information?*

There are 2 options for prospectus No2:

- *Option 1: No pro forma information has to be included because transaction No2 is not significant compared to the "new group" (30/140=21%).*
- *Option 2: Pro forma information has to be included because transaction No2 is significant compared to the historical financial information (30/100=30%).*

The inclusion of pro forma information (option 2) seems to be the more sensible option in this case. According to item 3 of Annex II, the starting point for the presentation of pro forma information in a prospectus is the historical unadjusted information (which in this case is the historical financial information -100-). Therefore it would make sense to take this data and not the "new group" as the basis for the calculation of the "significance" of transaction No2 since this historical unadjusted information is the information that according to item 3 a) of Annex II has to be included in the first column for the presentation of the pro forma information.

In this case, pro forma information shall reflect transaction No1 and transaction No2. Therefore, the pro forma adjustments to be included in the second column according to item 3 b) of Annex II should be those related to both transactions and not only to transaction No2.

54. Pro forma financial information included in a prospectus on a voluntary basis *December 2008*
(Modifies Q52 CESR/08-602. The only change is the inclusion of Luxembourg and Ireland's dissenting view)

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.*

The competent authorities of the United Kingdom, Luxembourg and Ireland dissent from the view that a report by an accountant or auditor should be required by the regulator in instances where issuers provide pro forma financial information on a voluntary basis in documents relating to non-equity securities on the basis that the requirement to present such a report arises specifically and only out of sub-paragraph 4 of paragraph 20.2 of Annex I to the Prospectus Regulation. Such a requirement can therefore only be applied to information in equity documents.

55. Auditor's statement in Pro Forma Financial information (section 7 Annex II Prospectus Regulation) *August 2008*

Q1) Is the auditor's statement on pro forma information required to include the exact wording as set out in section 7 of Annex II?

A1) *CESR considers that the auditor's statement on pro forma information is required to include the exact wording as set out in section 7 of Annex II. No other wording of the statement is accepted.*

Q2) May qualifications and/or paragraphs on emphasis of matter be included in the auditor's statement, without jeopardizing the obligation to render a statement in accordance with section 7 of Annex II?

A2) *CESR considers that qualifications to the auditor's statement may not be included as they would undermine the statement given by the auditor.*

In respect of emphasis of matter paragraphs, CESR would recommend not allowing their inclusion in the auditor's statement because it feels that emphasis of matter paragraphs in this context will only serve to reduce the clarity of the statement in respect of the pro forma information provided by the auditors.

CESR feels that an emphasis of matter paragraph cannot add substantial information from the point of view of investor's protection because such information can neither add to the information already provided in the basis of preparation of the pro forma information nor add more information regarding the consistent application of the accounting policies of the issuer without becoming a qualification. The conclusion of the auditor's report, as required by section 7 of annex II, should not allow the possibility of investors being left in doubt as to the conclusion the auditor has reached on these matters.

56. Retail cascade offers	December 2007

Q) CESR members discussed the main aspects arising in the context of a "retail cascade" distribution.

A) *CESR provides below an analysis of retail cascade offers:*

Introduction

The objectives of the Prospectus Directive – investor protection and lowering the cost of capital- are the key priorities for CESR in deciding the best way forward for this issue. It must also be borne in mind that when the Prospectus Directive was introduced, other pertinent FSAP legislations such as MiFID and Transparency Directive were not in place yet and the full import of other key legislations such as Market Abuse Directive had not been realised. It cannot therefore be in the interest of furthering the objectives of the Prospectus Directive to always require a prospectus to be drawn up each time an offer/sub-offer is made within the 12 month validity period of the prospectus in a retail cascade context when these other directives provide sufficient regulatory protection. CESR considers that these FSAP directives must be viewed as a whole.

Article 3.2 of the Prospectus Directive must therefore be seen in this light. CESR considers that the rationale for this article is to ensure that when a non-exempt public offer takes place, an offeror is not able to circumvent the publication of a prospectus by relying on an earlier exemption. It was not intended to impose further costs on issuers/intermediaries which would translate into an increase in the cost of raising capital by requiring several prospectuses to be drawn up in respect of the same securities within a short period of time. Such an interpretation would make the raising of capital prohibitive for issuers.

CESR conducted a fact-finding exercise and found that the current practice in most jurisdictions would appear to be that a prospectus drawn up by an issuer may be used for offers by intermediaries who are acting in association with the issuer. On the other hand, those intermediaries who are not acting in association with the issuer may not use the prospectus and they would be required to draw up a separate prospectus.

CESR acknowledges that the solution described in the following paragraphs for retail cascade is a temporary one based on the current provisions of the Directive and would consider whether a recommendation based on a more robust regulatory solution may be made to the EU Commission for the amendment of the Regulation.

Underlying principle

CESR members consider that the key principle in answering the following questions is the distinction between intermediaries who are acting in association with the issuer and those that are not. Therefore, CESR members encourage issuers to clearly disclose in the prospectus (or supplement) or through public announcements who the intermediaries acting in association with them are. In addition, CESR members consider that it is good practice to insert a bold notice in a suitable place in the prospectus informing investors that they should verify with the offeror whether or not the offeror is acting in association with the issuer.

What is a retail cascade?

A retail cascade is the term used to describe the distribution mechanism of debt securities to retail investors through a distribution network of intermediaries. Offers from the issuer to the intermediaries are usually exempt offers by virtue of Article 3.2 of the Directive. The final placement of the securities to the retail investors are however usually not exempt from the obligation to produce a prospectus.

Market participants have asked CESR to clarify how the Directive, in particular the definition of a public offer and its interaction with last paragraph of Article 3.2 applies where a retail cascade is being used. CESR has identified the three key issues that should be considered in such a case:

A. Who is responsible[19] for drawing the prospectus?

According to the current provisions of the Directive, anyone who makes a public offer is responsible for drawing up the prospectus (Article 3.1Directive). Where there is an offer consisting of other sub-offers from intermediaries to the end-investor, the intermediaries should be able to rely on the prospectus drawn up by the issuer without having to draw up a separate prospectus, in particular where the issuer has consented to this[20]. Therefore where the intermediaries are acting in association with the issuer, an additional prospectus should not be required. On the other hand, where the intermediary is not acting in association with the issuer but selling the securities on its account, then a separate prospectus would be required.[21]

B. Who is responsible for the publication of the supplements to the prospectus according to Article 16 Directive?

The issuer will be expected to update the prospectus for the duration of the period when the sub-offers from the intermediaries acting in association with it subsist but will not be expected to do so where the intermediaries are not so acting. Where the intermediaries are not acting in association with the issuer, they would be expected to update their own prospectus.

C. Information to be included in the prospectus?

As regards the completeness of the prospectus in respect of the information relating to the sub-offers, the information in the prospectus is usually sufficient except that some of the information, in particular the information required by Annex V, Item 5 (Terms and Conditions) will not be available at the time of the publication of the prospectus. Such information which relate to allocation, distribution and pricing[22] will be provided by the intermediaries to the end-investor. Such information on the subsequent sub-offers may be omitted on the basis of Article 23.4 of the Prospectus Regulation. The intermediaries would be expected to supply the information to the investor at the time of any sub-offer. CESR considers that it is good practice to insert a bold notice in a suitable place in the prospectus informing investors that such information would be provided at the time of any sub-offers.

57. Delineation between the Base Prospectus and the Final Terms (Articles 5.4 and 16.2 Directive)

December 2007

Q) CESR members discussed the delineation between the base prospectus and the final terms.

The delineation between the base prospectus and the final terms was already discussed and consulted upon in 2003, the outcome of which was the abstract generic rule (CESR-docs ref. 03-162 (esp. item 99), 03-300 (esp. item 49) and 03-301 (esp. item 102)). This rule that has been incorporated in Article 22.2 of

[19] Responsibility for the contents of the prospectus is, of course, determined by Article 6 Directive as implemented by the national legislation of each Member State.

[20] CESR thinks that issuers should avoid adding clauses in the prospectus restricting its use to qualified investors, when the intermediaries acting in association with the issuers intend to subsequently offer the securities to the public.

[21] In these circumstances, it is up to the offeror to use the issuer's prospectus by incorporating the relevant parts by reference into its own prospectus in accordance with Article 11 Directive subject to the provisions of Article 28 Regulation.

[22] It is of course not mandatory to insert the price. This could be omitted provided that the provisions of Article 8.1 a) Directive are complied with.

the Prospectus Regulation is the basic principle for analysing the relationship between the base prospectus and the final terms.

Due to the fact that structured products have become more complex over the last few years CESR, however, acknowledges market participants' needs for some practical guidance in this context.

In the call for evidence on the supervisory functioning of the Directive, CESR received feedback from market participants on the issue of the delineation of information between the base prospectus and the final terms. Market participants were of the opinion that there are inconsistent practices as regards the delineation issue. However, the market participants did not expect CESR to produce a list of information items that can or cannot be included in final terms.

A survey conducted among the members of CESR showed that there is certain level of inconsistency in the interpretations of different competent authorities. Most of the competent authorities, however, seem to have a quite flexible and pragmatic approach on the delineation of information. The survey also showed that some Member States do not yet have practical experiences of base prospectuses.

A) *CESR is aware of the fact that there is a certain level of inconsistency in the different competent authorities practices and intends to promote cooperation among it's members to work towards a more consistent approach.*

Taking into account the feedback given by the market participants and the results of the survey, CESR considers that it should maintain the flexible approach incorporated in Article 22.2 Regulation and not produce any detailed guidance on information items that should be in a base prospectus or final terms.

However, CESR also considers that the flexible system provided for in the Regulation should not be abused by using the final terms as a mean of circumventing the obligation to publish a supplement when the prerequisites as set forth in Article 16 Directive are met. In this context, CESR considers that it is the issuer's responsibility to bear in mind the general obligation to comply with Article 16 Directive.

It should also be noted that the Directive is intended to regulate disclosure of information rather than to regulate products that are appropriate to be offered to the public. Thus, there is usually no need to require information specific to a certain underlying or redemption structure to be vetted by the competent authorities.

Requirements of the Prospectus Regulation:

- *The issuer may omit information items which are not known when the base prospectus is approved and which can only be determined at the time of the individual issue (Article 22.2)*
- *The final terms may only contain information items from the applicable securities note schedule (Article 22.4)*
- *All information relating to registration document schedules must be given in the base prospectus or supplements to it*
- *The base prospectus must indicate information that will be included in the final terms and the method of publication of the final terms or the indication of how the public will be informed about the method of publication of final terms (Article 22.5)*
- *All the general principles applicable to a prospectus are applicable also to the final terms (second sentence of recital 21)*

Along these lines, CESR considers that a base prospectus should be easily analysable and comprehensible.

Thus, in addition to information about the issuer, the base prospectus should include general information (e.g. general terms and conditions, risks) relating to different types of securities and underlying assets that can be issued under the final terms. Information relating to specific securities to be issued under the base prospectus and required by the applicable securities note schedule can be given in final terms where the information relates to the individual issue and can only be determined at the time of the issue.

However, issuers should keep in mind the fact that final terms – as part of the prospectus – should be drafted so that they are easily analysable and comprehensible as required by Article 5.1 of the Directive.

CESR intends to continue working in this area towards a common understanding among its members and, therefore, feedback from market participants would be welcomed.

58. Level of disclosure concerning price information (Article 8.1 Directive and item 5.3.1 of Annex III Regulation) *December 2007*

Q) CESR members discussed the level of disclosure concerning price information according to Article 8.1 of the Directive and item 5.3.1 of Annex III Regulation. In this context, they discussed *inter alia* the interpretation of certain terms used in these provisions, the place where and the time when this information has to be disclosed.

Article 8.1 Directive
Member States shall ensure that where the final offer price and amount of securities which will be offered to the public cannot be included in the prospectus:

(a) the **criteria, and/or the conditions in accordance with which the above elements will be determined** or, in the case of price, the maximum price, are disclosed in the prospectus;
or
(b) the acceptances of the purchase or subscription of securities may be withdrawn for not less than two working days after the final offer price and amount of securities which will be offered to the public have been filed.

Item 5.3.1. Annex III Regulation
An indication of the price at which the securities will be offered. If the price is not known or if there is no established and/or liquid market for the securities, **indicate the method for determining the offer price**, including a statement as to who has set the criteria or is formally responsible for the determination. Indication of the amount of any expenses and taxes specifically charged to the subscriber or purchaser.

***A)** Article 8.1 reflects a market practice commonly known as book-building procedure to most European countries whereby the prospectus as approved by the competent authority does not include the final price. The Prospectus Directive allows this practice but sets some rules to avoid undermining investor protection, since the general rule is that investors must at least know the maximum price they have to pay for the shares at least at the time they subscribe for the offer. With respect to price information the issuer has to comply with the disclosure requirements according to item 5.3.1 of Annex III of the Prospectus Regulation (shares securities note) as well.*

CESR members discussed different cases about the level of disclosure of price information according to Article 8.1 Directive and item 5.3.1 Annex III. This spectrum of disclosure requirements may be simplified in the following main approaches:

i) Some CESR members consider that even if Article 8.1 has a different wording as compared with item 5.3.1 of Annex III of the Prospectus Regulation the content of the respective disclosure requirements is not necessarily of a substantially different nature, as they both focus on information about how the offer price is determined. Therefore these members consider that a general indication, provided that it is meaningful and not too generic, of the method or combination of methods would be sufficient without the need to give any kind of approximate figures (e.g. the company indicates that the method it will follow is the discounted cash flow method and will provide a general description of such method or just the indication that the price will be determined according to the outcome of the book building process).

ii) Other CESR members consider that item 5.3.1 focuses on the method of valuation of the company, whereas the Article 8.1 requires information on the procedure the issuer will adopt in setting the final price in order for investors to know how much they will pay for the shares. Therefore, these members consider that issuers should include in their prospectus:

- *according to Article 8.1 a reference to the criteria and/or conditions according to which the price will be determined (i.e. a reference to the book building procedure) and*
- *according to item 5.3.1 where there is no active market for the shares a (rather detailed) indication of the method(s) of valuation of the issuer, together with an indication of the approximate non-*

binding value(s) of the share that would result from the application of such method(s). This valuation(s) would be one input among others that the issuer would take into account when deciding the final price (e.g. market conditions at the moment the decision is taken, peer group analysis, the outcome of the book-building procedure, DCF-method, etc).

Case 1: The issuer discloses the final or maximum price.

In this case there is no need to describe the criteria and/or conditions of the price determination according to Article 8.1 a) and the issuer does not have to provide investors with a withdrawal right according to Article 8.1 b).

Further information about the methods of price determination according to item 5.3.1 Annex III, however, might be necessary, depending on the circumstances of the offer. If there is an established market and/or liquid market the Regulation does not require any further information, apart from the disclosure of the final price. It seems that the Regulation considers that the existence of published price quotations in an active market is the best evidence of the fair value of the shares and therefore the potential investors do not need further information about price determination. Such scenario usually occurs when the issuer launches an offer of shares that are already listed on the market. The same conclusion may be drawn, if the maximum price is disclosed instead of the final price. In this case CESR members agree that there is no need to include additional information either as investors would never be damaged by the determination of the final price that will never be higher the maximum price.

However, in case there is no established and/or liquid market for the shares, the issuer still has to provide the information regarding the method for price determination according to item 5.3.1. Annex III, even if it indicates the price (final or maximum). It seems that the assumption of the Regulation is that where there is no active market for the shares, which is the case for IPOs, the issuer would need to provide further information about the price. As to the extent of this information, CESR members take different approaches as described above.

Case 2: The issuer discloses neither the final nor the maximum price.

In this scenario the issuer would have to describe the criteria and/or conditions to avoid the investor's withdrawal right according to Article 8.1 b) and it would have to comply with the disclosure requirements according to item 5.3.1 Annex III. As to the extent of this information, CESR members take different approaches as described above.

CESR intends to continue working in this area towards a common understanding among its members and, therefore, feedback from market participants would be welcomed.

59. Disclosure of major holdings by third country issuers: interpretation of item 18.1 of Annex I Prospectus Regulation *December 2007*

Q How should item 18.1 of Annex I[23] on disclosure of major holdings be interpreted, in particular in relation to third country issuers?

A) *CESR considers that the reference to "the issuer's national law" in item 18.1 of Annex I, should be interpreted as follows:*

a) When the issuer is admitted to trading on an EU regulated market and the provisions of Transparency Directive 2004/109/EC[24] as implemented by the Member State apply, the information that the issuer

[23] In so far as is known to the issuer, the name of any person other than a member of the administrative, management or supervisory bodies who, directly or indirectly, has an interest in the issuer's capital or voting rights which is notifiable under the issuer's national law, together with the amount of each such person's interest or, if there are no such persons, an appropriate negative statement.

[24] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

provides to fulfil the requirements of the Transparency Directive should be included in the prospectus to satisfy item 18.1 of Annex I;

b) When the issuer is not admitted to trading on an EU regulated market and the provisions of the Transparency Directive do not apply, the information to be included under item 18.1 of Annex I is that which is notifiable according to the issuer's country of incorporation law.

When the issuer's country of incorporation law does not require any information to be notified, the issuer should include a negative statement in the prospectus to that effect.

60. Items 5.4.1 and 5.4.2 of Annex III Regulation: name of co-ordinator, placers, paying and depositary agents in the various countries where the offer takes place *December 2007*

Q) According to items 5.4.1[25] and 5.4.2[26] of Annex III Regulation, the prospectus shall contain the name and address of the co-ordinators of the offer, the placers (to the extend known to the issuer), the paying agents and the depository agents in the various countries where the offer takes place.

CESR has analysed the practical application of these provisions on passported prospectuses and has found out that sometimes some of this information is missing.

The problem described arises due to the issuers' practice of requesting the passport notification for many EU countries even if they are not totally sure at that time that they will actually make a public offer in all those countries. Hence the lack of certain information in the prospectus relevant to all or some of the host markets.

A) *Subject to the Q&A on "Retail Cascades", CESR considers that issuers should ensure that all the information requested in items 5.4.1 and 5.4.2 of Annex III Regulation should be included in all prospectuses as it is required by the Prospectus Regulation or provided to host investors through announcements in the host markets if that information is not known at the time the prospectus is approved. Issuers are encouraged to file these announcements with the host competent authorities, where appropriate. This does not prejudice the need for a supplement according to Article 16 Directive if the missing information were considered to be significant according to that article.*

61. Clarification of certain terms used in item 3.2 of Annex III Regulation: Capitalisation and indebtedness *December 2007*

Q) CESR members discussed de interpretation of certain terms used in item 3.2 of Annex III (those highlighted below in bold letters)

Item 3.2 of Annex III: Capitalisation and indebtedness
A statement of capitalisation and indebtedness (distinguishing between guaranteed and unguaranteed, secured and unsecured indebtedness) as of a date no earlier than 90 days prior to the date of the document. Indebtedness also includes **indirect and contingent indebtedness.**

A) *CESR members agreed on the following clarifications:*

Indirect indebtedness: *indirect indebtedness is any obligation that has not been directly incurred by the issuer, which is considered on a consolidated basis, but which may fall on the issuer to meet in certain circumstances: for instance a guarantee to honour a loan advanced by a bank to an entity (that is not in the issuer's group) if this entity defaults on repayments due on the loan.*

[25] *"Name and address of the co-ordinator(s) of the global offer and of single parts of the offer and, to the extend known to the issuer or to the offeror, of the placers in the various countries where the offer takes place"*
[26] *"Name and address of any paying agents and depository agents in each country"*

Contingent indebtedness: *contingent indebtedness is the maximum total amount payable in relation to any obligation which although incurred by the issuer has yet to have its final amount assessed with certainty, irrespective of the likely actual amount payable under that obligation at any one moment in time: for instance the total VAT liability due on goods in a bonded warehouse where the actual amount payable to the tax authorities in any given financial period will depend not on the actual goods bought by the issuer and deposited in the warehouse but on the level of those goods actually sold on to customers.*

62. Updated capitalisation and indebtedness statement (item 3.2 Annex III PR) *December 2008*

Q) Does item 3.2 of Annex III Prospectus Regulation require updated information in case of a significant change within the 90 days limit or is any statement sufficient as long as it is as of a date no earlier than 90 days prior to the date of the prospectus?

A) *Item 3.2 of Annex III Prospectus Regulation*[27] *requires a statement of capitalization and indebtedness as of a date no earlier than 90 days prior to the date of the prospectus.*

CESR considers that this determines the last possible date of the capitalisation and indebtedness statement in the absence of a significant change.

Where an event which could be described as a significant change occurs between the 90 day period and the date of the prospectus, the issuer must reflect this change in its capitalisation and indebtedness statement, as appropriate, otherwise the statement may be misleading. Generally the capitalisation and indebtedness statement must be consistent with the financial information included in the prospectus and the disclosure on significant changes in the issuer's financial or trading position according to item 20.9 of Annex I Prospectus Regulation.

63. Rights issue to existing shareholders *May 2008*

Q) Should the offer of rights to existing shareholders be considered as a public offer?

A) *The offer of Rights to existing shareholders should be considered as an offer of the underlying shares as the rights can almost immediately be exercised. It can not be considered as a free offer. The offer starts with the communication to the shareholder and the allotment of the right and ends when the period for subscribing the shares is over.*

Therefore a prospectus should be published at least at the beginning of the offer and should be updated through a supplement if necessary until the date that the trading of the new shares on a regulated market begins.

The competent authorities of Germany and Austria consider an offer of shares exclusively to existing shareholders not a public offer within the scope of the PD unless the subscription rights for these shares are going to be offered (also) to other persons than the existing shareholders.

The competent authority of Germany agrees with CESR that rights issues to existing shareholders that involve trading of rights between existing shareholders and persons other than existing shareholders, i.e. where the trading is not restricted to existing shareholders, qualify as public offers of the underlying shares. This is due to the fact, that in this case the general public is able to acquire rights and become shareholders. However, the competent authority of Germany considers a rights issue exclusively to existing shareholders not a public offer within the scope of the PD, if persons other than existing shareholders are excluded from trading of the rights. Existing shareholders do not represent the public but a definable group of persons who are already well informed about the issuer. As shareholders these persons decide on whether or not the rights issue will be made in the first place. Further, existing shareholders are entitled to specific information

[27] *CESR issued some guidance in relation to item 3.2 in paragraph 127 of its Recommendations for the consistent implementation of EC Regulation 809/2004 (CESR/05-054b).*

rights under national law and the applicable articles of association. Hence it is assumed that compared to the general public existing shareholders have a reduced need of information. The competent authority of Germany therefore concludes that as long as exclusively existing shareholders are allotted rights and no outside person can acquire rights to shares the offer is not addressed to the general public. Consequently such offer does not meet the criteria of a public offer in the meaning of Article 2.1 (d) PD. This understanding does not release the issuer from the obligation to publish a prospectus where there is a subsequent admission to trading on a regulated market of the shares.

The competent authority of Poland considers an allotment of pre-emptive right to existing shareholders not a public offer of the underlying shares within the scope of the PD. The offer starts with the communication to the shareholder concerning the underlying shares. Therefore, and according to the Polish Commercial Company Law, the prospectus should be published at least at the beginning of the period when shareholders may exercise the pre-emptive right and at least two weeks before the intended end of that period. If the listing of the subscription rights begins before the above period, than the prospectus should be published before it.

64. More than one final terms for a specific issue of bonds — *August 2008*

Q) Can an issuer provide investors and file with the competent authority more than one document with final terms for a specific issue of bonds?

A) *CESR has analysed 2 cases where more than one document with final terms for a specific issue of bonds could be filed:*

1. Amendment of information included in final terms that is not a significant new factor, material mistake or inaccuracy: in this case, CESR considers that issuers could either file a replacement of the final terms with the new information or could make an announcement (cf. Question 22 of CESR Q&A).

CESR notes that the practice in some Member States is to allow the issuer to amend final terms, if it has reserved such right in the applicable terms and conditions. It is the issuer's responsibility to ensure compliance with the applicable terms and conditions and any national laws in order to prevent an infringement of the existing securities holders' rights

2. A significant new factor, material mistake or inaccuracy relating to the information included in the final terms which is capable of affecting the assessment of the securities: in this case, it is CESR's view that a supplement to the related base prospectus with reference to the amended final terms in accordance with Article 16 of the Prospectus Directive would be required. In addition to the required supplement, CESR recommends to file a second set of final terms replacing the first set of final terms to give a clear picture for investors. This allows the investors to easily have a full and clear view on the relevant issue.

In line with other CESR's statements in this Q&A (cf. answer to Question 20 -Supplement to prospectuses: profit forecast), CESR considers that it is up to the issuer to assess the significance or materiality of a new factor, mistake or inaccuracy, without prejudice to the powers of the Home competent authority.

65. Significant Change Statements and Half-Yearly Financial Reports — *December 2008*

Q) A company has a year-end of 31 December, and has published a half-yearly financial report as of 30 June. It is preparing a prospectus for a wholesale issue of securities, using Annex 9 for registration document disclosure. For the purposes of significant change in paragraph 11.6, the issuer is required to provide the statement as of the date of "the end of the last financial period" - this could either be the interim financial information or the date of the audited financial information. (Note: for issues of at least Euro 50.000 there is no half-yearly reporting requirement).

If it is at the date of the half-yearly report, should the issuer be including the half-yearly report in the prospectus even though Annex 9 does not require this?

A) *As the half-yearly report is the last financial period for which financial information has been published, Annex 9, paragraph 11.6 should be given since 30 June - i.e the date of the last financial period to reflect the full picture of the company's financial situation. Provided issuers are satisfied that for the purposes of Article 5 of the Prospectus Directive the prospectus contains all necessary information, the half-yearly report will not be required in the document. The issuer would however be expected to include the half-yearly financial information in the list of documents on display under paragraph 14 (b) of the Annex since it is referred to in the prospectus.*

In case of a significant change in the issuer's financial or trading position after the date of the audited financial information the issuer may wish to include interim financial information to satisfy the materiality principle in Article 5 of the Prospectus Directive.

66. Item 4.6 of Annex III of Regulation 809/2004 — *December 2008*

Q) How should the requirement in item 4.6 of Annex III of the Prospectus Regulation on the disclosure of resolutions, authorisations and approvals be interpreted?

A) *The wording 'by virtue of which the securities have been or will be created and/or issued' in item 4.6. of Annex III of the Prospectus Regulation implies that according to this item only legal acts on the part of the issuer, i. e. general meeting resolutions and board of directors decisions, need to be disclosed.*

However, disclosure on any legal acts on the part of third parties, e. g. approvals by the central bank or competition authorities, or the fulfillment of any other external preconditions to the creation or the issuance of the securities might be appropriate according to item 5.1.1 of Annex III Prospectus Regulation and Article 5.1 Prospectus Directive.

If any internal resolutions, authorisations or decisions on the part of the issuer or any external preconditions on the part of third parties are pending or can be revoked, the issuer is expected to include a clear statement to that effect and an explanation of the consequences in case the required resolution, authorization, approval is not given or a precondition is not fulfilled. This information might also be required according to item 5.1.4. of Annex III Prospectus Regulation. Certain of the abovementioned elements might be considered as risk factors.

67. Transferable securities — *December 2008*

Q1) If an offer to purchase shares is directed to investors under the condition that each participating investor must sign an agreement (for example a shareholders agreement) which prescribes that the shareholders restrict their right to freely transfer their shares, does this condition of the offer affect the status of the shares as transferable securities?

A1) *The definition of transferable securities under the Prospectus Directive refers to the definition under Article 4.1.18) of Directive 2004/39/EC on markets in financial instruments.*

As stated in the document entitled "Your questions on MiFID" published by the European Commission Services (answer to question N° 115): "The essence of the definition of transferable securities in Article 4(18) MiFID is that, as a class, they are negotiable on the capital markets (…)".

The transferability of securities may be reduced on a contractual basis, such as selling restrictions applicable in a specific country or by a lock up agreement between the Company and existing shareholders. In these cases, CESR considers that those securities remain "transferable securities" falling into the scope of the Prospectus Directive.

This view is also backed by the fact that Prospectus Regulation requires information in relation to restrictions on the free transferability of the securities (Annex III, 4.8) and information in relation to lock-up agreements of selling securities holders (Annex III, 7.3).

Nevertheless, CESR Members are aware that some restrictions may be so broad that they result in transforming "transferable securities" into non-transferable securities, falling no longer into the scope of the PD.

CESR Members will analyse whether the security that is subject to a restriction is transferable or not on a case by case basis.

Q2) If the shares are considered transferable securities, irrespective of the conditions of the agreement, should information in relation to the agreement be incorporated in the prospectus?

A2) *Yes. The Prospectus Regulation requires information in relation to restrictions on the free transferability of the securities (Annex III, 4.8) and information in relation to lock-up agreements of selling securities holders (Annex III, 7.3).*

68. Disclosure for Mineral Companies in the CESR Recommendations *December 2008*

Q1) Should the additional disclosures in Paragraph 133 of CESR's Recommendations for certain mineral companies that have "not been a mineral company for at least the three preceding years" be required for mineral companies which have been in existence for three years but have not been extracting minerals on a commercial basis?

A1) *Yes. A purposive interpretation of paragraph 133 should be applied. Although it may appear that paragraph 133 of CESR's recommendations only concerns early stage mineral companies, i.e. mineral companies existing for not more than 3 years, it would be unacceptable not to cover mineral companies, existing for more than 3 years, but which are clearly not extracting minerals on a commercial scale for the last 3 years. For the latter ones, the additional disclosures of the aforementioned paragraph should also be required, in the same way as for the early stage mineral companies, as for both company categories the available information does not cover their mineral extracting activity on an ongoing basis for at least 3 years.*

Q2) Should issuers of debt securities with a denomination of at least EUR 50.000 be required to observe paragraphs 131-133 of CESR's recommendations relating to mineral companies?

A2) *No. It is not specifically disclosed that the relevant paragraphs of the CESR's recommendations do not apply to mineral companies issuing debt securities with a denomination of at least EUR 50.000. Nevertheless, a general principle under prospectus regulations is that wholesale investors need less information than retail investors. In this context, it is CESR's view that the mineral companies should be treated in the same way as property and shipping companies and that it is therefore not required that such recommendations should apply to wholesale denominated debt securities.*

69. Scope of the wording 'any bankruptcies, receiverships or liquidations' used in item 14.1 of Annexes I and X *December 2008*

Q) Third paragraph under (c) of item 14.1 requires that the prospectus includes:

> **"details of any bankruptcies, receiverships or liquidations with which a person described in (a) and (d) of the first subparagraph who was acting in the capacity of any of the positions set out in (a) and(d) of the first subparagraph was associated for at least the previous five years;"**

Is the required disclosure limited to declared bankruptcies, receiverships or liquidations?

A) *CESR considers that the scope of the required disclosure is not restricted to declared bankruptcies, receiverships or liquidations but that also information on bankruptcies, receiverships or liquidations that are pending or in are progress should be provided.*

70. Disclosure requirements for securities which are "unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities" *December 2008*

Background

CESR is aware that given the current market circumstances several Members States are considering the possibility of unconditionally and irrevocably guaranteeing, under various forms, securities issued by credit institutions in their jurisdictions to reactivate the market. CESR members have been approached by some of those credit institutions that are considering the possibility of drawing up a prospectus in accordance with the Prospectus Directive (to benefit from the option of passporting the prospectus) to make a pan-european offer. Some of these credit institutions have applied for derogations from some of the requirements of the annexes to the Prospectus Regulation on the basis that these securities have been guaranteed by Member States and that information on Member States is already in the public domain. Other institutions have argued that they are not readily able to obtain information required on the Member States in the Annexes.

Following these requests, CESR has discussed the issue and has reached the following agreement.

Q1) What are the disclosure requirements for securities "unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities" if an issuer decides to draw up a Prospectus Directive compliant prospectus (in accordance with Article 1.3 Directive)?

A1) According to Article 1.2 d) Prospectus Directive, the Directive shall not apply to securities "unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities".

Therefore, it is up to Member States legislation to define how to regulate these offers and admissions to trading. Member States might have set different requirements for these situations, meaning that issuers would have to check each national regime of the Member States where they want to make an offer to the public or an application for admission to trading on a regulated market.

Nevertheless, Article 1.3 Prospectus Directive entitles an issuer (or a person asking for admission to trading on a regulated market) to opt-in the Prospectus Directive; i.e. to draw up a prospectus in accordance with the Directive when securities are offered to the public or admitted to trading.

CESR considers that once an issuer decides to use the option provided in Article 1.3 Prospectus Directive to draw up a Prospectus Directive compliant prospectus for securities "unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities", ***all the requirements included in the Prospectus Directive and the Prospectus Regulation apply****. In particular, the issuer will be able to benefit from the possibility of "passporting" the prospectus to all EU Member States, once it is approved by the home Member State. On the other hand, the issuer must comply with the disclosure requirements as set in the relevant annexes in the Prospectus Regulation.*

CESR members have discussed the following example: a bank is preparing an offer of debt securities unconditionally and irrevocably guaranteed by a Member State, with a denomination per unit of less than EUR 50.000, and decides to opt-in the Prospectus Directive. In this example, CESR considers that the following annexes would be applicable:

- *Banks registration document (annex XI)*
- *Securities notes for debt securities with a denomination per unit of less than EUR 50.000 (annex V)*
- *Guarantees building block (annex VI)*
- *Registration document for Member States, third countries and their regional and local authorities (annex XVI): this information is requested as item 3 of annex VI (Information to be disclosed about the guarantor) states that "The guarantor must disclose information about itself as if it were the*

issuer of that same type of security that is the subject of the guarantee". Therefore, annex XVI should be filed in with the information of the Member State..

Nevertheless, on a case by case basis, it is possible for the competent authority to authorise the omission from the prospectus of certain information in accordance with Article 8 of the Directive. Besides, in those cases where certain information requirements are not pertinent to the issuer, to the offer or to the securities to which the prospectus relates, that information may be omitted in accordance with Article 23.4 Prospectus Regulation.

Q2) What are the disclosure requirements for securities guaranteed (but not unconditionally and irrevocably) by a Member State, their regional or local authorities and for securities guaranteed by third countries, their regional or local authorities?

A2) The Directive is applicable to these types of securities (i.e. issuers do not need to opt-in to be subject to the Directive) and therefore issuers should provide all the relevant information according to the Prospectus Regulation. In this case, the same reasoning as the one in the example provided in the previous question should be followed and, therefore, annex XVI would also be applicable.

71. Employee Share Scheme Prospectuses: Short-form disclosure regime for offers to the employees in those cases where a prospectus is required (application of Article 23.4 of the Prospectus Regulation)

February 2009

Background: The European Commission wrote to CESR on 18 July 2007 to request that regulators should adopt a common 'light-touch' approach to share offers to employees under the Prospectus Directive and Prospectus Regulation.

Following the Commission's request, CESR published a statement in December 2007 (CESR/07-825) stating that it was its intention to analyse the possibility of agreeing a short-form disclosure regime for offers to the employees in those cases where a prospectus is required and requesting market participants views. In particular, CESR stated that it would discuss the application of Article 23.4 of the Prospectus Regulation with the aim of permitting the omission of certain information requirements contained in the Annexes, on the basis that they may not be pertinent to the specific case of an offer to employees.

Having analysed the input received from market participants, CESR agrees with the statements by the European Commission (letter from commissioner McCreevy dated 11 September 2007) that the requirement to produce a full equity prospectus for offers made in the contest of an employee share scheme is not an effective means of informing employees about the risks and benefits of this particular kind of offer and imposes excessive costs on employers that are not justified in terms of investor protection. The significant amount of detailed information that would otherwise be required in a prospectus for third party investors is not pertinent to employee offers on the basis that employees are privy to information in their companies and have the option to purchase the securities directly from the market if they choose to pursue this option.

In trying to find a solution, CESR has established the following key questions. CESR acknowledges that the solution described in the following paragraphs is a temporary one based on the current provisions of the Directive. CESR is aware that the European Commission is intending to propose an amendment of the Prospectus Directive on the issue of offers to the employees in those cases where a prospectus is required. CESR might revisit the proposal below in light of the European Commission's proposal.

The European Commission has welcomed the publication of the approach adopted by CESR.

Q1) To which issuers should the short-form disclosure regime apply?

***A1)** CESR considers that it is appropriate to restrict the application of the short-form disclosure regime to those issuers who have securities admitted to trading on a market as this would normally imply that they are*

subject to some type of on-going information requirements (e. g. yearly publication of financial information).

Therefore, the short-form disclosure regime should be applicable to public offers of securities to existing or former directors or employees by their employer which has securities already admitted to trading on a market or by an affiliated undertaking.

Q2) To what type of securities should the short-form disclosure regime apply?

A2) *Having observed in practice that almost all the offers to employees where a prospectus is required are offers of shares, CESR has decided to focus on the information to be produced for shares offerings.*

Q3) What are the information disclosure requirements under this regime?

A3) *The issuer should prepare a prospectus omitting, in accordance with Article 23.4 of the Prospectus Regulation, all the information requested by the items of the relevant annexes which is not pertinent in case of an offer to employees.*

CESR considers that following items are generally not pertinent for offers of shares to employees and can thus be omitted from the prospectus in accordance with Article 23.4 of the Prospectus Regulation:

- Annex I: 5.1.2 to 5.1.5, 5.2, 6, 7, 8, 9, 10, 11, 15, 16, 17.1, 18, 19, 20.1 to 20.5, 20.6, 21, 22, 25;

- Annex III: 3.3, 4.10, 5.1.9, 5.1.10, 5.2, 5.4.1, 5.4.3, 5.4.4, 6.3, 6.4, 6.5, 7, 10.2.

Nevertheless, the Competent Authority has the right to request the issuer to include the information required in additional items from the annexes, when deemed appropriate in specific cases (in particular if the Competent Authority is not satisfied that the on-going information requirements of the relevant market ensure a sufficient level of information for investors).

Notwithstanding the omission of information in accordance with Article 23.4. of the Prospectus Regulation, all the rules for prospectuses set in the Prospectus Directive and in the Prospectus Regulation will still apply.

Q4) What is the role of the competent authority in relation to the prospectus prepared following the short-form disclosure regime?

A4) *The competent authority should scrutinise and approve the prospectus prepared following the short-form disclosure regime. Once approved, this prospectus can be passported to other Member States.*