



Ref.: CESR/03-067b

DRAFT

## CESR Prospectus Consultation

## FEEDBACK STATEMENT

[APRIL 2003]

*On Monday 31<sup>st</sup> March 2003, the European Commission, considering that the European Parliament has not started the second reading on the prospectus proposal, has invited CESR to provide its technical advice on issues initially required for 31<sup>st</sup> March by July 31<sup>st</sup> 2003. CESR welcomes this extension and has decided to hold an additional open hearing that will take place at CESR's premises, 11/13, Avenue de Friedland in Paris on 27<sup>th</sup> May 2003 (Agenda Ref. CESR/03-111). The present Feedback Statement on the consultation (Ref. CESR/03-067 b) as well the draft technical advice on level 2 implementing measures of the Prospectus Directive (Ref. CESR/03-066 b) has been approved by CESR at the Paris meeting held on March 21, 2003 subject to a last check dialogue with market participants. Written comments, in addition to those carried to the open hearing, should be sent to the secretariat by 16<sup>th</sup> June 2003.*



## **The Provisional Mandates and the Technical Advice**

1. On 27 March 2002, the European Commission requested CESR to provide technical advice on possible implementing measures in connection with certain aspects of the Directive on the Prospectus to be published when securities are offered to the public or admitted to trading (Prospectus).
2. On 7 February 2003 the European Commission published an Additional Provisional Mandate which supplements the previous one. The latter remains valid for the areas which have not been subject to change or are not revoked by the Additional Provisional Mandate.
3. In order to meet the 31 March 2003 deadline, according to the new series of mandates, CESR has concentrated on certain aspects dealt with in the Consultation Paper released in October 2002 (Ref: CESR/02.185b) and the Addendum to the Consultation Paper published in December 2002 (Ref: CESR/02-286b).
4. Three substantive areas were covered in the Commission's Provisional Mandate to CESR. These were as follows:
  - The minimum information requirements
  - The incorporation by reference
  - The availability of prospectus
5. As far as the minimum disclosure requirements are concerned, the Technical Advice released in [] 2003 concentrates on those concerning shares and equivalent securities, retail bonds and asset backed securities. An additional building block concerning guarantees is also included. In consideration of the new deadlines, schedules for non equity securities aimed at wholesale investors, those issued by certain types of entities such as credit institutions, securities issued by particular types of issuers, derivative securities, together with the implementing measures concerning the base prospectus shall be delivered during the next months.
6. The Technical Advice for the Commission also concerns the issues of incorporation by reference and availability of the prospectus. In particular, the latter also deals with the content of the notice and its method of publication.
7. This feedback statement provides a noverview of the process which CESR followed in finalising its advice to the Commission. It also discusses the main points which were made by respondents to the consultation process and explains the policy options which CESR has selected, following careful consideration of the points raised.
8. CESR undertook a number of steps prior to the publication of its first consultation paper. Firstly, it published a Call for Evidence (Ref: CESR/02-048) inviting all interested parties to submit views on what CESR should consider in its advice to the Commission. The issues raised in response to the Call for Evidence were taken into account in the preparation of the consultation document.
9. Secondly, CESR's Expert Group on Prospectuses, chaired by Pr. Fernando Teixeira dos Santos, Chairman of the Portuguese Securities Commission and supported by Ms Silvia Ulissi of the CESR secretariat, developed proposals for consultation with market participants and other interested parties. CESR's Expert group was assisted and advised in this task by a newly-



established Consultative Working Group (CWG) comprising a broad cross-section of EU market experts.

### **The Results of the Consultation Process**

10. In October 2002, CESR released its first consultation paper *Advice on possible Level 2 Implementing Measures for the proposed Prospectus Directive* (Ref: CESR/02-185b) setting out its proposals for technical implementing measures in the areas identified in the first provisional mandate and questions on a series of issues, with a deadline for comment of 31 December. A public hearing was held in Paris on 26 November, 2002 and a number of bilateral meetings and open hearings have also been held at national level.
11. Over 90 responses were received in response to the consultation paper (some of these endorsing responses submitted by others). These came mainly from European and national federations, representing financial services providers, especially banks, as well as individual banks, investment services firms, asset managers, regulated markets and exchanges, accounting firms and rating agencies. These groups accounted for well over half of all responses received, but there was also considerable input from issuers, academics and lawyers. Very low has been the response from investor representatives. The number of responses varied per country, with some countries channelling their input mostly through a small number of national federations, while others had a greater mix of federations and individual responses. Five responses were received from European federations. All responses which are public can be viewed on the CESR website.
12. In mid December 2002, CESR released an Addendum to the consultation paper released in October (Ref.: CESR/02-286b) setting out further questions and proposals for technical implementing measures dealing with the outstanding aspects that, due to the tight deadline, had not been covered in the first consultation paper. The deadline for responses to the Addendum was 6 February, 2003. A public hearing took place in Paris on 24 January, 2003 as well as several bilateral meetings and public hearings at national level.
13. Over sixty responses have been received on the second consultation paper coming from mainly the same respondents of the first paper.
14. In the light of responses received in the consultation, CESR has significantly reviewed the schedules submitted to consultation.
15. The remainder of this feedback statement will focus, firstly, on the general points which emerged during the consultation process and secondly, on the substantive points which were raised in each of the three technical areas in which CESR was requested to provide advice.

### **General Observations**

16. As a preliminary general observation, CESR received a number of comments which were not directly applicable to the Level 2 measures being proposed in the consultation paper but, rather, related more generally to the Level 1 text, besides, in certain cases a lack of understanding of the exact scope of the Commission's mandate to CESR. In many occasions respondents seemed aware that the solution was not within CESR's power, but nevertheless considered it useful to register their concern about the Level 1 measure, via the CESR consultation process. CESR would reiterate that its advice to the Commission must remain firmly within the parameters of the mandate. This feedback statement will similarly restrict itself to the relevant material.
17. The remainder of this introductory section will highlight the most frequently recurring general points made by respondents. Where applicable, further discussion of these points and CESR's

proposed response will then be taken forward in the relevant section later in the feedback paper.

18. Firstly, a key point emerging from a number of responses concerns the amount of detail in level 2 implementing measures. Many respondents considered that Level 2 measures should be relatively light. They suggested that the level of detail proposed by CESR at Level 2 was too extensive and prescriptive. Some respondents suggested that many of the areas included in the Level 2 advice were more appropriate for treatment at Level 3. Others supported the idea that detailed Level 2 measures could help in achieving a more uniform Single Market.
19. In the light of the comments received, CESR has sought to review, where possible, any excessively detailed measures proposed for Level 2 and to propose, where appropriate, a higher level approach. Nevertheless, it is CESR's view that in some cases the Level 2 measures do need to contain a sufficient level of detail to build upon the high level principles set out at Level 1 and to ensure adequate legal certainty and harmonization for cross border activities in the Single Market. In particular the reduction of the level of detail with respect to the versions submitted to consultation has taken in consideration the nature of the item and therefore has left in Level 2 those that appeared to be the necessary disclosure requirements.
20. Secondly, respondents expressed concern about the short period of time left to the consultation process. A number of respondents commented that the scope and complexity of the required implementing measures would have required a longer period of time in order to achieve a proper return from the consultation. Many respondents therefore sought to be given another opportunity to comment on CESR's proposals before their final transmission to the Commission. CESR acknowledges the usefulness of a double passage through the consultation process. The extension granted by the EU Commission to CESR of the deadline initially fixed for March 31<sup>st</sup> to July 31<sup>st</sup> allows CESR to hold an additional open hearing with the market participants on "non papers" prepared after considering the outcome of the consultation.
21. Thirdly, some respondents noted several overlaps between the Registration Document and the Securities Note schedules. The review process has concentrated on the existing duplications due to the organization of the expert group in two separate drafting groups hopefully eliminating all of them.
22. Another aspect that has raised almost unanimous concern by the respondents is the one linked to the reference made to IOSCO Disclosure Standards. As indicated in the Consultation Paper CESR has prepared the RD and SN schedules considering the disclosure requirements provided for by IOSCO as the minimum disclosure requirements. In particular this approach had been followed for shares. According to a great number of respondents the said IOSCO Standards should only be considered as a guideline and not, especially for debt securities, a benchmark of minimum disclosure requirements. In light of discussions during the legislative process CESR has significantly modified its approach and has consequently revised the schedules.
23. The remainder of this paper will examine key points raised by respondents in each technical section and will set out CESR's proposed method of dealing with them. Paragraph references in this feedback statement refer to CESR's previously mentioned consultation papers



## **PART ONE – MINIMUM REQUIREMENTS**

### **Registration document – Equity Securities (paragraphs 26-123)**

#### **Introduction**

24. More than half of the responses to the consultation raised the question of the high level of detail in the disclosure requirements set out in Annex A. CESR has considered the consultation responses on this issue. As mentioned in the October consultation paper, CESR's 1 proposals were produced using the view that "based on IOSCO disclosure standards" meant that they should be considered to be the minimum requirements. Obviously this was of most application in relation to the disclosure requirements for equity securities. The advice in relation to the interpretation of this directive requirement has changed. This has allowed CESR to reconsider the level of proscription in the disclosure requirements and take into account the strong message from consultees.
25. CESR has amended the disclosure requirements set out in Annex A to remove excessive amounts of detail. However, in order to achieve a maximum harmonised approach to the contents of prospectuses, and to meet the terms of the original mandate, it has been necessary to maintain a reasonably detailed set of disclosure requirements.
26. The following issues were raised beyond those on which specific questions were set out in the Consultation Paper.
27. Some respondents asked to clarify the question of responsibility for the information given in the prospectus and to disclose either the name of natural persons or the name and registered office of legal persons (Annex A, I.A.). As responsibility matters are settled by national law CESR does not propose any kind of civil liability regime. However, the wording in I.A. has been adjusted to the wording of Art. 6 of the proposed Prospectus Directive.
28. Some market participants suggested to limit the information on important events in the development of the company's business (Annex A, III.A.5) to the most recent two or three financial years otherwise there would be an overload of information. As only the important events have to be disclosed CESR does not share the concerns raised. There might well be events which happened four years ago and still have an impact on the issuer's business.
29. In Annex A, III.B.3, CESR consulted on the obligation to disclose information concerning the company's principal future investments, with the exception of interests to be acquired in other undertakings on which its management bodies have already made firm commitments. A few respondents asked to delete the words "...on which its management bodies have already made firm commitments" and therefore to extend the exception clause. CESR discussed this matter in detail and came to the conclusion that there is no reason for the exception. As only the principal future investments have to be disclosed the amount of information should be limited to the material information. There is no danger that ongoing negotiations for future transactions will be hampered as only those investments have to be disclosed on which the management has already made firm commitments.
30. Concerning information on liquidity and capital resources (IV.B.1) quite some respondents proposed to delete the requirement to discuss any material unused sources of liquidity. Additionally they were concerned that an evaluation of the sources and amounts of the company's cash flows would be very difficult and had to be prepared by an expert which would increase the costs of the issue. CESR decided not to require a cash flow statement – if not included in the annual financial information anyway - but to require an explanation of the sources and amounts and a narrative description of the issuer's cash flows.

31. Some respondents proposed to delete the line item on management and directors' conflicts of interests (Annex A, V.A.2) as they thought that an issuer was generally not aware of potential conflicts of interests and therefore could not fulfil this requirement. CESR considered this as not being a valid argument as issuers have to make the necessary dispositions to recognise material conflicts of interests.
32. A number of respondents argued against the proposal that the last audited financial statements may not be older than 15 months at the time when the prospectus is published (Annex A, VII.G.1). They were severely concerned not being able to issue between March and May because time has to be calculated for the drafting and the approval of the prospectus as many companies do not publish their annual accounts before March or end of April. CESR balanced those reasons and the general interest of investor protection not to base an investment decision on outdated financial information. CESR proposes now that the last year of audited financial information may not be older than: (i) 18 months from the date of the registration document if the issuer includes audited interim financial statements in the registration document; or (ii) 15 months from the date of the registration document if the issuer includes unaudited interim financial statements in the registration document.
33. Concerning statements by experts (VIII.E.) some respondents expressed the opinion that the consent of an expert was not always possible to achieve and should therefore be deleted. CESR thinks that this concern might be based on a misunderstanding of the term "expert". Only those experts who gave an opinion at the request of the issuer are meant in the text thereby excluding all publicly available statements or information of specialised service providers such as for example Reuters.
34. Some respondents believed that disclosure of related party transactions should be to the same standard as the standard in the International Financial Reporting Standard. This would avoid the issuer having to apply two tests to effectively the same information. CESR has taken this sensible suggestion on board and amended the disclosure requirement accordingly.
35. It was also considered that the IOSCO disclosure standard in relation to operating and financial review etc had not been completely captured by the disclosure requirements set out in Part IV of Annex A. An additional requirement to provide a narrative description of the issuer's financial condition has therefore been added to this part of Annex A.
36. The remainder of the comments deal with the specific issues raised in the consultation paper.

#### **Risk Factors (paragraphs 45-47)**

37. A large number of respondents agreed with the approach adopted by CESR. A minor drafting amendment was made to reflect the restriction of risk factors relevant to the registration document rather than the issue of securities.

#### **Pro Forma financial information (paragraph 48-65)**

38. There was a significant number of respondents in favour of not making pro forma information mandatory. On the basis that pro forma information was mandatory many respondents agreed that 25% was a sensible threshold for the definition of "significant gross change".
39. CESR considered the arguments put forward by the respondents and there were strong views either way in the CESR group. But overall CESR felt that, although there should be some flexibility about how the details of a significant gross change to a company could be provided, it would normally be appropriate to provide pro forma information.

40. Where pro forma information was provided, it was considered important that this information should be presented in a reasonably standard format. It should also be capable of comparison with the historical financial information. The replies in connection with Annex B were generally supportive, although some amendments were made to reflect the fact that pro forma information does not present the actual financial position of the company.

#### **Profit Forecasts and Estimates (paragraphs 66-87)**

41. There was a degree of confusion about whether CESR was proposing that profit forecasts should be made mandatory. It was not CESR's intention to make profit forecasts mandatory. This has now been made clearer in the wording of the disclosure obligation.
42. The strongest concerns about profit forecasts were raised by accountancy firms, who felt that they could not be expected to give an opinion about the "due and careful enquiry" made. Some respondents were also concerned about the need for a report from the company's financial advisor at all. This was mainly on the basis of the cost involved. The scope of the report has been amended to address the concerns raised, but overall CESR felt that the comfort for investors gained from a report outweighed the cost involved.
43. There was a great number of respondents who favoured the requirement to update an outstanding profit forecast and this has been included in the disclosure obligations. There was also a general agreement that the definition of profit forecast was a sensible one.

#### **Directors and senior management privacy (paragraphs 88-89)**

44. Although there was some support for the disclosure requirements as consulted upon, there was a strong message that they were too detailed and should be restricted in timescale. CESR has considered these points and adjusted the disclosure requirements accordingly in an attempt to balance the interests of investors and the privacy of directors and senior management.

#### **Controlling Shareholders (paragraphs 90-91)**

45. Most respondents were in favour of disclosing any limiting measures in place in relation to a controlling shareholder. CESR has considered the text and believes that the method of exercise of the control is the important issue at stake. The wording has therefore been amended to reflect the need to disclose how the control will not be abused.

#### **Documents on display (paragraphs 92-93)**

46. A large number of respondents believed that the obligation to put documents on display were too detailed and too onerous. CESR has removed the obligation to put material contracts on display and amended the obligation to put expert reports etc on display to require only those prepared at the issuer's request.

#### **Specialist building blocks (paragraphs 94-123)**

47. The Additional Provisional Mandate has amended the timetable for providing advice in relation to "different categories of issuers, investors and markets". Whilst CESR has considered the responses to the questions raised on these issuers, it has not completed the process of producing Level 2 advice in relation to these issuers. The feedback statement in relation to these considerations will be published at the same time as when the Level 2 advice is given to the Commission.

## Registration document – Debt Securities

### **Introduction (Paragraphs 124 – 129)**

48. Overall, most of the respondents consider that identical disclosure requirements for debt and equity securities is inappropriate. The reason being that the interests and risk focus for investors in these securities are different. The IOSCO disclosure standards are said by respondents to be inappropriate for corporate retail debt since they were not designed for such products in the first instance. It is considered that the disadvantages that investors will incur from an identical disclosure regime for the retail debt disclosure as for the equity disclosure far outweighs the protection offered and the net effect of this will be to drive investors to jurisdictions outside the EU, such as Zurich and the U.S.A.
49. CESR has considered this issue at length and recognised the need to balance investor protection with the cost of issuing securities. It has therefore removed those items of disclosure which are considered to be irrelevant or burdensome for issuers which do not provide sufficient value to investors. CESR has tailored the retail debt disclosure regime to meet the needs of both parties.
50. The following items were in particular considered by respondents to be mostly inappropriate for the disclosure regime of corporate retail debt:
- a) I.B – Advisers
  - (b) II.A.1 – Selected financial information
  - (c) III.B – Investments
  - (d) III.C.2 – Principal markets – breakdown is inappropriate
  - (e) III.E – Property, plants and equipment
  - (f) VI.A - Major shareholders
  - (g) VI.B – Related party – instead a general requirement should be given not a detailed one.
  - (h) V.III.E – Material contracts should not be put on display.

CESR has amended the original proposed text based on these responses although there was no specific consultation on some of these issues.

### **Disclosures about the advisers of the Issuer (Paragraphs 132 –135)**

51. A great number of the respondents consider that there is no added value in mentioning bankers and legal advisers with whom the issuer has a continuing relationship in prospectuses. It is now uncommon for companies to have such continuing relationships with their advisers since they are appointed on a 'deal by deal' basis and more importantly, to mention them may create a false impression in the mind of the investors that the companies will have their support in the event of financial difficulty.



52. CESR has therefore deleted this requirement since it considers, in line with the consultation response, that regardless of the identity of these advisers, the investor will make an investment decision about the issuer's solvency.
53. On the other hand, there was a split view as to whether there should be a disclosure relating to the bankers and legal advisers who were involved in the issue of a particular debt instrument. This issue has been dealt with by with reference to the Securities Note.

#### **History of the Company's investments (Paragraphs 136 – 139)**

54. The general consensus of respondents was that past investments are not important to investors in debt securities except where it may affect the company's ability to meet its obligations under the issue. The response for current and future investments was however mixed, although most of the respondents stated that current investments are not important for investors in debt securities in particular where such investments would have been reflected in the company's consolidated financial statements.
55. On the other hand, a smaller number of respondents argue that it is important to show where the company has committed, commits and will commit its funds and how liquid those investments are since this could be considered as an indicator of liquidity.
56. In response to this, CESR has altered the original proposed text so that disclosure on investments made since the date of the last published financial statements and future investments upon which the issuers' management have made firm commitment will be required.

#### **Operating results, liquidity and capital resources (Paragraphs 140 – 142)**

57. It was considered that there should be a reduced level of detail for debt securities than for Equity on these items to reflect the different interests of the respective investors in both types of securities. This was in line with CESR's expectations and therefore the level of detail has been reduced for debt securities.

#### **Age of latest accounts (Paragraphs 143 – 146)**

58. The question of **when** interim financial statements should be disclosed was not addressed but as regards the **form and content**, most of the respondents do not consider that it is appropriate to stipulate these. They consider that it is more appropriate to stipulate that it conforms to international accounting standards, for instance, IAS/IFRS or US-GAAP and further, some respondents envisaged that this will be dealt with in the proposed Transparency Obligations Directive (TOD). Others think that stipulating the form and content will ensure transparency and consistency. Since it is expected that TOD will deal with the content of financial statements, only a requirement of the age of the latest annual accounts and the requirement to include half yearly and quarterly statements have been stipulated by CESR.

#### **Documents on display (Paragraph 147 – 150)**

59. A great number of the respondents do not consider that it is appropriate for documents to be put on display but if they must, then they should be restricted to publicly available documents, for instance, the constitution documents of the issuer and the financial statements. They argue that to do otherwise will breach the data protection, privacy laws and possibly even criminal laws of a number of jurisdictions. Further, having to put material contracts on display will be detrimental to the issuer in many respects as it will result in an undue competitive disadvantage on the part of the issuer. There is no added value in displaying these contracts, which could be summarised in the prospectus in any event. In addition, having to display a whole lot of



additional documents may cause investors to have ‘information overload’ and detracts from the value of the prospectus since the investors will then have to conduct their own due diligence.

60. On the whole CESR agrees with this view and in reaching a compromise, has altered the requirements for documents to be put on display by limiting it to publicly available documents.
61. On the issue of translation of documents, most of the respondents consider that translation of the documents will be too time consuming and costly, the burden and detriment to issuers outweigh the benefits. There is no obligation to translate the prospectus and therefore, there should be no corresponding obligation to translate documents. A summary of the documents in the language of the prospectus will suffice. If there is a requirement to translate, then it should be in a language that is customary in the sphere of international finance. Consequently, this has not been required by CESR in its implementation measures for retail debt.

#### **Additional information (Paragraphs 151 – 156)**

62. Most of the respondents do not consider that the detail of information in VIII.G of Annex A is relevant for retail debt. For instance, information about value of shareholding is considered to be irrelevant. However, it is thought that information about guarantees provided to subsidiaries should be included.
63. CESR has made a considerable reduction to the disclosure requirements for major shareholders in the retail debt schedule. Related party transactions have been deleted on the basis that they are, on the whole, irrelevant for investors in debt securities and also partly because such transactions would have been disclosed in the annual financial statements.

#### **Registration document – Asset backed Securities**

##### **General comments**

64. In relation to the Asset Backed Securities Registration Document disclosure requirements, CESR raised a question in the Addendum as to whether these disclosure requirements were appropriate for asset backed securities. Only 14 responses were received on this question. However, those who did respond tended to provide detailed comments on the proposed disclosure requirements. CESR has given due consideration to all drafting suggestions made by respondents, when amending the text of the disclosure requirements.

##### **Specific comments raised in responses**

65. Several respondents raised comments in relation to the level of detail contained in certain disclosure requirements. CESR has taken these comments into consideration when amending this schedule.
66. The original introductory text included in the ABS registration document stated that the ABS registration document disclosure requirements applied to issuers that were special purpose vehicles or entities, as well as special purpose vehicles with no separate legal identity. It became apparent from the consultation responses that this introductory text was not clear and, in fact, some respondents suggested deleting it. Therefore, CESR has proposed not to include this introductory text in the amended Annex. In addition, references to ‘funds’ or ‘entities with no separate legal identities’ have been deleted from all disclosure requirements in this schedule containing such references.

67. Several respondents suggested that the language used in certain of the disclosure requirements in the ABS registration document should be consistent with that used in other schedules/building blocks. CESR accepts these comments and has sought to ensure consistency between the disclosure requirements in this schedule and other registration document schedules/building blocks.
68. Several respondents made comments to the effect that material contracts referred to in the registration document should not be made available for inspection. In line with amendments made by CESR to other disclosure schedules, this requirement has been deleted from this schedule.

### **Securities Note**

#### **The building block approach (paragraph 249 of the CP)**

69. Many respondents did not answer this question and almost all of those who answered this question supported the creation of building blocks in principle. Many respondents did not give a reason for their support, but where they did, they largely cited the greater flexibility it would provide for the new regime as the reason for their support.
70. However, many respondents who supported the proposal in principle believed that the building block system ran the risk of becoming too prescriptive and gave two reasons for this. Several considered that there was far too much detail in the building blocks. These respondents believed that this high level of detail was too prescriptive and that it might result in the loss of the very flexibility that the system was intended to provide and therefore believed that more generalised and generic blocks should be created.
71. A number of other respondents said that the creation of too many building blocks would mean a loss of flexibility and advocated restricting the number of blocks created to the three main ones (SN Equity, SN Debt and SN Derivatives) and only a few essential additional blocks. Some respondents shared both of these reasons.
72. A few other respondents also believed that there should only be three main building blocks, but argued for an additional block to cover their own particular area of interest, such as asset backed securities, banks or exchanges. A number of respondents pointed out that there was a great deal of unnecessary overlap with the RD
73. Clearly there is overwhelming support for the building block system, but a significant number felt that it ran the risk of sacrificing its flexibility if it became too detailed and/or resulted in an unnecessary proliferation of building blocks. These comments have been taken into account in the final drafting of the building blocks.
74. Most respondents did not answer the question and most of these approved the proposal. Very few respondents gave a reason for their decision, but those that did believed that it would promote the ease of comprehension or avoid duplication in the SN

#### **Format of the Schedules (paragraph 250 CP)**

75. Only a small number of respondents believed that the Common and Specific Items should be kept separate but there was no consensus on the reason for the objection, even where one was given. For example, one respondent cited clarity as a reason for keeping the blocks separate, whilst another gave ease of amendment in the future as its reason.

76. Other respondents appear to have misunderstood the building block system when formulating their response to the question, for example believing that it would be possible to file the Common Items and Specific Items with the Competent Authority as separate documents, rather than as a single SN. In addition, a number of respondents added that, while they supported the proposal, many of the Common Items were not truly common and were in fact only applicable to Equity. Again some of the respondents also made the point that there was unnecessary overlap between the SN and RD in response to this question
77. Once again, there is overwhelming support for the proposal indicated in the consultation paper. There will therefore be a limited number of main schedules combining the common items and the security-specific items blocks. A limited number of building blocks with high-level disclosure requirements can then be added to the schedules in order to deal with disclosure requirements that are not addressed by them.

### **Complex Financial Instruments (paragraph 251 CP)**

78. Most of the respondents did not answer this question and most of those who answered this question agreed that the Competent Authority (CA) should be able to add specific items of another schedule to the main schedule chosen, that it considers necessary having regard to the characteristics of the securities offered, as opposed to their legal form.
79. The key points arising in the responses agreeing with the proposal were as follows
- Disclosure items can be adapted to the characteristics of each security thus proving more flexibility.
  - CA should be able to disapply specific disclosure items having regard to the characteristics of the security.
  - Avoids delaying an issuer's access to the capital markets by waiting for CESR to issue guidance on a specific type of instrument.
  - CA should have to authority to add in specific items but this authority should be provided with specific guidelines in this area.
  - CA should always have the right to require additional specific items.
80. The key points arising in the responses disagreeing with the proposal were as follows:
- Main schedule contains sufficient information
  - Objective of harmonisation will not be achieved.
81. Taken in consideration the responses to the Consultation Paper, competent authorities should be able to add specific items of another schedule to the main schedule chosen, as well as disapply specific disclosure items having regard to the characteristics of the securities, as opposed to their legal form. CESR should provide general guidelines at Level 3 for competent authorities to rely on in such situations.

**Advisers (paragraph 252 CP)**

82. Many of the respondents did not answer the question and a small number of the respondents who answered this question believe that advisers should be mentioned in all cases.
83. The key points arising were as follows:
- Information in relation to advisers may give investors an indication of the quality of the information presented.
  - Provides the investor with additional information.
  - Adviser should be mentioned but the extent of their liability should be detailed.
  - Adviser should be co-responsible for the information in the Prospectus.
84. Many of the respondents who answered this question believe that advisers should not be mentioned in all cases. The key points emerging from these responses were as follows:
- Advisers should only be mentioned if they could be held liable for the information provided in a prospectus.
  - Question appears to imply that by naming an adviser liability may be attributed to that adviser. Mentioning the adviser does not relieve the directors of their liability for the contents of the prospectus.
  - Advisers should only be involved where they have been involved as arrangers.
  - Advisers should only be mentioned where their intervention is provided for by a European regulation.
  - As the information in relation to the adviser will already be included in the registration document it would not appear necessary to repeat the information in the securities note.
  - Mentioning legal advisers would add no value.
  - Disclosure of financial and legal advisers would not be relevant in the case of corporate retail debt.
  - Advisers should not be mentioned unless there is a conflict of interest
85. CESR has therefore considered that advisers should not be mentioned in all cases. In discussing the responses to this question, CESR noted that it should not be mandatory for issuers to



mention advisor(s) in a SN. However, when an issuer discloses the advisor(s) connected with an issue, it should also state the capacity that the advisor(s) acted in.

### **Audited information (§ 253 CP)**

86. Many of the respondents did not answer the question. Most of the respondents who answered this question are in favour of requiring the audit report on all information which has been audited but which forms no part of the annual financial statements. Most of them believe that the audit report is valuable information and an important basis for investor confidence. One respondent is of the opinion that the report should not be included but a note that this other information has been audited.
87. Another respondent warned that auditors would then refrain from the current practice to review certain information not included in the annual accounts due to the fear of liability.
88. Some responses dealt with the question where the auditors report should be published. The following alternatives were given:
- It should generally be contained in the RD. Some respondents are of the opinion that the SN should then contain a reference.
  - It should generally be contained in the RD except where relating to the specific offer in which case it should be contained in the SN
  - Report should generally be contained in the SN
  - Report should only be contained in the SN where it is different from the report contained in the RD otherwise a cross-reference is sufficient
  - Report should be included where the financial information is published (SN, RD or both)
89. CESR considered the auditors report to reveal valuable information for investors. However, it points out that the disclosure requirement is confined to cases where a report was actually produced by the auditors. CESR is of the opinion that the auditors report must be inserted where the information to which the report refers is given.

### **Responsibility (§ 254 CP)**

90. A number of the respondents did not answer the question and many of those who answered this question feel that there is no necessity that responsibility must rest with the same persons. Those respondents suggesting to split responsibility up argue that for practical reason it is not possible to make the same persons responsible for all parts of the prospectus. It could well be that people change in the time between the release of RD and release of SN.
91. As the details of civil liability are up to the law of each Member State, the disclosure requirements should be open to all possibilities which are in line with Article 6 of the draft Directive. This includes the possibility that certain persons are liable only for certain parts of



the prospectus. However, CESR feels that there should be at least one person or body who is responsible for the entire prospectus. The scope of liability should be disclosed in the RD and in the SN.

#### **Legislation under which securities have been created (§ 259 CP)**

92. Only a small number of respondents answered the question. Out of those respondents who have answered this question many are in favour of this requirement. One says it would be a duplication of information asked for under V.A 2 and 12 (law applicable and other specific legislation regarding the issue/offer). Another believes it would lead to uncertainty as to level of disclosure. Those who have answered yes without any comment could possibly be satisfied with information under V.A.2 and 12.
93. CESR agreed that the line items under V.A.2 and 12 would cover the information asked for and that V.A.2 could be deleted.

#### **Court competent in the event of litigation (§ 259 CP)**

94. A significant number of the answers were positive ones and many noticed it might be useful. Some noticed that it would not be possible in pan-European offers and that it may be too burdensome to require the issuer to predict every possible situation for every type of investor in every country an issuer offers in, for a pan-European offer and it may be unnecessary (expensive to investigate) to always have to cover it in every prospectus.
95. CESR has considered this point and has decided that this requirement might be too burdensome for issuers and therefore has delete it.

#### **Redress service available if any (§ 259 CP)**

96. Out of those respondents who have answered this question a great number are in favour of this requirement. It is said that it would be potentially extremely broad and could cover all European consumer protection legislation. A suggestion would be that of not requiring this, or to limit it to the name of the relevant consumer protection legislation and possibly the name of the relevant consumer protection authority.
97. CESR decided to delete this requirement. If there is a redress service available on contractual grounds it is always possible to mention it.

#### **Rating (§ 259 CP)**

98. An important number of the respondents who answered this question favour disclosure of rating (at least for debt instruments) and many of those prefer the second wording. The rating agency that has answered the CP suggests that the disclosure item should only encompass ratings made by rating agencies and not by commercial banks. It suggested to define a rating agency as “an entity whose primary business is the issuance of credit ratings made broadly available to the general public for the purpose of evaluating the credit risk of debt securities.”

99. It has to be noticed that if the information is “direct” in the meaning of the Market Abuse Directive it must be disclosed by the issuer. This would be the case if the rating has been requested. To avoid a situation where an issuer terminates co-operation with the rating agency in order to avoid disclosure an addition under (ii) is suggested: “...which are assigned to an issuer or its debt securities (i) at the issuer’s request or with its co-operation in the rating process or (ii) which may have consequential impact on the issuer or its debt securities”.
100. The same rating agency also suggests to make a reference with a link or a similar means, to the rating agency for the explanation of the meaning of the rating.
101. A change in rating would probably be a significant new factor in the meaning of Article 16 of the amended proposal for the Directive of the European Parliament and of the Council on the Prospectus, and require a supplement to the prospectus if it occurs before the closing of the offer.
102. CESR came to the conclusion that ratings -not only ratings delivered by rating agencies, but also by commercial banks- would be required for debt instruments which were a result of a request or co-operation of the issuer. CESR did not want to create doubt as to the scope of the rule by putting in that non-requested ratings are covered. Indeed, CESR is of the opinion that interrupted co-operation would equal information of “direct effect” and be covered by the market abuse directive. In addition, such a situation could be regarded as a “significant new factor” (Article 16 of the amended proposal for the Directive of the European Parliament and of the Council on the Prospectus) or as “material” (Article 5 of the amended proposal for the Directive of the European Parliament and of the Council on the Prospectus) and disclosure could be required on one of those grounds. CESR also is of the opinion that the rating result should be accompanied by an explanation of it, and not only a reference to the home page of the rating agency.

### **Blanket Clause (§§ 122-123 Add. CP)**

103. In certain cases, some line items set out in one of the three SN schedules might be inapplicable for a specific issue. A different matter is the case where disclosure requirements are applicable but might be inappropriate to the issuer’s sphere of activity or to the legal form of the issuer or to the securities to which the prospectus relates. This concern has been dealt with under Article 8 (3) of the amended proposal for the Directive of the European Parliament and of the Council on the Prospectus.
104. This exception does not encompass those cases in which the issuer cannot provide the required information simply due to the nature of the particular issue. For instance, the SN Debt Schedule requires a statement of the resolutions, authorisations and approvals by virtue of which the securities have been or will be created and/or issued. In some jurisdictions no such resolutions, authorisations and approvals may be foreseen by the respective applicable law. In such a case no information has to be disclosed in order to comply with the line item.
105. With the introduction of a blanket clause CESR acknowledged that the three main schedules might in certain circumstances contain disclosure requirements which are not applicable to the specific issue in question. CESR considered it to be more appropriate to have only three main SN schedules and thereby running the risk that some disclosure requirements may not fit to any offer of securities than to develop a separate schedule for any single product.



106. In order to give guidance for the regulators and preventing the issuers from adding lots of negative statements for non-applicable line items, CESR discussed the introduction of a blanket clause for the SN schedules as follows: *“If certain information required in the line items or equivalent information is not applicable to the issuer or to the securities to which the prospectus relates this information can be omitted.”*
107. A significant number of market participants generally welcomed the introduction of the blanket clause. However, some concern was raised that CESR cannot override Article 8 (3) of the draft Directive. It seems that some market participants misunderstood the background of the blanket clause. They understood the blanket clause to be a definition and specification of Article 8 (3).
108. Another concern was that a harmonized application has to be obtained. Some market participants asked for an extension of the scope so that the blanket clause also applies to the registration document. A number of market participants pleaded for a more flexible approach by extending the scope of the blanket clause on information of minor importance. If certain line items are actually not applicable to an issue they should simply not apply and no information in this concern should be requested from an issuer.
109. CESR is of the opinion that this ratio is pretty obvious and the explicit mentioning of a blanket clause is redundant. The competent authorities should express this ratio towards the issuers for the sake of clarification. The harmonized application of this -unwritten- rule will be achieved by a further and closer cooperation between the competent authorities.
110. CESR acknowledged the suggestion to extend the scope to information of minor materiality. Due to the purpose of harmonization, CESR could not follow this proposal. CESR already reflected the general perception from market participants that the schedules would be too detailed by shortening them. Therefore there is also no need to grant the issuer a further ease by such an extended blanket clause.

### **Working Capital (§§ 125-126 Add. CP)**

111. In creating the separate disclosure requirements for RDs and SNs, it was sometimes necessary to allocate different parts of IOSCO disclosure requirements between the RD and the SN. One example of such a possible allocation split was IOSCO disclosure V.B.1.a., second sentence, which deals with working capital statements (*“Include a statement by the issuer that, in its opinion, the working capital is sufficient for the issuer’s present requirements, or, if not, how it proposes to provide the additional working capital needed.”*).
112. Most of the respondents who answered this question considered that this disclosure is more appropriate to the RD Equity.
113. The common argument put forward is a “logical” one as it is merely said that this information on the issuer should be included in the RD Equity. It is also said that inserting this statement in the SN Equity is of no importance for the investor and could be misleading if there has been no material changes in the working capital since the issuer’s annual report. Some respondents considered that this disclosure is more appropriate to the SN. This is due to the fact that:

- capital statements may be subject to quick and sudden changes,
- it is a dynamic statement with a finite life,
- the item is pertinent to the issuer's position at the date when a prospectus is used,
- information should be timely and relate to the position of the company at the time of the issue.

114. One respondent suggested that this item should be in the RD Equity or SN Equity at the choice of the issuer. Another respondent supported that it would be more appropriate to require the company to give a statement only in the case it regards its working capital is not being sufficient for the company's present requirements. Another one, considering the time and expense necessary to produce a working capital statement, suggested that a statement which is less than 12 months old may be relied upon, provided that there has been no material change to the statement during the period and a statement to that effect is contained in the SN Equity.

115. As a conclusion, CESR proposes that the statement about working capital is included in the SN Equity for it relates to the position of the company at the time of the issue. The statement about working capital forms part of the discussion concerning liquidity and capital resources that is currently part of the RD. The question has been raised if it should not be more appropriate to make these disclosures part of the SN rather than the RD so that the wider discussion is more closely linked to the working capital statement. CESR is of the opinion of the major part of the respondents who prefers to keep the other disclosures regarding liquidity and capital resources in the RD.

#### **SN Equity Schedule (§§ 260-261 CP and § 132 Add. CP)**

116. CESR has proposed the adoption of three main schedules (SN Equity, SN Debt and SN Derivatives) and has requested views on the items that were considered unnecessary and those that were missing and should be added to the schedules. In general, as already referred to in relation to the questions on the building block approach and on the format of the schedules (§§ 249 and 250 of the CP), a significant number of respondents, on the one hand, considered the level of detail in the schedules too extensive and prescriptive, and, on the other hand, called attention to overlaps between the SN and the RD.

117. CESR recognises that excessive detail may jeopardize the clearness of the schedules. Nevertheless, CESR is also of the opinion that the items in the schedules do need to contain a sufficient level of detail to ensure harmonization of the prospectus drawn up for cross border offers and admissions to trading.

118. CESR has, therefore, carefully reviewed the SN Equity Schedule and, where possible and appropriate, has removed any excessively detailed items. CESR has tried to achieve this goal by adopting more general and straightforward wordings, by deleting lists of examples, by deleting repeated items and items with unclear meaning, and by merging items with similar content.

119. Besides the amendments that arise from proposals made during the consultation, it is worth noting that some items of the SN Equity Schedule have been changed due to other reasons. In fact, the wording of certain items has been aligned with the text of the draft Directive (e.g. the disclosure requirements related to the persons liable for the prospectus), and certain items have been amended following the outcome of other questions discussed in the CP (e.g. the



disclosure requirement related to advisers - § 252 of the CP). The paragraphs below will examine the amendments made in relation to specific items that have been criticised by a significant number of respondents.

### **SN Equity Securities Schedule (Annex K CP)**

120. To deal with concerns expressed by some respondents, who considered it to be unnecessary and of difficult compliance, the item related to capitalization and indebtedness has been amended, extending the deadline requirement (from 60 to 90 days) and removing the need for a negative statement.
121. A vast number of respondents expressed the view that the section on reasons of the offer and use of proceeds was too detailed and too wide. The wording of this section has been restated in more general terms without putting at risk the importance of the information to be provided.
122. The schedule presented for consultation comprised two items related to interest of experts: interests of experts in the issue/offer and conflicts of interests. These items have been criticised by some respondents mainly because they seem too broad and because no guidance has been provided on the concept of conflict of interest in the scope of an offer an/or admission to trading. Taken in consideration the overlap between the two, these two items have been merged and the new wording makes it clearer that only interests *material* to the issue are required to be disclosed.
123. Some respondents pointed out that the section on pre-allotment disclosure and over-allotment and greenshoe was too detailed and some respondents proposed to delete certain items included in this section. The disclosure requirements proposed in this section follow the proposals made in an earlier CESR document (*Stabilisation and Allotment – A European Supervisory Approach*, April 2002, CESR/02-020b) that CESR believes should be taken in consideration in the present work.
124. Two examples of disclosure requirements that have been amended to avoid excessive detail, as mentioned above, are the items related to underwriting and pricing. In both situation, the adoption of a paragraph with a more general wording make it possible to delete a few other paragraphs and to prune unnecessary repetitions.
125. The disclosure requirement related to price history has been considered as too detailed by some respondents, unduly burdensome and unnecessary as it comprises information which is publicly available. CESR has debated this issue at length and it has been decided to remove this item from the schedule.
126. A vast number of respondents considered the section on expenses of the issue/offer too detailed, irrelevant for investors, and not material for the assessment of the issuer or of the securities, and proposed the information required to be limited to the net proceeds of the offer and to an estimated of the expenses. CESR recognises that the detailed of this item was excessive and therefore has confined the disclosure to net proceeds and total expenses. However, as the underwriting commissions are deemed to be relevant information in general, it has been made clearer that when describing the main features of such agreement the commissions paid should be disclosed.

127. Insofar as proposals of items to be included in the SN Equity Schedule, CESR has carefully considered the proposals received. However, CESR believes that in certain cases the item suggested is already included in the schedule (this applies for a proposal to include information on allotment and stabilisation), in other cases the proposed requirement is already provided for at level 1 (circumstances in which the investor is allowed to withdraw its application), and in other cases the disclosure does not relate directly to the issues specified in Article 5(1) of the Directive (this is the case of information regarding characteristics of the clearing systems of trades that will only be disclosed if material to the offer/admission).

#### **Additional Information in the SN Equity Schedule (Annex 7 Add.CP)**

128. CESR has come to the conclusion that rather than drafting specific building blocks for shares in general, or for specific classes of shares, it would be more adequate to add to the SN Equity Schedule (Annex K of the CP) a few items of information, in particular with regard to the description of rights attached to the securities, broad enough to cover any class of shares.

129. Most respondents were supportive of the approach proposed. Some respondents agreed with the proposal, provided that the *blanket clause* is adopted (see §§ 120–123 of the Add.CP). Considering the wide support, CESR has added to the SN Equity Schedule those items of information. However, the wording of these items has been slightly changed either to avoid duplications with the *chapeau* of the main item either to ensure its clarity.

#### **SN Debt Schedule (§§ 260-261 CP and § 136 Add. CP)**

130. CESR refers to the general comments made for the SN Equity Schedule. For the same reason, CESR has carefully reviewed the SN Debt Schedule and, where possible and appropriate, has removed any excessively detailed items. CESR has tried to achieve this goal by adopting more general and straightforward wordings, by deleting lists of examples, by deleting repeated items and items with unclear meaning, and by merging items with similar content.

131. Some items of the SN Debt Schedule have been changed due to other reasons (e.g. to align with the text of the draft Directive or to adapt to the outcome of other questions included in the CP or the Add.CP).

132. The paragraphs below will examine the amendments made in relation to specific items that have been criticised by a significant number of respondents.

#### **SN Debt Schedule (Annex L CP)**

133. Some items initially proposed in the SN Debt Schedule like Selling securities holders, Capitalization and indebtedness or specific line items under Terms and conditions of the offer or Plan of distribution, have been deleted to deal with the concerns expressed by most respondents of an excessive level of detail and taking into consideration the fact that in most cases these disclosure requirements are only relevant for equity securities.

134. The schedule presented for consultation comprised two items related to interest of experts: interests of experts in the issue/offer and conflicts of interests. Concerning these items the same approach as in the SN Equity has been followed for the reasons mentioned above.

135. Two examples of disclosure requirements that have been amended to avoid excessive detail, as mentioned above, are the items related to interest rate and underwriting. In both situations, the adoption of a paragraph with a more general wording makes it possible to delete a few other paragraphs and to prune unnecessary repetitions.
136. Concerning the section on expenses of the issue/offer CESR has followed for the Debt schedule the same solution as the one taken in the SN Equity schedule.
137. Insofar as proposals of items to be included in the SN Debt Schedule, most respondents considered that the schedule contained already all the relevant information for investors. However, following the responses given to § 259 of the CP (see above), CESR has included an additional requirement related to the rating.

#### **Additional Information in the SN Debt Schedule ( Annex 8 Add.CP)**

138. CESR has come to the conclusion that rather than drafting specific building blocks for debt securities with a derivative component it would be more adequate to add under the item Interest rate of the SN Debt Schedule (Annex L of the CP) a few items of information regarding the underlying, in order to deal with these products.
139. Considering the wide support expressed by the respondents, CESR has added those items of information to the SN Debt Schedule. However, the wording of these items has been slightly changed to ensure its clarity.
140. Concerning the additional items to be included under Risk factors -in particular examples of the way the instrument works and examples of the best and worst case scenario- CESR has decided, for the time being, to postpone its decision. Since these requirements are also included in the draft SN Derivative Schedule that has not been finalized yet, CESR considers that a common approach should be followed in both schedules on that topic. Therefore this question will be discussed when analysing the SN Derivative Schedule.

#### **Additional SN Building Block for Asset Backed Securities (§§ 143-144 Add. CP)**

141. In relation to the additional SN building block for Asset Backed Securities (Annex 10 of Add.CP), CESR raised a question in the Addendum as to whether these disclosure requirements were appropriate. Only 12 responses were received on this question. However, those who did respond provided detailed comments, including drafting suggestions, on the proposed disclosure requirements. When amending the text of the disclosure requirements, CESR has given due consideration to all comments and drafting suggestions made by respondents.
142. Several respondents raised comments on the definition of asset backed securities. CESR is of the view that given the specialized nature of asset backed securities it is necessary to give a definition. CESR has sought to simplify/clarify the definition initially contained in the building block and now indicated in the text of the Technical Advice.
143. CESR has made amendments throughout the building block to reflect comments made by respondents that ABS typically do not represent an ownership interest, as well as comments that that term 'securitised assets' should be used consistently throughout the building block.

144. Several respondents made comments on disclosure B.2.2, concerning information on obligors. In order to address these comments, CESR has amended the disclosure so that in the case of a small number of easily identifiable obligors, a description of each must be given, whereas in all other cases (i.e. where a large number of obligors is involved), only the general characteristics of the obligors must be provided. CESR is of the view that a description of the economic environment, as well as global statistical data referred to the securitised assets, is relevant information and should continue to be included.
145. Several respondents made comments on disclosure B.2.11, concerning information where the assets comprise obligations of 5 or fewer obligors, or where an obligor accounts for 20% or more of the assets or a material portion of the assets. Comments arose on the percentage limit level, as well as the term ‘material portion’ being too broad. However, CESR has not proposed an amendment as it is of the view that it is necessary to include an objective criterion while at the same time allowing for flexibility in certain cases.
146. One respondent stated that the information should be limited to that which is publicly available. It is important to note that the information required is that so far as the issuer is aware or able to ascertain from information published by the obligor. Several comments arose on who would be responsible for this information. CESR considers that the responsibility disclosures set out in Section 1 of the SN Debt Schedule, adequately addresses the concerns raised.
147. CESR has amended disclosure B.2.11 to require more detailed information on each obligor, i.e. it should be the same as that required for an issuer under the RD Wholesale Debt, rather than that under the RD ABS building block, as was previously suggested. In response to a concern that details of principal terms of any relationship between an issuer, guarantor and obligor, would be extremely burdensome to comply with when many obligors exist, CESR has constrained this disclosure to relationships that are material to the issue.
148. Several comments arose on disclosure where more than 5% of the assets comprise equity securities that are not admitted to trading on a regulated market, stating that the requirement was too extensive. In response to the concerns expressed, CESR considers it appropriate to increase the threshold to 10%.
149. A number of comments also arose on the disclosure requirement where a material portion of the assets are backed by real property. CESR considers it appropriate to require a valuation report in such circumstances. It should be noted that this disclosure may be amended as a consequence of any changes to the property companies’ building block.
150. Several respondents raised comments on the Investment Considerations section of this building block. In order to address concerns expressed, CESR has restricted the disclosure requirement concerning securities backed by existing assets to situations involving further issues, and has also moved this disclosure requirement to the B section. As suggested by respondents, average life and method of calculation for the securities for different prepayment rates is speculative and not usually provided by issuers. Therefore, CESR proposes to delete this disclosure. The ratings agency disclosure is duplicative of that contained in the SN Debt Schedule and, therefore, CESR proposes that it be deleted.
151. In relation to the ‘Structure and Cash Flow’ section, and in response to a comment received, CESR has adapted the disclosure concerning the structure of the transaction (D.1.1) to allow for a structure diagram, if necessary. Two respondents stated that a financial service table



should not be required when explaining how the cash flow from the assets will meet the issuer's obligations (D.1.4(a)). Having considered this issue further, CESR considers that it remains a valuable disclosure and, therefore, should be retained.

152. In response to several comments received on the level of detail of the disclosure concerning the originator or creator of the assets backing the issue (B.1.5), CESR considers that this disclosure should continue to be required for originators of assets backing the issue, but has deleted the reference to 'creator'.

### **Additional Building Block for Guarantees (§§ 149-150-151 Add. CP)**

153. There was overwhelming support for the proposal, with a great number of those in favour of this Building Block making no additional comment in answer to the question. In view of the strong support CESR will adopt the proposal for a Guarantees Building Block.

154. There were very few calls for amendments to the Building Block. Most respondents combined their answers to questions 150 and 151, and only a small number suggested any amendments. There was also little consensus over the amendments that might be necessary for this Building Block.

155. However, CESR has assessed each of the suggested amendments given in response to the Addendum to the Consultation Paper and re-evaluated the building block in light of the comments. CESR's response to the suggested amendments is set out below.

### **Nature of the Guarantee**

156. It was suggested that the obligation in paragraph 1 was too wide and would catch guarantees covering obligations that had no material impact on the security being issued. The new wording suggested would have narrowed the scope of the building block too far, but we acknowledged the validity of the comment and amended the paragraph by amending the first sentence so that it reads "*A description of any arrangement intended to ensure that any obligation **material to the issue** will be duly serviced ...*".

157. Some respondents wanted the scope of the obligation narrowed so that the building block only caught arrangements that gave security holders a right to demand a payment from the issuer or a financial backing of the issuer in another form. Some wanted it restricted to arrangements that gave the security holder a direct right of action against the guarantor. CESR decided to reject these suggestions. In the case of the first suggestion, the point of most guarantees is that you can also demand payment from the guarantor so to accept this amendment would make the building block redundant. In the case of the second suggestion, CESR intentionally sought to catch arrangements beyond the scope of a traditional guarantee as their presence or absence would affect an investment decision and they would no obligation to disclose them otherwise. There were also some minor drafting amendments suggested.

158. Only minor drafting amendments were suggested for the scope of the guarantee.

### **Declaration of Responsibility**

159. There were suggestions for amendments to these paragraphs, but on reflection we decided that these obligations were adequately covered in the main SN Schedules to which this block would be added, so these two paragraphs could be deleted.

### **Information to be disclosed about the guarantor**

160. It was suggested that we amend the paragraph so that the disclosure would operate to require the guarantor to disclose information about itself as if it were the issuer of the security. This would mean that the guarantor could disclose at the most appropriate level so, for example, a bank acting as guarantor could take advantage of the reduced RD disclosure requirements for banks. CESR decided to adopt this suggestion as it was equitable and gave greater flexibility.

161. Some respondents suggested that information on the guarantor might be incorporated by reference. This would only be possible where the Competent Authority has approved the documents to be incorporated so the suggestion dove-tails with another suggestion, that information on the guarantor be adapted where it is listed. This proposal is sensible, as it does not reduce the level of disclosure; it merely simplifies the drafting of the prospectus. However, the draft Directive itself permits this so no amendment to the Guarantees Building Block is needed.

### **Documents on display**

162. There were some calls to delete this requirement, for the same reasons given in relation to the equivalent requirement placed in the main SN Schedules. In principle we decided that while there would be no general obligation to disclose documents in the main Schedules, this requirement would be assessed on a case by case basis. In this instance it was decided that the guarantee was such a fundamental document its display was justified.

163. Conversely, there were also calls to require the disclosure of the text of the guarantee in its entirety. This obligation would result in the verbatim reproduction of very lengthy documents in the prospectus which would be a burden on issuers without giving any benefit to investors as the material terms and conditions would be disclosed under paragraph 2 of the building block and the guarantee itself would be displayed.

### **Other Matters**

164. Some respondents also suggested that the building block should permit reduced disclosures on the issuer where the guarantor is making full disclosures. This would run counter to current practice and, where the security holder has an option of proceeding against the issuer, the information is valuable. Accordingly CESR decided to reject this proposal.



## **PART TWO – INCORPORATION BY REFERENCE**

### **General comments**

165. Of the responses received to the consultation paper around thirty did not comment on the part regarding incorporation by reference and among those that did a certain number of them commented on the provisions contained in the text of the Directive. Most of them referred to the requirements incorporation by reference as too restrictive. In particular, the main object of consideration has been the circumstance that only information contained in documents that have been previously approved or filed with the competent authority may be incorporated. This provision, it has been noted by certain respondents, seems to be particularly problematic with respect to third country issuers, whose possibility to take advantage of the provision on incorporation by reference might be reduced. Consequently the proposed level 2 implementing measures that touched this particular aspect of incorporation by reference have been equally criticised.
166. Several respondents have also commented on the role of the competent authority when authorizing incorporation by reference in the approval of the prospectus process. In particular some respondents have suggested that the competent authorities should be given a certain level of flexibility. Taking in consideration the present text of the Directive when a document has the required characteristics its incorporation should be allowed. Nevertheless, in order to avoid, as indicated by several respondents, that the prospectus ends up becoming a one page document simply containing references to other documents, CESR has advised that the issuer, when drafting the prospectus, should duly consider whether the comprehensibility of the prospectus is endangered.

### **Documents that can be incorporated by reference (paragraphs 270-282)**

167. With specific reference to the characteristics of the documents that can be incorporated by reference, CESR had advised to assure at level 2 that the documents should be drawn up in the same language as the prospectus or the documents composing it into which the information is incorporated by reference and that they should have been previously filed with the competent authority.
168. Almost all respondents seemed to agree on the first requirement on the basis that the documents incorporated by reference are part of the prospectus and should therefore be treated similarly.
169. The second requirement on which, as mentioned above, several comments have been received, has instead been deleted from CESR's proposed advice because it is inserted in the present text of the Proposed Directive.
170. CESR had also proposed the introduction at level 2 of an illustrative list of documents that might be incorporated by reference and asked whether such a list was acceptable. Most respondents felt the list was acceptable even though some of them suggested to amend the wording. Nevertheless several other respondents noted that probably the list might not be necessary as the requirements the documents should have are already indicated in the proposed directive.
171. CESR is of the opinion that the list is useful even if it is for illustrative purposes and has therefore kept it in its advice amending the wording of several documents in consideration of the respondents' suggestions.
172. As far as "press releases" are concerned, some respondents questioned whether their incorporation by reference should be allowed. In particular several have noted that the term "press releases" needs clarification as to whether these should be interpreted as referred to

all forms of press releases or should be confined to regulatory announcements. In order to restrict these to those that are published according to the existing Directives, as required by the Proposed Directive the suggested wording has been introduced. In order to avoid other similar misunderstandings it has been made more clear that the documents indicated in the list may only be incorporated by reference if they have the requirements provided for by the law and the implementing measures.

173. Accepting other respondents' suggestions, "circulars to security holders" have been added to the list.
174. A certain number of respondents suggested to remove from the list the annual and interim financial statements or the audit report because such documents contain extremely relevant information that should be inserted in the prospectus and not only incorporated by reference. CESR has kept these documents in the list because the information incorporated by reference is in the prospectus and therefore the incorporation of such documents does not mean that the said information is not contained in the prospectus.
175. Other amendments have been introduced after having considered the answers to CESR's question in paragraph 282 on the need for further technical advice. In particular many respondents have indicated the need to clarify whether partial incorporation of a document could be allowed. CESR is of the opinion that this practice should be allowed because it might prove useful especially when historical information is incorporated and in order not to overburden investors with an excessive amount of unnecessary information. CESR has therefore included in its advice to the Commission the clarification that the issuer may incorporate information in a prospectus by making reference only to certain parts of a document, provided that this is not misleading and the issuer states that the non incorporated parts are not relevant for the investor.
176. As suggested by other respondents CESR has also clarified that if the document incorporated by reference contains information which has undergone material changes, the prospectus should clearly state such a circumstance including the updated information.
177. One respondent has expressed the opinion that incorporation by reference should not be allowed in the supplements but on the other side suggested to use the press releases as supplements. CESR is of the opinion that incorporation by reference may prove useful also in occasion of the publication of supplements that are always a part of the prospectus.

**Documents that can be incorporated by reference for annual updating of the registration document (paragraph 283)**

178. The approach followed in the Consultation Paper according to which the second point of the provisional request on incorporation by reference was no longer consistent with the amended text of the Directive has been confirmed by the Additional Provisional Request that has clearly stated that the request was revoked since the obligation to update the registration document on an annual basis had been removed. No technical advice is therefore given on this particular issue.

**Additional Technical Advice (paragraphs 284-290)**

179. On the basis that the information incorporated by reference is part of the prospectus, CESR also proposed in the consultation paper that the documents incorporated by reference should be made available with the same modalities as the prospectus. Having this provision been included in the text of the Proposed Directive, CESR has deleted it from its technical advice.
180. Coherently with the advice given for the request concerning the availability of the prospectus, CESR had proposed in the consultation paper to limit the possible links of a prospectus made available in electronic form only to the documents incorporated by



reference with easy and immediate technical modalities. Various respondents have shown their agreement to the said advice.

## **PART THREE – AVAILABILITY OF PROSPECTUS**

### **General Comments**

181. Besides the specific comments made in relation to the matters particularly dealt with in the first draft of technical advice and mentioned below, comments have been received with regard to an additional point that, in the perspective of some respondents, should be covered by the CESR technical advice.
182. This point concerns the timing of the availability of the prospectus to investors and, in particular, the meaning of the “reasonable time in advance” referred to in Article 14(1) of the draft Directive (**Common Position adopted by the Council**).
183. In view of the terms of the Provisional Request in this area, CESR consider that any advice on this point would not remain in the parameters of such Provisional Request.

### **Availability in an electronic form (paragraphs 302 – 307)**

184. CESR had proposed as level 2 advice that when a prospectus has been put available through an electronic form some additional safety measures are required, such as accessibility, restricted links, document protection and ability to easily download and print the prospectus. CESR also advised for the need to include a disclaimer, limiting the offer to its target markets.
185. Besides the formulation of such proposed measures, CESR requested views on the need of additional implementing measures at Level 2 defining what can be considered “easy access” and what specific file formats could be accepted.
186. A significant number of the respondents were of the opinion that no further implementing measures were necessary. Others considered that CESR should develop additional advice on the “easy access” concept and the specific file formats.
187. Bearing in mind that any advice given in what concerns this specific details could rapidly become out of date as a result of technological changes, CESR is of the opinion that Level 2 advice, in what concerns availability in an electronic form, is complete and, therefore, it has merely been changed to accommodate the amendments made to the draft Directive, in particular in what refers to article 14 (2) (c) and (d).

### **Availability via the press (paragraphs 308 – 314)**

188. Within this section, CESR proposed an approach at level 2 which set out the requirements with regard to the scope, the minimum circulation, and the nature of the newspapers used when the issuer, the offeror or the person asking for admission to trading chooses to publish the prospectus by this mean.

189. A significant number of respondents found this requirements, and in particular the one concerning circulation, too restrictive and too formalistic and, in certain countries, leading to the preclusion of the insertion of the prospectus in currently used newspaper and to the limitation of the designated newspapers to “tabloids” or sports newspapers.
190. A few respondents made comments to decisions taken at level 1, considering that the press should not be used, or at least should be rethought, as a means of availability of the prospectus, and suggesting that the duty to deliver a paper copy, if requested, should also apply in this case.
191. CESR accepts the comments made insofar as the minimum circulation requirement is concerned. As the establishing of a threshold is not considered appropriate for the reasons already set out in the Consultation Paper, CESR is, therefore, proposing to adopt a subjective requirement and to leave its assessment to the competent authorities.

### **Additional Technical Advice**

#### **Notice stating where the prospectus is available (paragraphs 316 – 328)**

192. As additional technical advice in relation to the mandate, CESR proposed, as a enhancement to the regime on the availability of the prospectus, the maintenance of the duty to publish a notice stating that a prospectus has been published and where it is available, as foreseen in the existing Directives, and put forward proposals with regard to its minimum content and the arrangements for its disclosure.
193. The latest version of the draft Directive includes a specific provision for such notice (article 14 (3)) and the Additional Provisional Mandate requests CESR to provide technical advice on implementing measures relating to the content and method of publication of this notice. As a result, CESR advice on this subject will not any longer be termed as “additional advice”.
194. Most respondents were supportive of the proposal to address the minimum content of the notice at level 2. Some respondents considered that this matter should be the competence of the issuer or that there is no need to determine the minimum content of the notice. A few respondents considered the content, as proposed, too detailed.
195. CESR has carefully considered these last comments and, in particular, whether any of the items that are included in the content of the notice should be removed. However, on balance, CESR is in favour of retaining all the items, which it considers not to be burdensome to the issuer, the offeror or the person asking for admission to trading. Therefore, the advice has been merely aligned to the wording amendments made in the draft Directive.
196. With regard to the means of publication of the notice, CESR has proposed that this means should depend on, and be different from, the means of publication of the prospectus. In addition, CESR sought views on whether, besides the publication of a specific notice, the list available at the web-site of the competent authority should mention where the prospectus is available and, in the case of an affirmative answer, whether this indication in the web-site of the competent authority should be considered as an alternative to the publication of a formal notice.

197. There was a very high degree of agreement amongst respondents in favour of the indication, in the list of prospectus posted on the website of the competent authority, of the place where each prospectus is available.
198. On the other hand, not all of the respondents who agreed with this indication consider it as an alternative to the publication of a formal notice. In fact, some respondents pointed out that the publication of the notice should still be required for effective dissemination of the information.
199. Finally, with regard to the particular arrangements for the publication of the prospectus, some respondents pointed out the convenience of the possibility to publish the notice in the official gazette of the regulated market.
200. CESR recognises the usefulness of the indication, in the list of prospectuses posted on the website of the competent authority, where the prospectus is available. However, CESR considers that this indication cannot be seen as an alternative to the publication of the notice since it would lead to a restriction of the right that is now conferred to the home Member States by the draft Directive.
201. CESR has decided, therefore, to supplement its advice by stating that the list available at the website of the competent authority should indicate where the prospectus is available, but without proposing that such indication is an alternative to the publication of the notice.
202. In addition, CESR accepts that, indeed, the gazette of the regulated market should be an alternative mean of publication of the notice when it relates to an admission prospectus of securities already admitted to trading in that regulated market. CESR has, consequently, added a new paragraph to its advice to state such alternative.

#### **Publication in the form of a brochure (paragraphs 329 – 331)**

203. CESR had suggested that when a prospectus is published in the form of a brochure (or *in printed form*, as it is now referred in Article 14 (2) b) of the draft Directive) and it is composed of more than one document, each one of them should clearly mention that it does not constitute the complete prospectus.
204. As Article 14 (5) of the draft Directive already mentions that each document shall indicate where the other constituent documents of the full prospectus may be obtained, CESR advice on this matter becomes redundant.
205. CESR also asked if there were any other issues that should be mentioned regarding the publication in the form of a brochure.
206. Most respondents were of the opinion that no other issues were important enough to be dealt with at level 2 advice. One respondent suggested the settlement of a minimum edition amount in case of offers of high value addressed to unidentified investors. The range of different factors involved, which may also depend from country to country, leads to an extreme difficulty in establishing thresholds. In CESR's opinion, this obstacle makes such sort of decision impossible to be taken at level 2 advice.

**Delivery of a paper copy (paragraphs 332 – 335)**

207. In this section, CESR proposed in the first draft of its advice that the duty to deliver a paper copy free of charge when the prospectus is available in an electronic form should be: a) performed as soon as possible allowing a prompt consultation, b) limited to one copy to each investor, c) free of any mail costs.
208. CESR requested views on whether mail or delivery costs should be born by the issuer.
209. Most respondents agree that the issuer should not ask the investor the payment of delivery or mail costs. Some respondents pointed out that the delivery or mail costs should not have to be born by issuers while one has suggested that this expense could be, in some way, shared with the financial intermediaries. Others respondents have suggested that the onus to pay mail costs should only apply when the prospectus is to be sent to addresses within the jurisdictions in which the offer is made or the admission to trading is being sought.
210. CESR has also asked if level 2 legislation should deal with other issues in what concerns the deliver of a paper copy. Most respondents have replied that no other questions were missing. Few respondents have said that other issues could be dealt although no single proposition has been made. CESR has received one comment that stresses that all provisions concerning the publication of the prospectus should be the remit of the competent authority and not mentioned at level 2.
211. Considering the outcome of the consultation, CESR has acknowledged that, exception made to the requisite for the paper copy of the prospectus to be made available in due time, the proposed implementing measures related to the deliver of a paper copy were too detailed and, above all, not truly necessary considering the principles already provided for in the draft Directive. CESR has decided, therefore, not to make proposals of implementing measures regarding the quantity of paper copies that each investor is entitled to receive and the eventual payment of mail or delivery costs.
212. Finally, bearing in mind that Article 14 (6) of the draft Directive states that the paper copy of the prospectus can be delivered by the issuer, the offeror, the person asking for admission to trading or the financial intermediaries placing or selling the securities, CESR has changed its advice on the speediness of that delivery to make this circumstance clearer.