



THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/03-210b

CESR's Advice on Level 2 Implementing Measures for the Prospectus Directive

Consultation Paper

July 2003



EXECUTIVE SUMMARY

Background

The deadline set up by the European Council for the Prospectus Directive to be approved is the end of 2003. CESR has taken into account the latest developments at Level 1 when preparing this advice, and in particular the agreement at the second reading between the European Parliament and the Council that was voted by the Parliament on 2 July and by the Ecofin of 15 July. If the targets for implementation of Level 1 and Level 2 measures are to be met, it is essential that the work on Level 2 measures starts while the final details of some components of the Level 1 measures are still under debate. This is why CESR is working on its advice to the European Commission on possible implementing measures of the future Directive.

Purpose

The purpose of this consultation document from CESR is to seek comments on the advice that CESR proposes to give to the European Commission on a number of these implementing measures. The measures covered are those set out in a provisional mandate received by CESR from the EU Commission for which CESR has to submit its advice by 31 December, 2003.

Consultation Period

Consultation closes on 30 October 2003.

Areas Covered

- **Minimum information:**
 - The directive provides that for the elaboration of the various models of prospectuses, account shall be taken of the different types of securities, in particular non-equity securities issued under an offering programme, and also the various activities and size or the public nature of the issuer. CESR proposes technical implementing measures related to schedules to be used for the option granted under article 1.3 of the proposed directive to **Member States and Member State's regional or local authorities** in case they choose to draft a prospectus and thus benefit from the European passport. CESR proposes to include in the scope of this schedule also non-EU States and their regional or local authorities.
 - In addition, CESR provides draft technical advice concerning the historical financial information to be included in the prospectus both for EU and non-EU issuers. This proposal modifies the last version included in the documents released in April and May 2003 (CESR/03-066b and CESR/03-128). Initially the scope of CESR's proposal was limited to the additional information that non-EU issuers whose historical financial information does not give a true and fair view of their assets and liabilities, financial position and profit and losses, would have to include in the prospectus. As CESR examined this topic, it emerged that, additionally, other financial information issues had to be tackled. These are basically auditing standards and possible changes in the accounting principles of the issuer.



- **Advertising:** CESR proposes technical advice in relation to possible draft implementing rules concerning the dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading, in particular before the prospectus has been made available to the public or before the opening of the subscription.

Further Details

Full details of CESR's proposed advice, together with contact details can be found in the consultation paper.

INDEX

| | |
|--|--------------------|
| Introduction | Paragraphs 1 - 12 |
| Preliminary statement by Fernando Teixeira Dos Santos | Paragraphs 13 - 22 |
| Minimum Information | |
| Member States, non-EU States and their regional or local authorities | Paragraphs 23 - 42 |
| Financial Information requirements in a prospectus | Paragraphs 43 - 70 |
| Advertisements | Paragraphs 71 - 87 |
| Annex A – Mandate from the EU Commission | |
| Annex B – Members of the Consultative Working Group | |
| Annex C – Call for evidence – summary of main issues | |
| Annex D – Member States, non-EU States and their regional or local authorities | |
| Annex E – Historical Financial Information for EU and non-EU issuers | |



I INTRODUCTION

1. CESR invites responses to this consultation paper on its proposed advice to the European Commission regarding a third set of technical implementing measures for the Directive on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive).
2. Respondents to this consultation paper should address their input to Mr Fabrice Demarigny, Secretary General, CESR, by email at secretariat@europesefco.org.

Background

3. On 27 March 2002, the European Commission (EC) published its provisional request for CESR to provide technical advice on possible implementing measures on the Prospectus Directive. On 7 February 2003, the European Commission published an additional provisional mandate.
4. CESR has to deliver its technical advice under three different deadlines: 31 July 2003, 30 September 2003 and 31 December 2003.
5. The present consultation paper addresses the technical advice required by 31 December 2003.
6. CESR set up an Expert Group on Prospectus, responsible for developing the advice to the EC. It is chaired by Pr. Fernando Teixeira dos Santos, Chairman of the Portuguese Securities Commission and supported by the CESR Secretariat, first by Ms Silvia Ulissi until 8 April 2003 and since then by Mr Javier Ruiz. The Expert group set up a working sub-group coordinated by Mike Duignan of the UK Financial Services Authority that drafted the initial proposal on minimum information requirements presented in this consultation paper.
7. In addition, under the terms of CESR's Public Statement of Consultation Practices (Ref: CESR/01-007c), a Consultative Working Group (CWG) has been established to advise the Expert Group. A full list of members of the CWG can be found in Annex B.
8. On 7 February 2003, CESR published a Second Call for Evidence (Ref: CESR/03-038) inviting all interested parties to submit views by 31 March 2003 on the issues which CESR should consider in its advice to the Commission. CESR received around 19 submissions by end of March and these can be viewed on the CESR's website.
9. On March 24, 2003 the Council has adopted its common position under written procedure and the EC has adopted its communication on the common position on March 26, 2003. CESR has taken into account this common position N° 25/2003 (ref. 2003/C 125 E/02) when preparing this consultation paper as well as the amendments introduced afterwards as a result of the agreement at second reading between the European Parliament and the Council that was voted by the Parliament on 2nd July and by the Ecofin of July 15th.
10. The timetable for handling the third part of the mandate (December 31 deadline) is set out below.



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|-----------------------|--|
| 15 September, morning | Prospectus Experts Group meets with CWG. |
| 9 October, afternoon | Open hearing on consultation paper in Paris. |
| 30 October | Consultation period closes. |
| 11/12 December | CESR plenary approves advice. |
| 31 December | Deadline for submission of CESR's advice to European Commission. |

In order to facilitate the consultation process, CESR will be holding an open hearing on 9 October 2003 in Paris at CESR's premises, *11-13 avenue de Friedland*. Please register your interest in participating with Mr Fabrice Demarigny at the following email address: secretariat@europesefesco.org.

References

11. The additional mandate asks that CESR should have regard to a number of principles and a working approach agreed between DG Internal Market of the EC and the European Securities Committee in developing its advice. These are as follows:

- CESR should take account of the principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- CESR should take full account of the key objectives of the Prospectus Directive: the need to encourage and build an efficient, cost-effective and competitive pan-European capital market on the one hand, and to provide the necessary levels of investor protection on the other.
- CESR should not seek to produce a legal text.
- CESR should take full account of developments in the Council and Parliament.

12. Papers already published by CESR which are relevant to this mandate are:

- *A European Passport for Issuers – A report for the European Commission – January 2001 (Ref. FESCO/00-138b)*
- *A European Passport for Issuers: an additional submission to the European Commission – August 2001 – (Ref. FESCO/01-045)*
- *Stabilisation and Allotment, a European Supervisory Approach – April 2002 (Ref. CESR/02-020b)*



- *CESR's Advice on level 2 implementing measures for the proposed prospectus directive (CESR/03-208)*

II PRELIMINARY STATEMENT BY FERNANDO TEIXEIRA DOS SANTOS

13. This consultation paper builds upon the experience of the three previous consultations undertaken by CESR on the Prospectus Directive (CESR/02-185b, CESR/02-286, CESR/03-066b and CESR/03-128 documents): some of the comments made in response to the above mentioned CESR documents are applicable to the issues dealt with here, especially those concerning financial information. Comments received in response to CESR's second call for evidence have been taken on board as well.

14. The 31 December mandate focuses on the following substantive areas:

- **Minimum disclosure requirements:** CESR presents here a draft proposal on minimum information requirements that complements its first advice on the prospectus directive submitted to the European Commission on July 31. It relates to the disclosure requirements applicable to **securities issued by Member States, Non-EU States and their regional or local authorities** and to the **historical financial information to be included in prospectuses both for EU and non-EU issuers**.
- CESR also releases on this paper a draft on possible implementing rules concerning the dissemination of **advertisements** in relation to an offer of securities to the public or the admission to trading, in particular before the prospectus has been made available to the public or before the opening of the subscription.

15. The additional mandate also requests CESR's to deliver factual information on the following aspects by 31 December:

- Advertisement practices and relevant legislation in the Member States
- Analysis of the way Member States interpret the notion of equivalence in the context described in Article 4 of the proposed directive (mergers and take-overs)
- Legislation and practices of Member States regarding the treatment of third countries issuers with respect to drawing up and approval of prospectuses

CESR is already working on these aspects in order to meet the 31 December deadline.

16. On **Member States and Member State's regional or local authorities schedule**, CESR has taken into account the responses to the second call for evidence, in particular the concerns expressed by some respondents regarding possible disclosure requirements for non-EU sovereign issuers and their regional or local authorities. Bearing these comments in mind, CESR has deeply analysed this issue and has come to the conclusion that the requirements set in the proposed schedules are also appropriate for these issuers. Therefore the proposed schedule will be used by Member States, **Non-EU States** and their regional or local authorities, where they are issuing the securities or acting as guarantors.



17. CESR now delivers its proposed technical advice on historical financial information to be included in the prospectus both for EU and non-EU issuers. This new proposal would be inserted in the different schedules and building blocks released by CESR on July 31, 2003 and would substitute the previous items dealing with financial information both of EU and non-EU issuers. The proposal is in the line of not requiring any additional information for non-EU issuers preparing financial statements according to GAAP equivalent to IAS Regulation. However, non-EU issuers that do not comply with this equivalence to IAS Regulation, will be required to prepare their financial statements according to GAAP that would be acceptable for EU issuers. In addition, some exemptions have been introduced for “wholesale issues” in order to adapt this requirement to the different nature of the investors concerned.
18. Obviously the notion of equivalence becomes the central element of the non-EU issuers regime. GAAP deemed equivalent to IAS Regulation are considered appropriate for prospectuses produced according to Community legislation.
19. CESR considers that any decision on whether third countries’ GAAP ensure equivalence with IAS Regulation deserves a harmonized approach. CESR also believes that the issue of equivalence in relation to prospectuses drawn up according to Community legislation (article 7 of the prospectus directive) and that of equivalence in respect of prospectuses produced according to a third country legislation (article 20 of the prospectus directive) should be dealt with jointly.
20. CESR is currently working with the European Commission in order to devise the best procedure to manage the question of equivalence on this area.
21. On its provisional advice concerning **advertising**, CESR does not have the intention to present a definition of what can be considered as advertisements. However, CESR deems necessary a common understanding of what is encompassed under this term in order to have a harmonized interpretation of the principles on dissemination of advertisements and the powers of competent authorities set out by the prospectus directive. Additionally, CESR considers fundamental for the vitality of the European market that no blackout periods for the dissemination of any advertisements should be imposed, before the prospectus has been made available.

The Consultative Working Group

22. CESR is grateful for the ongoing assistance of the Consultative Working Group (CWG), established in connection with the provisional mandate on the Prospectus Directive. There have been three meetings between the CWG and CESR’s Expert Group on the issues covered by said mandate, during which the CWG provided comment and guidance on developing drafts of the papers the Group has produced. The CWG will continue to offer its views and advice to CESR as its work progresses. The next meeting between the CWG and the Experts Group will take place on 15 September.

III MINIMUM INFORMATION

Extract from the European Commission's mandate

Particular schedules should be envisaged for the option granted to sovereign issuers and to municipalities in case they choose to draft a prospectus; CESR should provide its technical advice by 31 December at the latest.

III.1 MEMBER STATES, NON-EU STATES AND THEIR REGIONAL OR LOCAL AUTHORITIES

Introduction

23. Whilst EU Member States and their regional or local authorities can be outside the scope of the Prospectus Directive¹, they are nevertheless obliged to produce a prospectus in order to benefit from a single passport for raising capital in the EU². Non-EU sovereign issuers and their regional or local authorities do not have an exemption from the requirement to produce a prospectus if they wish to make a public offer of securities in the EU or wish their securities to be admitted to trading on a regulated market. As such, the annex for Member States and their regional or local authorities can apply to both EU and non-EU member states alike.
24. The registration document for Member States and their regional or local authorities presents a dilemma. On one hand, it could be said that information need not be disclosed for Member States other than administrative information such as the name and address of the issuer. This is due to the fact that ample information is already publicly available on such issuers and the probability of default by a Member State is smaller than for other types of issuers.
25. On the other hand, it could be argued that whilst the probability of insolvency is remote, investors nevertheless require some information about Member States and their regional or local authorities. This is evident from a cursory survey of some of the prospectuses that have been issued in the past by such issuers in the EU. The list in paragraph 31 below represents some of the information that issuers have included in prospectuses in the past.
26. CESR would gravitate towards the latter option, partly on the basis that issuers already provide some information, but it is anticipated that such information would be expected to be brief and not extensive. CESR considers that a general discussion about the issuer's economy and political system is essential for investors to make an informed decision as to whether or not to purchase the securities in the light of recent highly publicised default by some sovereign issuers. Furthermore, information in respect of

¹ Article 1 – Paragraph 2(b)

² Preamble to the Prospective Directive – Paragraph (15)



some Member States and their regional or local authorities may not be readily accessible by all investors.

Definition of Member States and their regional or local authorities

27. An allied issue is who should benefit from this annex, bearing in mind that the draft Directive requires that account should be taken of the public nature of the issuer.³ The Directive also lists some of the entities that may fall broadly under this category and are outside the scope of the directive and this list includes Member States and their regional or local authorities, public international bodies and non-profit organisations.
28. CESR's initial opinion is that public international bodies are more akin to corporates in their structure and the appropriate annex for these bodies should be the retail or wholesale debt annex as appropriate.
29. This annex would therefore only apply strictly to Member states, Non-EU States and their regional or local authorities. This would be the case where they were issuing the securities themselves or acting as guarantor.

QUESTION

30. *Do you agree with this approach? If not, please give your reasons.*

Minimum Information

31. The list of information that CESR would expect includes the following:
- a. Name and contact address of the Issuer
 - b. Responsibility statement
 - c. Risk Factors
 - d. The economy – a general discourse including public finance and public debt including a summary of the debt and debt payment record, Budgetary issues, Gross Domestic Product.
 - e. Political system
 - f. Legal and arbitration proceedings
 - g. Trend Information
 - h. Statement by experts
 - i. Documents on display

³ Article 7 – Paragraphs 2(f)



QUESTION

32. *Do you agree with this list as more fully described in Annex D?*
33. *Is there any other information which you consider relevant for Member States and their regional or local authorities and should be included in the Annex?*

Specific Requirements

34. Under item 4 of Annex D, Public Finance and Trade, CESR requires the disclosure of certain economic indicators. Even if the issuer will have to put on display the financial/economic information of the relevant periods, CESR considers that a section of selected financial/economic information would be material for investors, in the same way that is required in the equity and retail debt RD schedules.

QUESTION

35. *Do you consider that it is appropriate to have such a disclosure requirement? If so, do you believe that the selected indicators are those relevant to make an investment decision? Please give your reasons.*

36. CESR has considered whether investments and development plans should be included in the annex for sovereign and local Authorities.
37. On one hand, it could be said that the solvency of a sovereign issuer is rarely affected by one or more investments and that if this were the case, i.e. for extremely big investments, disclosure would be given in the risk factors section.
38. On the other hand, CESR recognises that, particularly for local Authorities, the legal framework under which these entities operate can be different across countries: in some countries they can be involved in risky business and they can even be insolvent.
39. In such context, discussion about the issuer's investment and development plans may be essential to make an informed decision as to whether to purchase or not the securities. In which case, disclosure 3.3 of the Annex would be amended to include a requirement to provide a "general description of the investment and development plans of the issuer and the issuer's prospects".

QUESTION

40. *Do you deem that Investments and development plans should be included in the Annex for Member States and regional and local authorities? If so, please give your reasons.*

41. It seems reasonable to include a requirement to provide information that might expose a conflict of interest for any expert used by the issuer. This has previously been dealt with by a requirement to disclose an interest in the issuer. It is unlikely that any expert would have a material interest in the issuer when the issuer is a Member State. It is also unlikely that the expert will have a material interest in the offer itself, bearing in mind the likely level of finance being raised. CESR has therefore amended the text of this disclosure requirement to require disclosure of “information in respect of any conflicts”.

QUESTION

42. Do you consider that potential conflicts of interest should be disclosed? If so, do you consider that the wording used will be sufficient to capture such conflicts?

III.2 FINANCIAL INFORMATION REQUIREMENTS IN A PROSPECTUS

Introduction

43. Through the Accounting Regulation⁴, IAS can be considered as the European benchmark for financial reporting for companies preparing consolidated accounts that are admitted to trading on a regulated market.

44. CESR noted in its previous advice to the commission that if an issuer has to apply IAS in its consolidated accounts after its admission to trading, it would seem sensible that its consolidated financial statements (included in its prospectus) for the previous year or two years be restated or reconciled to IAS. This would ensure a high level of transparency and comparability of the company’s financial reporting.

45. In considering this issue CESR has concluded that it is important that the historic financial information presented to Investors within a prospectus is comparable both within the track record being presented and also with the way it will be presented on an ongoing basis. This rationale should apply in the case of any change in the accounting standards or policies adopted by the issuer whether voluntary or imposed by EU or national regulation. Annex E sets out the proposed amendment to achieve this.

46. In considering a requirement for comparability, CESR has looked at a number of options for an admission to trading on a regulated market or a public offering prospectus. As an example CESR has considered the case of an admission to trading prospectus for an issuer that presents consolidated financial statements.

⁴ Regulation 1606/2002 on the application of international accounting standards



Option 1 - Require IAS to be presented for all three years

47. This option provides a three year comparable record under IAS, which will be consistent with the accounting standards and disclosures used going forward. This option may also improve and increase comparability and understandability in other member states where passporting is used. The disadvantage of this approach is the additional cost of potentially needing to restate three years worth of financial statements. This approach is currently already adopted for the purposes of the prospectus in a number of member states.

Option 2 - Require the two most recent years to be presented under IAS

48. Whilst any requirement to restate anything less than three years will be less onerous in terms of cost than a full three year restatement, this has the disadvantage that there is less comparability in the three year record. Two years restatement under this option may provide investors with some comparability without the need to restate the earliest year as through first time application disclosures, investors may have some comparability between non-IAS and IAS financial statements in the middle year.



Option 3 - Require reconciliations to be presented for between local GAAP and IAS

49. There are a number of further options under this heading – reconciliations could be for one, two or three years. It can be argued that the work required to perform reconciliation is only marginally less than a full restatement under IAS – all adjustments and differences in accounting policies would need to be identified in order to produce reconciliation. In addition it is likely that where differences between local GAAP and IAS are large, any reconciliation is likely to be long, complicated and difficult to follow. This is a good reason to say that if the work is being done to identify the differences; a restatement is likely to be much easier to follow and would not add greatly to the work performed.

Option 4 – Accept local GAAP accounts with no restatement or reconciliation

50. One CESR member supported a 4th option not to impose additional financial information requirements on companies for the purposes of a prospectus over and above those imposed under the IAS regulation. The advantage of this approach is that the issuer will not have to produce potentially costly restatements of its local GAAP accounts and in the absence of any significant changes in accounting policies, the financial information will be comparable in itself. The disadvantage is that investors may not be able to compare at a later date the audited historical track record in the prospectus with financial information produced following admission (i.e. where an issuer is required under the accounting regulation to present financial information under IAS). From the point of view of the investor this could be seen as unsatisfactory. In addition, after the year 2005, the further disadvantage of this approach is that no comparability will be possible between the issuer who seeks admission and /or makes a public offer and other issuers of the same industry who are already admitted to trading.

Preferred option

51. Considering the options available and the advantages and disadvantages of each, there is an almost unanimous view for option 2, requiring issuers to include two years of audited historic financial information prepared and presented in accordance with the accounting standards which will be adopted in the issuer's next annual financial statements having regard to the accounting standards and polices and legislation applicable to such annual financial statements.

52. Requiring the inclusion of two years comparable information rather than three, will reduce the costs of restatement for the issuer but will still provide investors with some comparability.

53. CESR notes that a “four column approach” has been adopted in some Member States where there are two, rather than three years of comparable financial information in a prospectus. Such an approach is outlined below.

54. Under the four column approach an issuer with a year ended 31 December 2009 seeking admission to trading on a regulated market in 2010 would present IAS for 2009 and 2008 and would also present 2008 and 2007 under local GAAP. The issuer would be obliged under the first time application rules to produce 2009 IAS



comparatives for the 2010 numbers so this option would create additional work in respect of the 2008 IAS numbers only.

55. For issuers of debt, for example, the audited historical financial information has to be provided for only two years. However, there is an almost unanimous view within CESR that it is still important to have two years of audited historic financial information prepared and presented in accordance with the accounting standards which will be adopted in the issuer's next annual financial statements. Therefore, debt issuers would have to provide two years annual financial statements restated to IAS standards (assuming that the issuer did not already produce annual financial statements to these standards).

QUESTIONS

56. *What are your views on the costs of providing reconciliation as compared with a full restatement?*
57. *What are your views on the most appropriate way to present the financial information?*
58. *What are your views on the importance of comparability both within the audited historical track record and with the reporting standards that are to be adopted?*
59. *What are your views on how this should be achieved?*
60. *Do you agree with the approach taken in relation to issuers of debt securities? If not, please state your reasons.*

Auditing Standards

61. CESR acknowledges that currently the EU lacks a comprehensive set of rules at community level on how audits should be conducted and on the audit infrastructure needed to safeguard audit quality. Therefore, historic audited financial information in prospectuses may be subject to differing levels of audit scrutiny. This could hamper the proper functioning of the single market. The European Commission has recently released its priorities on this area of audit of company accounts. One of them is requiring International Standards on Auditing (ISAs) for all EU statutory audits. To this effect, the Commission will work to prepare the implementation of ISAs from 2005. CESR fully shares this objective and awaits the outcome of the EC's work.

Non EU issuers

62. CESR considers that the financial information requirements for non-EU issuers should generally follow the requirements for EU issuers.
63. Where the historic financial information of a non-EU issuer has been prepared under equivalent accounting standards and reported on under equivalent auditing standards there should be no additional disclosure requirements as the standards are equivalent.



64. Where the historic financial information of a non-EU issuer has been prepared under non equivalent accounting standards the issuer should prepare said financial information to IAS Regulation, or to a Member's State local GAAP or to a non Member's State local GAAP equivalent to IAS Regulation. As set out in Annex E.
65. CESR is of the opinion that nevertheless, there are some circumstances where the nature of the securities being offered may however mean that it is appropriate not to require issuers to go to the expense of producing full new financial information in accordance with the previous paragraph. Lower disclosure standards have therefore been included for wholesale debt issuers and the issuers of high denomination asset backed securities or depository receipts.
66. Where the historical financial information of a non-EU issuer has not been independently audited in accordance with the auditing standards of a Member State or an equivalent standard, the issuer should present the financial information audited in accordance with one of those standards. Annex E sets out the proposed disclosure requirement.
67. CESR is of the opinion that nevertheless, there are some circumstances where the nature of the securities being offered may however mean that it is appropriate not to require issuers to go to the expense of producing a full new audit report according to the previous paragraph. Different audit standards have therefore been included for wholesale debt issuers and the issuers of high denomination asset backed securities or depository receipts. These are set out in Annex E. If the text is agreed, these will be inserted into the relevant disclosure requirements.
68. These members note that this represents a departure from the intention to treat non-EU issuers the same as EU issuers however believe that the nature of the securities demands a different treatment.

QUESTIONS

69. *What are your views on extending this treatment to EU issuers for the types of securities identified?*
70. *Are there any other types of issuer where you believe that different requirements should apply?*

IV. DISSEMINATION OF ADVERTISING

Extract from the mandate

DG Internal Market requests CESR to provide by 31 December 2003 at the latest:

- (1) factual information regarding advertisement practices and relevant legislation in the Member States;
- (2) technical advice on possible draft implementing rules concerning the dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading, in particular before the prospectus has been made available to the public or before the opening of the subscription.

71. This matter is dealt with in article 15 of the prospectus directive. This provision imposes that any type of advertisements relating either to an offer to the public of securities or to an admission to trading on a regulated market, where an obligation to draw up a prospectus exist, shall:

- State that a prospectus has been or will be published and indicate where investors are or will be able to obtain it;
- Be clearly recognisable as such and that the information contained in it shall not be inaccurate, misleading or inconsistent with the information contained in the prospectus, or with the information required to be in the prospectus, if the prospectus is published afterwards.

72. The competent authority of the Home Member State shall have the power to exercise control over the compliance of advertising activity in relation to a public offer of securities or an admission to trading on a regulated market, with the principles described above.

73. Finally, the Directive also states that if no prospectus is required, any material information provided by an issuer or an offerer and addressed to qualified investors or special categories of investors (including information disclosed in the context of meetings relating to offers of securities) shall be disclosed to all qualified investors or special categories of investors to whom the offer is exclusively addressed. If a prospectus is required to be published, then such information shall be included in the prospectus or in a supplement to the prospectus.

74. Accordingly, the prospectus directive goes well beyond the current directive 2001/34 which only deals in its Article 101 with the prior communication to the competent authorities of the means of publication.

75. Article 15 also includes a level two provision envisaging implementing measures concerning, however, only the dissemination of advertisements with the aim of taking account of technical developments on financial markets and to ensure uniform application of the directive.

76. CESR is aware that national regulations on this area differ hugely within the European Union. This lack of harmonization is obviously reflected in the very different roles that



CESR members play as regards advertisements in relation to an offer to the public of securities or an admission to trading to a regulated market.

77. While some securities regulators in the EU play an active role in the scrutiny of advertisements, others do not have such competence or only in relation to limited aspects of the advertising campaign. Even when the advertisements are disseminated by the underwriters or by the selling syndicate, there is no assurance of a harmonized approach, as the applicable rules of conduct might be very different in each jurisdiction.
78. These different approaches have proved effective in the different Member States, as they are adapted to the particular circumstances of each jurisdiction. Now they will be tested by the creation of a European single market for retail securities.
79. In order to comply with the Commission's mandate and especially having in mind the current absence of harmonization, CESR deems necessary to have first a common understanding of what the directive means by advertisements.
80. CESR does not intend to add anything to the definition of advertisements that can be found in a common dictionary. But CESR considers that its advice on advertisements must be restricted to communications having the following features:
- The advertisements relate to an offer to the public of securities or to an admission to trading on a regulated market. Accordingly, advertisements that consist of merely general promotion of the issuer, unconnected with a public offer or an admission to listing, are outside the scope of this paper.
 - .
 - The advertisement is not considered as a prospectus. Formal notices might give raise to less investor protection concerns as their contents are set out by law. Advertisements having marketing literature might be potentially riskier in terms of breaching the principles established by paragraphs 2 to 5 of Article 15 of the directive.
 - The advertisements are disseminated to the public by interested parties: issuer, offerer or person asking for admission, the financial intermediaries that participate in the placing and/or underwriting of the securities.
 - The aim of the advertisement is to promote the potential subscription or acquisition of the securities.
81. Article 15 of the Directive states that the competent authority of the home Member State shall have the power to exercise control over the advertising activity, but does not say anything about how to exercise said control.
82. CESR considers that advertising campaigns perform an important role for the retail market and cannot be made apart or dissociated from the effort to sell or to subscribe securities, relating either to an offer to the public of securities or to an admission to trading on a regulated market.
83. Having said this, CESR considers the vitality of the European market fundamental and in this context seeks views on the prohibition on the dissemination of any



advertisements (blackout periods), before the prospectus has been made available, as long as the remaining rules are respected.

QUESTIONS

84. *Do you agree with the scope of the present consultation paper on advertising? Please give reasons for your answer.*

85. *Do you believe that blackout periods should be imposed for the dissemination of any advertisements when a prospectus has not been made available? Please give reasons for your answer.*

86. In addition to what is covered by the mandate, CESR considers useful to seek views on the following issues:

87. *Do you consider that control over compliance of advertising activity with the principles referred to in paragraphs 2 to 5 of Article 15 of the Directive should be harmonized? If so, do you think that competent authorities should exercise the above mentioned control? Please give reasons for your answer.*

* *

*