THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

**Ref: CESR/04-225b**

# CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses nº 809/2004

# Consultation Paper

**June 2004**

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# EXECUTIVE SUMMARY

## Background

The European Commission has adopted on the 29th of April 2004 the Regulation nº 809/2004 implementing the Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive). The Regulation will apply from 1 July 2005 which is also the deadline for Member States to implement the Prospectus Directive.

The Lamfalussy approach for securities markets regulations comprises four levels: framework principles included in legislation adopted by the European Parliament and Council (Level 1), measures implementing those Directives and adopted by the Commission after advice from the Committee of European Securities Regulators (CESR) and the agreement of the European Securities Committee (Level 2), co-operation among regulators (Level 3) and enforcement (Level 4).

Once the level 1 and level 2 on prospectuses have been successfully completed in the form of the Prospectus Directive and its implementing Regulation, CESR considers that its priorities in this area should be to contribute to the application of the new rules in a consistent manner.

To achieve that goal CESR decided to start working on recommendations that would facilitate consistent implementation of the Regulation.

## Purpose

The purpose of this consultation document from CESR is to seek comments on the recommendations that CESR proposes to issue on a number of items set out in the schedules and building blocks included in the annexes of the Regulation.

## Consultation Period

Consultation closes on 18 October 2004.

## Areas Covered

- **Financial Information Issues:**

  The purpose of the recommendations is not to provide interpretations of IAS/IFRS or Member States' local GAAP but to contribute to clarifying certain disclosure requirements included in the Regulation where necessary.

- **Non Financial Information Issues:**

  This section comprises three areas. First, CESR proposes to issue recommendations in order to facilitate co-ordination among competent authorities when applying Article 23

of the Regulation. This Article gives competent authorities the power to require adapted information (in addition to the information items included in the schedules and building blocks) to those issuers listed in the Annex XIX of the Regulation (specialist issuers).

The second area covers recommendations on certain items of the prospectus where CESR feels that recommendations might be useful for the sake of clarity at this stage.

In addition, CESR also proposes recommendations on certain issues not related to the prospectuses schedules and building blocks. For example, to facilitate co-ordination on the contents of the document required when certain exemptions set out by Article 4 of the Prospectus Directive apply.

**Further Details**

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

# INDEX


**Annex A Call for Evidence: summary of main points made**

**Annex B Members of the Consultative Working Group**

# I INTRODUCTION

1. CESR invites responses to this consultation paper on its proposed recommendations for the consistent implementation of the Commission's Regulation on prospectuses.

2. Respondents to this consultation paper can post their comments directly on CESR's website (www.cesr-eu.org) under the section "consultations".

**Objective of the recommendations**

3. One of CESR's objectives when producing the advice for the European Commission (EC) was to focus the information requirements of the level 2 legislative measures on the information that is relevant to the investor, in line with the Lamfalussy Process. Another objective was to avoid any kind of ambiguity that could lead to different interpretations of the rules and, therefore, hamper the functioning of the Single Market. In order to facilitate the understanding of certain disclosure requirements, CESR proposes to draft recommendations that will facilitate the consistent implementation of the future Regulation. This view was shared by respondents to CESR's consultations.

4. The second interim report monitoring the Lamfalussy Process issued in December 2003 by the Inter-Institutional Monitoring Group also shares this approach and specifically encourages CESR and the national regulatory authorities to intensify and speed up its work at level 3.

5. When producing a prospectus, issuers and their advisers may have doubts about the extent of the information to be supplied under a certain item in the schedule. The purpose of these recommendations would be to help issuers and their advisers to make such judgements and to assist consistency across Europe in the way in which these schedules are implemented. Subject to the provisions of the level 1 Prospectus Directive, which are transposed by Members States, and the provisions of the level 2 Commission's Regulation on prospectuses, which are directly applicable, CESR's members will recommend that issuers prepare their prospectuses according to the recommendations unless they turn out to be unsuitable to a particular case.

6. The elaboration of recommendations will facilitate not only that the implementation of the rules is consistent across the EU but also, by way of this prior public consultation, that the views from market participants and end-users will be fully considered.

7. The outcome of CESR's work will be reflected in common recommendations which do not constitute European Union legislation and will not require national legislative action. CESR Members will introduce these recommendations in their day-to-day regulatory practices on a voluntary basis. The way in which these recommendations will be applied will be reviewed regularly by CESR.

8. CESR recommendations for the consistent implementation of the Commission's Regulation on Prospectuses will not prejudice, in any case, the role of the Commission as guardian of the Treaties.

**Background**

9. The Prospectus Directive was published in the Official Journal of the European Union on 31 December 2003. Member States have to transpose the directive in the domestic laws or regulations not later than 1 July 2005.

10. The Commission Regulation 809/2004 implementing the Prospectus Directive was published on 30 April 2004. The Regulation shall apply from 1 July 2005.

11. The Regulation is based on the advice that CESR submitted at the request of the EC, following consultation with industry and users of the legislation during the drafting of the advice. CESR provided its advice on July, September and December 2003.

12. To that effect CESR set up an Expert Group on Prospectus, that was responsible for developing the advice to the EC. CESR decided that this group would continue the level three work which is the subject of this consultation paper. The group is chaired by Pr. Fernando Teixeira dos Santos, Chairman of the Portuguese Comissao do Mercado de Valores Mobiliários and supported from the CESR Secretariat by Javier Ruiz. The Expert group set up two working sub-groups coordinated by Adetutu Odutola of the UK Financial Services Authority and by Cristina Dias from the Portuguese Commission. Raquel Garcia from the Spanish Comisión Nacional del Mercado de Valores co-ordinates the two drafting groups.

13. An important part of this work relates to disclosure of financial information where specific technical expertise in the field of financial reporting and auditing is needed. This is therefore carried out jointly by the Prospectus Group and CESR-Fin. CESR-Fin is a permanent group on financial reporting and is chaired by John Tiner, Chief Executive of the UK FSA. Michel Colinet is the secretary of CESR-Fin.

14. In addition, under the terms of CESR's Public Statement of Consultation Practices (Ref: CESR/01-007c), a Consultative Working Group (the "CWG") has been established to advise the Expert Group. A full list of members of the CWG can be found at Annex B. The Prospectus Group has met once with the CWG and its members have provided written contributions to the drafting sub-groups that were taken into account when this consultation paper was prepared.

15. On 4 March 2004, CESR published a Call For Evidence (Ref: CESR/04-057) inviting all interested parties to submit views by 15 April 2004 on the issues which CESR should consider when producing the recommendations. CESR received around 12 submissions and these can be viewed on the CESR's website. A summary of the main issues raised by respondents is included in Annex A.

16. The timetable for preparing the recommendations on prospectuses is set out below.

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| 7 Sept, morning | Prospectus Group and CESR-Fin meet with CWG |
| 7 Sept, afternoon | Open hearing |
| 18 October | Deadline for comments on the consultation |
| October-January 2005 | Analysis of the responses and review of the proposals |

Since the Directive and the Regulation will not apply until 1 July 2005, CESR will publish the recommendations not later than that date.

In order to facilitate the consultation process, CESR will be holding an open hearing on the 7th of September 2004. When CESR published its call for evidence in relation to this work (CESR/04-057) it was announced that the hearing would take place at the end of June or beginning of July 2004. Nevertheless, following suggestions from the market, CESR decided to postpone the hearing in order to give more time to participants to assess the proposals. Therefore the open hearing will take place on the 7th of September, six weeks before the end of the consultation. It will be in Paris at CESR's premises, *11-13 avenue de Friedland*. You can register for the open hearing via the new website of CESR (www.cesr-eu.org) under the heading "hearings".

**References**

17. Papers already published by CESR which are relevant to this consultation paper are:

- *CESR's Advice (July submission) on level 2 implementing measures for the prospectus directive (CESR/03-208)*
- *CESR's Advice (September submission) on level 2 implementing measures for the prospectus directive (CESR/03-300)*
- *CESR's Advice (December submission) on level 2 implementing measures for the prospectus directive (CESR/03-399)*
- *The role of CESR at "level 3" under the Lamfalussy process (CESR/04-104b)*

## II PRELIMINARY STATEMENT BY FERNANDO TEIXEIRA DOS SANTOS

18. The 11th meeting of CESR, on 11/12 December 2003, gave a mandate to the Prospectus Expert Group to produce recommendations on how best to complete a prospectus. The mandate focused on the following areas that the Group had identified during the process of producing its level two advice:

    i. Issues on which CESR had already publicly stated that the need for recommendations would be assessed once the level two measures were adopted (as recorded in the feedback statements or technical advices produced in the course of the work of the Prospectus Group).

    ii. Issues on which the Prospectus Group internally agreed to examine in the future the need for level three recommendations. These relate mostly to certain disclosure items were CESR considered that too much detail was not appropriate for the level two measures.

    iii. Recommendations on financial information requirements of prospectuses. Such recommendations would respond to the requests that the accounting profession had expressed during the consultations that the Prospectus Group had undertaken.

19. The content of the proposed recommendations can be summarized as follows:

- **Financial information issues.** Among these are selected financial information; operating and financial review; capital resources; profit forecasts or estimates; restatements of historical financial information; pro forma financial information; financial data not extracted from the issuer's audited financial statements; interim financial information; working capital statements and capitalization and indebtedness.

- **Non financial information issues.** One of the main objectives of this document is to ensure co-ordination on the requirements that competent authorities may impose on specialist issuers. In addition, recommendations are proposed on a number of items of the prospectus, such as principal investments; property, plants and equipment; compensation; arrangements for involvement of employees; nature of control and measures in place to avoid it being abused; related party transactions; legal and arbitration proceedings; acquisition rights and undertakings to increase capital; option agreements; history of share capital; rules in respect of administrative, management and supervisory bodies; description of the rights attaching to shares of the issuer; material contracts; statements by experts; information on holdings; interests of natural and legal persons involved in the issue and clarification of the terminology used in the collective investment undertakings of the closed-end type schedule. Finally, the paper also includes recommendations on issues not related to the schedules such as the content of the documents mentioned in article 4 of the Directive, identification of the competent authority for the approval of

base prospectuses contained in a single document and the disclaimer when a prospectus is published in electronic form.

20. This consultation paper deals with a number of topics on which CESR considers recommendations should be ready by July 2005, when issuers start applying the new schedules and building blocks contained in the new prospectus legislative framework. Notwithstanding, the real assessment of consistent implementation across the EU, can only be assessed effectively once the legislative measures will come into effect. Once CESR members have experience on the practical operation of the new rules and legislation, CESR will be in a position to assess whether the recommendations need to be updated and how to address any problems of co-ordination that might arise.

**The Consultative Working Group**

21. CESR is grateful for the ongoing assistance of the CWG, established to assist the Expert Group on Prospectuses for the elaboration of the level three recommendations. There has been one meeting between the CWG and CESR's Expert Group. In addition, the CWG members have provided written comments to the drafting sub-groups via email on developing this consultation paper and will continue to offer its views and advice to CESR as its work progresses.

# III FINANCIAL INFORMATION ISSUES

Unless specifically stated, the references and the recommendations below relate mainly to the disclosure requirements in the share registration document (Annex I of Regulation 809/2004) but should be adapted for the other registration documents, as appropriate.

## 1. SELECTED FINANCIAL INFORMATION

**3. Selected financial information**

**3.1.** Selected historical financial information regarding the issuer, presented for each financial year for the period covered by the historical financial information, and any subsequent interim financial period, in the same currency as the financial information.
The selected historical financial information must provide the key figures that summarise the financial condition of the issuer.

**3.2.** If selected financial information for interim periods is provided, comparative data from the same period in the prior financial year must also be provided, except that the requirement for comparative balance sheet information is satisfied by presenting the year end balance sheet information.

### *A. Introduction*

22. The primary purpose of including selected historical financial information in a prospectus is to summarize key information coming out of the historical financial information of the issuer, for each financial year covered by the historical financial information and any further interim financial period.

### *B. Selected Financial Figures Recommended*

23. The selection of figures must be based on relevance criteria on a case by case basis, and so it is a question of judgement to assess which selected information must be highlighted for a particular issuer in the specific circumstances when the prospectus is presented, such as the sphere of economic activity of the issuer, its industrial sector, the major captions of its financial statements, etc.

24. These key figures must be extracted directly from the historical and interim financial information included under paragraph 20.1 on a straight-forward basis.

25. When the issuer decides to include additional figures which entail some kind of calculation from, or elaboration based on, the basic figures directly contained in the financial information, then the following principles could be usefully taken into consideration when key figures are being selected: Key figures should be Understandable, i.e. they should contain clear descriptions and, where needed, definitions about the sources of the data and method of calculation in order not to be too complex for investors to understand; Relevant, i.e. they should be supported by a thorough analysis of

the specific issuer's business environment and should fairly highlight the key issuer's financial aspects about the financial condition (and performance); Comparable, i.e. they should be capable of justification by being compared with the historical financial information data included in the prospectus, where the figures are expected to be taken out from.

26. Examples of selected financial data are:

    a) net sales or operating revenues;

    b) profit (loss) from operations;

    c) profit (loss) from continuing operations;

    d) profit or loss for the period and allocation attributable to minority interests and to equity holders of the parent;

    e) basic and diluted earnings per share amounts for profit or loss attributable to ordinary equity holders and, if presented, profit or loss from continuing operations attributable to those equity holders;

    f) total assets;

    g) total non-current assets;

    h) total non-current assets held for sale;

    i) total equity attributable to equity holders of the parent;

    j) total equity; and

    k) dividends declared per share.

27. These figures must be defined in accordance with the financial reporting standards used in preparing the historical financial information.

28. If the historical financial information included in the document is restated, the selected financial data must be taken out from the restated historical financial information.

29. If in accordance with Annex I, paragraph 20.1, the last two years audited historical financial information are presented in a form consistent with that which will be adopted in the issuer's next published annual financial statements and as a result all financial periods are not fully comparable, the issuer could consider following one of the ways recommended for the presentation of historical information.

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| 30. *Q: Do you agree with this proposal? If not, please state your reasons.* |

## 2. OPERATING AND FINANCIAL REVIEW

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| **9. Operating and financial review** |
| **Financial Condition**<br><br>To the extent not covered elsewhere in the registration document, provide a description of the issuer's financial condition, changes in financial condition and results of operations for each year and interim period, for which historical financial information is required, including the causes of material changes from year to year in the financial information to the extent necessary for an understanding of the issuer's business as a whole. |
| **Operating Results**<br><br>Information regarding significant factors, including unusual or infrequent events or new developments, materially affecting the issuer's income from operations, indicating the extent to which income was so affected. |
| Where the financial statements disclose material changes in net sales or revenues, provide a narrative discussion of the reasons for such changes. |
| Information regarding any governmental, economic, fiscal, monetary or political policies or factors that have materially affected, or could materially affect, directly or indirectly, the issuer's operations. |

31. The OFR should assist the investor's assessment of the past and future performance of the issuer by setting out a fair analysis of the development and performance of the issuer's business and of its financial condition, together with a description of the principal risks and uncertainties that it faces. This analysis should be a balanced and comprehensive one consistent with the size and complexity of the business, in order to provide investors with a historical and prospective review of the issuer's performance and financial condition 'through the eyes of management'. The OFR should focus on those issues which the issuer consider to be significant in the circumstances of their business as a whole.

32. To the extent necessary for an understanding of the company's development, performance or condition, the analysis may include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business (key value drivers), including information relating to environmental and employee matters.

33. Performance should be discussed in the context of the long-term objectives of the business and related measures drivers for sales, for instance price/volume sales analysis, market share or revenues/ square metres, backlog including any milestones and benchmarks disclosed in previous periods.

34. The analysis should cover any special factors that have affected performance in the period under review; this includes influences whose effect cannot be quantified, as well as any specific 'exceptional or non-recurrent items' reported in the financial statements. The analysis could also discuss the selected financial information disclosed in accordance with item 3 of Annex I of the Regulation.

35. The OFR should provide information about the different components of earnings and cash flow and the extent to which they are recurring elements, thereby enabling investors to make a better prediction about the sustainability of earnings and cash flow in the future. The OFR should also discuss any returns to shareholders including distributions and share repurchases.

36. The issuer and its advisers, when compiling the OFR, should bear in mind the following overarching principles:

    **Audience**: The OFR should focus on matters that are relevant to investors and should not assume a detailed prior knowledge of the business, nor of the significant features of its operation environment. Thus, issuers should not assume that all investors are qualified investors.

    **Time-frame:** The OFR should discuss the performance of the periods for which historical financial information is required in the prospectus, identifying those trends and factors relevant to the investor's assessment of the past and future performance of the issuer's business and the achievement of its long-term objectives. The discussion should comment on the impact on future operations of significant post-balance sheets events.

    **Reliability**: The OFR should be neutral, free from bias and complete dealing even-handedly with both good and bad aspects. Where a significant matter is not discussed in the OFR for instance because it is discussed elsewhere in the prospectus, the issuer should ensure that investors are not misled by the omission by providing cross-references.

    **Comparability**: Although the approach adopted in the presentation of the OFR by the issuer may be different from that of other issuers, the disclosure should be sufficient for the investor to be able to compare the information with similar information about the issuer for previous periods. Comparability will be enhanced if the measures disclosed are accepted and widely used, either within the industry sector or more generally.

37. *Q: Do you consider that it is appropriate to include key performance indicators about past performance?*

## 3. CAPITAL RESOURCES

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| 10.1 | Information concerning the issuer's capital resources (both short and long term); |
| 10.2 | An explanation of the sources and amounts of and a narrative description of the issuer's cash flows; |
| 10.3 | Information on the borrowing requirements and funding structure of the issuer; |
| 10.4 | Information regarding any restrictions on the use of capital resources that have materially affected, or could materially affect, directly or indirectly, the issuer's operations. |
| 10.5 | Information regarding the anticipated sources of funds needed to fulfil commitments referred to in items 5.2.3. and 8.1. |

38. Under this disclosure requirement, issuers should discuss the capital structure of the business. Information on relevant ratios, such as interest cover and debt/equity ratios where appropriate should be provided as well as short and long term funding plans.

39. Cash inflows and outflows during the period under review should be described, including a brief discussion of any material unused sources of liquidity. The discussion should cover an analysis of the sources and amounts of the issuer's cash flows, including the nature and extent of any legal or economic restrictions on the ability of subsidiaries to transfer funds to the company in the form of cash dividends, loans or advances and the impact such restrictions have had or are expected to have on the ability of the company to meet its cash obligations. Such constraints would include exchange controls and taxation consequences of transfers. The discussion also should include funding and treasury policies and objectives in terms of the manner in which treasury activities are controlled, the currencies in which cash and cash equivalents are held, the extent to which borrowings are at fixed rates, and the use of financial instruments for hedging purposes.

40. The issuer's liquidity at the end of the period under review should be discussed, including a commentary on the level of borrowings, the seasonality of borrowing requirements (indicated by the peak level of borrowings during that period) and the maturity profile of both borrowings and undrawn committed borrowing facilities.

41. Where the issuer has entered into covenants with lenders which could have the effect of restricting the use of credit facilities, and negotiations with the lenders on the operation of these covenants are taking place or are expected to take place, this fact should be discussed. Where a breach of covenant has occurred or is expected to occur, the prospectus should give details of the measures taken or proposed to remedy the situation.

42. *Q: Do you agree with this proposal? If not, please state your reasons and please provide alternative information.*

## 4. PROFIT FORECASTS OR ESTIMATES

**13. Profit forecasts or estimates**
If an issuer chooses to include a profit forecast or a profit estimate the registration document must contain the information set out in items 13.1 and 13.2:

13.1 A statement setting out the principal assumptions upon which the issuer has based its forecast, or estimate.
There must be a clear distinction between assumptions about factors which the members of the administrative, management or supervisory bodies can influence and assumptions about factors which are exclusively outside the influence of the members of the administrative, management or supervisory bodies; the assumptions must be readily understandable by investors, be specific and precise and not relate to the general accuracy of the estimates underlying the forecast.

13.2 A report prepared by independent accountants or auditors stating that in the opinion of the independent accountants or auditors the forecast or estimate has been properly compiled on the basis stated and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer.

13.3 The profit forecast or estimate must be prepared on a basis comparable with the historical financial information.

13.4 If a profit forecast in a prospectus has been published which is still outstanding, then provide a statement setting out whether or not that forecast is still correct as at the time of the registration document, and an explanation of why such forecast is no longer valid if that is the case.

43. The inclusion of a profit forecast or estimate in a prospectus is the responsibility of the issuer and persons responsible for the prospectus and due care and diligence must be taken to ensure that profit forecasts or estimates are not misleading to investors.

44. In addition, the following principles should be taken into consideration when profit forecasts are being compiled. Profit forecasts and estimates should be **Understandable**, i.e. they should contain disclosure that is not too complex or extensive for investors to understand; **Reliable**, i.e. they should be supported by a thorough analysis of the issuer's business and should represent factual and not hypothetical strategies, plans and risk analysis; **Comparable**, i.e. they should be capable of justification by comparison with outcomes in the form of historical financial information; **Relevant**, i.e. profit forecasts and estimates must have an ability to influence economic decisions of investors and provided on a timely basis so as to influence such decisions and assist in confirming or correcting past evaluations or assessments.

45. Where an issuer provides a profit forecast or estimate in a registration document, it must be reported upon by independent accountants or auditors in the registration document as described in item 13.2 of Annex I of the Regulation. Where the issuer does not produce a single prospectus, upon the issuance of the securities note and summary at a later time, the issuer should provide a statement as to whether or not the profit forecast or estimate previously provided in the registration document is still valid. Where the issuer states that the profit forecast or estimate is still valid, it does not need to take any further action in respect of it but if the profit forecast or estimate is no longer valid, the issuer should provide an explanation of why such forecast is no longer valid. However, if the issuer alters the profit forecast, it must be reported upon as described in item 13.2 of Annex I of the Regulation.

46. If an issuer has made a statement that would constitute a profit forecast if made in a prospectus, for instance, in a regulatory announcement, and that statement is still outstanding at the time of publication of the prospectus, the issuer will be expected to provide a statement in respect of the outstanding profit forecast or estimate in the prospectus when it publishes a prospectus following the procedure detailed in the above. Such profit forecast or estimate must be reported on by independent accountants or auditors as described in item 13.2 of Annex I of the Regulation. CESR considers that outstanding forecasts by issuers made outside of prospectuses will inevitably be material information pursuant to Article 5.1 of the Directive and should be disclosed in prospectuses.

47. Where there is an outstanding profit forecast or estimate in relation to a material undertaking which the issuer has acquired, the issuer should consider whether it is appropriate to make a statement as to whether or not the profit forecast or estimate is still valid. The issuer should also evaluate the effects of the acquisition and the profit forecast made by that undertaking on its own financial position and report on it as it would have done if the profit forecast or estimate had been made by the issuer.

48. The forecast or estimate should normally be of profit before tax (disclosing separately any non-recurrent items and tax charges if they are expected to be abnormally high or low). If the forecast or estimate is not of profit before tax, the reasons for presenting another figure from the profit and loss account must be disclosed and clearly explained. Furthermore, the tax effect should be clearly explained. When the results are published relating to a period covered by a forecast or estimate, the published financial statements must disclose the relevant figure so as to enable the forecast and actual results to be directly compared.

49. CESR recognises that often, in practice, there is a fine line between what constitutes a profit forecast and what constitutes trend information as detailed in item 12 of Annex I of the Regulation. A general discussion about the future or prospects of the issuer under trend information will not normally constitute a profit forecast or estimate as defined in Articles 2.10 and 2.11 of the Regulation ("any form of words which expressly or by implication indicates a figure or minimum or maximum figure for the likely level of profits or losses for the current financial period and/or subsequent periods or contains data from which a calculation of such a figure for future profits or losses may be made,

even if no particular figure is mentioned and the word 'profit' or 'loss' is not used"). Whether or not a statement constitutes a profit forecast is a question of fact and will depend upon the circumstances of the particular issuer.

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| 50. *Q: Do you agree with the above approach in relation to profit forecasts and estimates? If not, please state which particular aspects you do not agree with and give you reasons* |

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| 51. *Q: Do you consider that it is appropriate to provide examples of what may or may not constitute a profit forecast or estimate? If so, could you please provide some examples?* |

## 5. HISTORICAL FINANCIAL INFORMATION

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| **20.1** | **Historical Financial Information**<br>Audited historical financial information covering the latest 3 financial years (or such shorter period that the issuer has been in operation), and the audit report in respect of each year. Such financial information must be prepared according to Regulation (EC) No 1606/2002, or if not applicable, to a Member State national accounting standards for issuers from the Community. For third country issuers, such financial information must be prepared according to the international accounting standards adopted pursuant to the procedure of Article 3 of Regulation (EC) No 1606/2002 or to a third country's national accounting standards equivalent to these standards. If such financial information is not equivalent to these standards, it must be presented in the form of restated financial statements.<br><br>The last two years audited historical financial information must be presented and prepared in a form consistent with that which will be adopted in the issuer's next published annual financial statements having regard to accounting standards and policies and legislation applicable to such annual financial statements.<br><br>If the issuer has been operating in its current sphere of economic activity for less than one year, the audited historical financial information covering that period must be prepared in accordance with the standards applicable to annual financial statements under the Regulation (EC) No 1606/2002, or if not applicable to a Member State national accounting standards where the issuer is an issuer from the Community. For third country issuers, the historical financial information must be prepared according to the international accounting standards adopted pursuant to the procedure of Article 3 of Regulation (EC) No 1606/2002 or to a third country's national accounting standards equivalent to these standards. This historical financial information must be audited.<br><br>If the audited financial information is prepared according to national accounting standards, the financial information required under this heading must include at least:<br>(a) balance sheet;<br>(b) income statement;<br>(c) a statement showing either all changes in equity or changes in equity other than those arising from capital transactions with owners and distributions to owners;<br>(d) cash flow statement;<br>(e) accounting policies and explanatory notes<br><br>The historical annual financial information must be independently audited or reported on as to whether or not, for the purposes of the registration document, it gives a true and fair view, in accordance with auditing standards applicable in a Member State or an equivalent standard. |

***Introduction: Restatements pursuant to paragraph 2 of item 20.1***

52. This text provides recommendations on the application in several circumstances of the second paragraph of item 20.1 quoted above, in particular in the situations where this provision will lead to the restatement of the previously published historical financial information.

53. The second paragraph of item 20.1 was mainly introduced considering the specific situation of new applicants offering securities to the market for the first time, and seeking listing of these securities on an EU regulated market. Indeed, new applicants will often (but not always) have to change their set of accounting standards[1] after their admission to trading. In many cases, this will lead them to adopt IAS/IFRS as basis for their consolidated accounts, instead of the local GAAP they used until when they prepare and file the initial listing prospectus[2].

54. In this case, 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 (once listed). As explained below, restatement to IAS/IFRS of previously published financial information (initially prepared under local GAAP) will ensure a higher level of transparency and comparability.

55. The second paragraph of the item 20.1 also applies to situations where the set of accounting standards used in the next published financial statements is identical to the set of accounting standards used in the last published financial statements. Recommendations are also provided on how issuers should have regard, for the presentation of historical financial information, to the accounting standards or policies that, within the set of standards, will be adopted by the issuer whether voluntary or imposed by the EU or National regulation.

56. The following example will illustrate some of the possible different situations. Consider an issuer preparing a prospectus for a public offering and admission to trading of these securities on a regulated market in 2010. The issuer must statutorily present its financial statements e.g. in March, every year. Balance sheet date is 31 December.

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1 A set of accounting standards refers to a consistent and complete body of accounting rules issued by one standard setter, such as the national standards and GAAP or the IAS/IFRS. Compliance with a set of standards usually needs full compliance with all the requirements of each applicable standards and interpretations.

2 In compliance with article 4 of the EU Regulation 1606/2002 of 19 July 2002 on the application of international accounting standards, companies whose securities are traded on a regulated market have to apply the endorsed IAS/IFRS for the preparation and presentation of their consolidated financial statements[2]. For the other companies, application of IAS/IFRS depends on the choice of the relevant Member States which can require or allow application of these standards. Its is expected that in the longer term, most European companies seeking an initial listing will adopt IAS/IFRS as basis for their statutory consolidated accounts before being listed as this will facilitate the application to listing. However, it is necessary to envisage the situation where issuers apply national accounting standards before becoming listed.

a. **Situation a: the set of accounting standards will change (in the next published financial statements)**. Point A below.

The issuer is a new applicant and used national GAAP as basis for its statutory consolidated financial statements in 2007, 2008 and 2009. Pursuant to the EU Regulation 1606/2002, the issuer will have to apply IAS/IFRS as from 1st January 2010 (and present comparatives under IAS/IFRS as at 31 December 2009). If the IPO takes place after March 2010, the *next published financial statements* will be the 2010 ones, i.e. IAS/IFRS financial statements as at 31 December 2010 which will actually be published in March 2011.

A similar situation is that of issuers which voluntarily decide at the time of the IPO to adopt IAS/IFRS for the preparation of the financial statements as at 31 December 2009, although historical financial information was always presented under local before.

b. **Situation b: the set of standards does not change (in the next published financial statements).** Point B below**.**

i. The issuer already used IAS/IFRS as basis for its consolidated accounts (this is the case if the issuer is already listed or if the issuer is a new applicant but used to apply IAS/IFRS before the offering, in accordance with its national reporting framework).
ii. The issuer is a new applicant and used national GAAP as basis for its statutory consolidated financial statements in 2006, 2007 and 2008. As the IPO takes place before March 2010, the *next published financial statements* will be the 2009 ones, i.e. national GAAP financial statements.

**A. Issuers applying a different set of standards in the last and in the next published financial statements**

***Presentation of historical annual financial information***

57. In this case, the issuer is required to completely restate the financial information covering the last two financial years (in the example 2009 and 2008). The restatement applies to all parts and aspects of the financial statements. The restated financial information must be audited.

58. The issuer is not required to restate the first year (in the example 2007) but inclusion of the first year in the prospectus remains mandatory pursuant to the paragraph 1 of item 20.1 (for share registration documents). Where the issuer decides not to restate this first year, it is recommended that it adopts a presentation format for the three years of financial information that allows comparability and continuity over time.

59. The recommended approach is to use the middle period (2008) as a bridge from the first year (2007) and the third year (2009), by presenting the middle period under the two sets of accounting standards.

60. Indicative format when the information is displayed on the face of the financial statements

| Items of Financial Statements | Year 2009 Under IFRS | Year 2008 Under IFRS (restated) | Year 2008 Under previous GAAP (as previously published) | Year 2007 Under previous GAAP (as published) |
|---|---|---|---|---|

61. For the presentation of the financial information as prepared under previous GAAP, issuers can choose to present them on the face of the financial statements using the "bridge approach" described above when the "old" and "new" formats of accounts are sufficiently comparable or, if it is not the case, to present these financial statements prepared under previous GAAP on separate pages.

***When is the issuer considered as first time adopter of IFRS?***

62. In the circumstances described above, an additional question is to know when the issuer has to be considered as first time adopter of IFRS for the purpose of application of IFRS1 First-time Adoption of International Financial Reporting Standards. In other words, referring to example given above, is the issuer considered as first time adopter for 2009 financial statements (as restated to IAS/IFRS following the restatement rule of paragraph 2 of item 20.1) or for 2010 financial statement (application of EU Regulation 1606/2002)?

63. Paragraph 3 of IFRS1 indicates that "An entity's first IFRS financial statements are the first annual financial statements in which the entity adopts IFRSs, by an explicit and unreserved statement in those financial statements of compliance with IFRSs". The paragraph 4 of the Standard adds that IFRS 1 does not apply when an entity "stops presenting financial statements under national requirements, having previously presented them as well as another set of financial statements that contained an explicit and unreserved statement of compliance with IFRSs".

64. It follows from the above that when the issuer has to present audited financial statements restated under IAS/IFRS for the last two years in its prospectus, the issuer should apply IFRS 1 for the financial statements covering the last year presented. Referring to the example, the issuer could apply IFRS1 in the 2009 financial statements (as restated under IFRS) and this implies that the 2008 financial statements will be restated into IAS/IFRS as comparatives.

***Which IFRS to apply?***

65. Basically, the requirement is to apply all IAS/IFRS effective at the balance sheet date of the "next published financial statements".

66. In some cases, it may be difficult to know with sufficient certainty which standards or policies will be applicable in the "next published financial statement". For example if the public offer is realised in 2010, so far the next published financial statement (2010) are not included in the prospectus. Then, when the prospectus is prepared and filed, the issuer may not be aware of all possible future new or amended standards which will be in force for the 2010 financial statements. In some other (rare) cases, the retrospective application of the future new or amended standards may not be permitted.

67. Restatement of the historical financial information will usually not be possible in such situations. In these situations, in addition to IAS 8 requirements (see below), the issuer will, in accordance with item 20.1 of prospectus regulation have regard to these future new or amended accounting standards and policies applicable to the 2010 financial statements by providing additional disclosure, where the information is available and is expected to have a material impact on the results and financial position of the issuer.

**B. Issuers applying the same set of standards in the last and in the next published financial statements (this being national GAAP or IAS/IFRS)**

68. In this case, the issuer should basically follow the requirements of the applicable set of accounting standards relating to changes in accounting policies and/or the transitional requirements in new standards. Such requirements provide for the solutions aimed at ensuring the historical comparability between all financial periods presented (i.e. retrospective application and restatement and/or provision of additional disclosures).

69. As far as IAS/IFRS are concerned, this aspect is covered by IAS 8 Accounting Policies, Changes in Accounting Estimates and Errors and by specific transitional provisions in any IAS/IFRS.

70. IAS 8 basic principle is that a change in accounting policy resulting from the initial application of a Standard or an Interpretation must be accounted for in accordance with the specific transitional provisions, if any, in that Standard or Interpretation. When an entity changes an accounting policy upon initial application of a Standard or an Interpretation that does not include specific transitional provisions or changes an accounting policy voluntarily, it shall apply the change retrospectively (IAS 8, paragraph 49 and following).

71. The Standard uses the 'impracticability' criterion for exemption from changing comparative information when changes in accounting policies are applied retrospectively. The Standard includes a definition of 'impracticable' and recommendations on its interpretation. IAS 8 also provides that when an entity has not

applied a new Standard or Interpretation that has been issued but is not yet effective, the entity shall give additional defined disclosure.

72. It results from these requirements that the accounting standards and policies applicable to the next published financial statement will, in accordance with the accounting standards (IAS or local GAAP), normally be taken into account for the preparation of the financial statements themselves. Therefore, no additional restatement for the prospectus purposes is necessary.

73. In addition, the issuer will, in accordance with item 20.1 of prospectus regulation have regard to future new or amended accounting standards and policies applicable to the next published financial statements by providing additional disclosure in the prospectus, where the information is available and is expected to have a material impact on the results and financial position of the issuer and where the financial statements do not already include such information (e.g. in application of IAS 8, as explained above).

74. When a prospectus for admission to trading of securities contains historical financial information prepared on the basis of national GAAP only, issuers might consider giving additional IAS/IFRS based financial information (in a condensed form or not), so as to provide investors with information comparable on an ongoing basis (once admitted to trading).

75. *Q: Do you agree with the conclusion stated in the previous paragraph? If not, please state your reasons.*

## C. Audit of the annual financial information

76. The first paragraph of item 20.1 requires issuers to provide audited historical information covering the latest 3 financial years, and the audit report in respect of each year. The historical financial information in a prospectus may be presented as a comparative table extracted from the issuer's previously published statutory financial statements, or the statutory financial statements may be incorporated by reference into a prospectus or attached to a prospectus. In these cases, the statutory audit reports will be provided in respect of each year presented.

77. When historical information has been restated, an audit report produced for the purposes of the prospectus shall be provided on any restated accounts presented in the prospectus. If the issuer uses the "bridge approach" presenting the middle period under the two sets of accounting standards, the audit report on restated financial information need only cover the restated financial statements. The statutory audit report would be for the earliest period when the bridge approach is adopted.

78. The last paragraph of item 20.1 above mentioned provides that "The historical annual financial information must be independently audited or reported on as to whether or not,

for the purpose of the registration document, it gives a true and fair view, in accordance with auditing standards applicable in a Member State or an equivalent standard".

79. In accordance with the 4th and 7th accounting EU Directives, the companies must have their annual and consolidated accounts audited by one or more persons authorized to audit accounts under the laws of the Member States[3]. The same directives require that the annual and consolidated accounts give a true and fair view (article 2.3 of the 4th Directive and article 16.3 of the 7th Directive).

80. These provisions apply to the statutory annual and consolidated accounts of all companies and to the statutory audit of these accounts.

81. As the prospectus provisions also require (where applicable) restated historical financial information to be audited, the same assurances should be given, as regards the audit, for the restated information. In this context, the words "reported on …" indicate that restated financial information must be audited by the auditor following the same professional requirements as for statutory audit of the statutory financial statements.

## D. Content of historical annual financial information

82. When the issuer applies IAS/IFRS to present historical annual financial information in a registration document, that information should include all those components of the complete set of financial statements as defined in IAS 1 and that information should cover the latest 3 financial years.

83. Where the historical annual financial information has been restated in order to comply with the requirements of the second paragraph of the item 20.1, these restated financial statements may be presented as a substitute to the statutory financial statements.

84. The fourth paragraph of the item 20.1 requires that the issuer applying national accounting standards must include at least the following historical annual financial information in a registration document which is in line with the requirements of IAS 1:

(a) balance sheet

(b) income statement

(c) statement showing the changes in equity

(d) cash flow statement

(e) accounting policies and explanatory notes

[3] Article 51 of the Fourth Council Directive (78/660/EEC) of 25 July 1978 (annual accounts) and article 37 of the Seventh Council Directive 83/349/EEC of 13 June 1983 (consolidated accounts).

If the national accounting standards of a Member State do not include regulation on how to prepare the above mentioned statements, especially regarding the statements (c) and (d), the principles of IAS/IFRS should be followed as the first basis in preparing these statements to the extent that IAS/IFRS are applicable or suitable. These statements, if not included in the previously published statutory accounts, should be audited for the purposes of the registration document.

85. *Q: Do you agree with this proposal? If not, please state your reasons.*

## 6. PRO FORMA FINANCIAL INFORMATION

**20. 2 Pro forma financial information**

In the case of a significant gross change, a description of how the transaction might have affected the assets and liabilities and earnings of the issuer, had the transaction been undertaken at the commencement of the period being reported on or at the date reported.

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

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

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

***Report prepared by independent accountants or auditors***

86. In practise, the required report will often be prepared by the statutory auditor of the issuer. The report may also be prepared by auditors other than the statutory auditor or, where applicable, by "accountants" other than those auditors (as covered by the 8th Directive).

87. Where applicable, accountants should be subject to equivalent professional requirements (auditing and reporting standards, experience, training, continuous education…) as well as ethical and independence requirements as auditors

88. The Eighth Council Directive 84/253/EC of 10 April 1984 on the approval of persons responsible for carrying out the statutory audits of accounting documents deals primarily with the approval of statutory auditors in Member States.

89. On the basis of the preparatory work by the EU Committee on Auditing, the Commission issued a Recommendation on "Quality Assurance for the Statutory Auditor in the EU" in November 2000 and a Recommendation on Statutory Auditors' Independence in the EU in May 2002.

90. Beginning 2004, the EC has issued a proposal for a Directive, which will amend the existing Eighth Directive.

91. Notwithstanding any future EU legislation on the statutory audit and/or auditor, which will determine the regime applicable to independent auditors or audit firms, the meaning of independent auditors is that provided by existing EU legislation, i.e. the 8th Council Directive 84/253/EC of 10 April 1984 on the approval of persons responsible for carrying out the statutory audits of accounting documents.

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| 92. *Q: Do you agree with this proposal? If not, please state your reasons.* |

**Annex II Pro forma financial information building block**

The pro forma information must include a description of the transaction, the businesses or entities involved and the period to which it refers, and must clearly state the following:

a) the purpose to which it has been prepared;

b) the fact that it has been prepared for illustrative purposes only;

c) the fact that because of its nature, the pro forma financial information addresses a hypothetical situation and, therefore, does not represent the company's actual financial position or results.

In order to present pro forma financial information, a balance sheet and profit and loss account, and accompanying explanatory notes, depending on the circumstances may be included.

Pro forma financial information must normally be presented in columnar format, composed of:

a) the historical unadjusted information;

b) the pro forma adjustments; and

c) the resulting pro forma financial information in the final column.

The sources of the pro forma financial information have to be stated and, if applicable, the financial statements of the acquired businesses or entities must be included in the prospectus

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| The pro forma information must be prepared in a manner consistent with the accounting policies adopted by the issuer in its last or next financial statements and shall identify the following:<br>a) the basis upon which it is prepared;<br>b) the source of each item of information and adjustment. |
| Pro forma information may only be published in respect of<br>a) the current financial period;<br>b) the most recently completed financial period; and/or<br>c) the most recent interim period for which relevant unadjusted information has been or will be published or is being published in the same document. |
| Pro forma adjustments related to the pro forma financial information must be:<br>a) clearly shown and explained;<br>b) directly attributable to the transaction;<br>c) factually supportable.<br><br>In addition, in respect of a pro forma profit and loss or cash flow statement, they must be clearly identified as to those expected to have a continuing impact on the issuer and those which are not. |
| The report prepared by the independent accountants or auditors must state that in their opinion:<br>the pro forma financial information has been properly compiled on the basis stated; that basis is consistent with the accounting policies of the issuer. |

***Clarification of certain terms used in the annex***

93. *'Factually supportable':* the nature of the facts supporting an adjustment will vary according to the circumstances. Nevertheless, facts are expected to be capable of some reasonable degree of objective determination. Support might typically be provided by published accounts, management accounts, other financial information and valuations contained in the document, purchase and sale agreements and other agreements to the transaction covered by the prospectus. For instance, in relation to management accounts, the interim figures for an undertaking being acquired may be derived from the consolidation schedules underlying that undertaking's interim statements.

94. *'Directly attributable to transactions':* Pro forma information should not reflect matters that are not an integral part of the transaction which is the subject of the prospectus. In particular, pro forma financial information should not include adjustments which are dependent on actions to be taken once the current transaction has been completed, even where such actions are central to the issuer's purpose in entering into the transaction.

95. The accounting treatment applied to adjustments should be presented and prepared in a form consistent with the policy the issuer would adopt in its last or next published financial statements. For instance, the issuer should not include deferred or contingent consideration in its pro forma if such consideration is not directly attributable to the transaction at hand but to a future event and may result in unduly inflating the net assets figures.

96. For these purposes, 'Significant gross change' is described in paragraph 9 of the recitals of the Regulations.

97. Thus, in order to assess whether the variation to an issuer's business as a result of a transaction is more than 25%, the size of the transaction should be assessed relative to the size of the issuer by using appropriate indicators of size. A transaction will constitute a significant gross change where at least one of the indicators of size is more than 25%.

98. *Q: Please provide examples of indicators of size which you consider appropriate.*

99. *Q: CESR members had a discussion on appropriate definitions of indicators of size. Should they refer to IAS/IFRS figures, local GAAP figures, other definitions or not defined at all?. If you provided examples of indicators of size in response to the preceding question, please explain your preferences on definitions of the proposed indicators.*

## 7. FINANCIAL DATA NOT EXTRACTED FROM THE ISSUER'S AUDITED FINANCIAL STATEMENTS.

20.4.3 Where financial data in the registration document is not extracted from the issuer's audited financial statement state the source of the data and state that the data is unaudited.

100. Financial data not extracted from the issuer's audited financial statements will typically include any information, statistics, ratios or other data which purports to represent the performance of the issuer's business activities and which cannot be sourced or derived from the issuer's audited financial statements.

101. Where the financial data in a prospectus is not extracted from the issuer's audited financial statements, the data should be clearly identified in the prospectus as such together with the definitions of the terminology used and the basis of preparation adopted. In addition, a clear indication should be given as to which figures relate to

historical, forecast, estimated or pro forma information, as appropriate with reference made to where the basis of presentation can be found.

102. The actual audited historical financial information should be given greater prominence than any forecast, estimated or pro forma figures and a statement that investors should read the whole document and not just rely on the key or summarised information must be provided in the prospectus.

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| 103. *Q: Do you agree with this proposal? If not, please state your reasons.* |

## 8. INTERIM FINANCIAL INFORMATION

**20.6 Interim and other financial information**

**20.6.1** If the issuer has published quarterly or half yearly financial information since the date of its last audited financial statements, these must be included in the registration document. If the quarterly or half yearly financial information has been reviewed or audited, the audit or review report must also be included. If the quarterly or half yearly financial information is unaudited or has not been reviewed state that fact.

**20.6.2** If the registration document is dated more than nine months after the end of the last audited financial year, it must contain interim financial information, which may be unaudited (in which case that fact must be stated) covering at least the first six months of the financial year.

The interim financial information must include comparative statements for the same period in the prior financial year, except that the requirement for comparative balance sheet information may be satisfied by presenting the years end balance sheet.

### *A. Introduction*

104. The prospectus shall present all the up-to-date financial information that has been already disclosed by the issuer. To that end, if the issuer has disclosed any interim financial information of the current financial year, it shall include such information in the prospectus.

105. When the prospectus is dated more than nine months after the end of the last audited financial year, it must provide an update - in a condensed format - of the historical annual financial information included in this prospectus. The objective is to provide investors with information on the recent developments in the financial position and performance of the issuer. This means that the prospectus must include financial information covering the first six month of the financial year, even if the issuer has not previously published any interim financial information.

106. The Interim financial statements required under the provisions of item 20.5 have the same meaning as Interim financial information required under 20.6.2.

***B. Content of Interim Financial Information for the application of item 20.6.2***

*B.1. Issuers already listed on a regulated market*

107. Issuers listed on a regulated market shall include in the prospectus the condensed set of financial statement included in the half-yearly financial report covering the first six months of the financial year stated by the article 5 of the agreed Transparency Directive.

*B.2. New issuers.*

108. The interim financial information should be presented according to the same set of standards as the one used to prepare historical financial information referred to under item 20.1, except for accounting policy changes made after the date of the most recent annual financial statements, provided under point 20.1, that are to be reflected in the next annual financial statements.

109. For new issuers, the interim financial information covering the first six months of the current financial year should at least include:

(i) a condensed balance sheet;
(ii) a condensed income statement;
(iii) selected explanatory notes.

110. For new issuers seeking listing on a regulated market and publishing consolidated accounts[4] or for new issuers already using IAS/IFRS as basis for the preparation and presentation of their consolidated financial statements, the interim financial information should, in addition, include a condensed cash flow statement and a condensed statement of changes in equity.

111. The interim financial information must include comparative statements for the same period in the prior financial year, except the balance sheet, in the following terms:

a. Balance sheet as of the end of the first six months of the current financial year and comparative balance sheet as of the end of the immediately preceding financial year;
b. Income statement cumulatively for the first six months of the current financial year with a comparative income statement for the comparable period of the immediately preceding financial year;
c. Statement showing changes in equity cumulatively for the six months of the current financial year, with a comparative statement for the comparable

[4] Once listed, these issuers will be required to apply the IAS/IFRS pursuant to the EU Regulation 1606/2002 (see above). They will also have to apply IAS 34 in their future interim reporting.

period of the immediately preceding financial year (when the statement is required – see above);

d. Cash flow statement cumulatively for the six months of the current financial year, with a comparative statement for the comparable period of the immediately preceding financial year (when the statement is required – see above).

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| 112. *Q: Do you agree with this proposal? If not, please state your reasons.* |

## 9. WORKING CAPITAL STATEMENTS

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| **3.1 Working Capital Statements (Shares Securities Note Annex III)**<br><br>Statement by the issuer that, in its opinion, the working capital is sufficient for the issuers present requirements or, if not, how it proposes to provide the additional working capital needed. |

### *A. Definitions*

***"Working capital"***

113. Working capital should be considered as an issuer's ability to access cash and other liquid resources in order to meet its liabilities as they fall due.

***"Present requirements"***

114. A prospectus may be valid for up to 12 months and therefore present requirements should be considered to be a minimum of 12 months from the date of the prospectus. A twelve month period is also consistent with the period that directors will be familiar with assessing when considering the applicability of going concern in annual financial statements.

### *B. Introduction*

115. The working capital statement either provides forward looking comfort by the issuer that it has sufficient cash flow [for a period of at least 12 months], taking into account a wide range of variables and sensitivities or information on how this is to be achieved. Investors expect the working capital statement to be made by issuers with a high degree of confidence i.e. it should be reliable.

116. Where information is available, issuers should also consider whether there are any foreseeable working capital difficulties beyond the 12 month present requirement'

guideline. Where such difficulties are foreseen, issuers will need to consider whether supplementary disclosure in the prospectus is appropriate.

117. Working capital statements can be distinguished from other forms of prospective financial information e.g. profit forecasts in that the degree of confidence investors expect in the statement made by issuers is greater.

118. When giving a working capital statement issuers should ensure that the statement or explanation is understandable i.e. the working capital statement should be clear and unambiguous leaving no doubt in the investors mind as to whether there is, or is not, sufficient working capital.

119. For an issuer which has subsidiary undertakings the investor is in substance, investing in the business of the whole group and this is the basis on which information in the prospectus is presented e.g. financial information in the prospectus will be presented on a consolidated basis. When considering the working capital statement an investor should expect comfort that the business of the issuer (which may be operated through subsidiaries) will have sufficient working capital for its present requirements. Therefore where an issuer has subsidiary undertakings the working capital statement should relate to the issuer's group i.e. cover all subsidiary undertakings. When considering working capital on a group basis the issuer will need to consider, amongst other things, the nature of group banking arrangements and any restrictions on transfer of funds between subsidiaries e.g. where overseas subsidiaries are involved.

### ***C. "Clean" working capital statements***

120. The requirement of the regulation is to make a statement that there is sufficient working capital for present requirements i.e. a "clean" working capital statement or explain how additional working capital will be provided.

121. There may be a desire by issuers to disclose assumptions and include potential caveats to the clean statement required by the regulation. The addition of such disclosures will detract from the value of the statement. Detailed disclosure of assumptions that the issuer has made in reaching its opinion, will put the onus on investors to reach their own conclusion regarding adequacy of working capital and are therefore not acceptable.

122. In making a clean statement there should therefore be no reference to:

- "Will have" or "may have" sufficient working capital, rather than "is sufficient", "will have" or "may have" could for example indicate an unidentified future time or event such as debt facilities yet to be agreed, within the next 12 months
- Assumptions, sensitivities, risk factors, or caveats. All working capital statements should be made on the basis of reasonable assumptions -

disclosure of these only serves to qualify and confuse the statement for shareholders and investors.

***D. "Qualified" working capital statements***

123. If an issuer is unable to make a clean statement as required by the regulation then it must be the issuers opinion that it does not have sufficient working capital i.e. the decision for issuers is binary. It is not acceptable for the issuer to state that they are unable to confirm.

124. In such cases where the wording of the regulation cannot be tracked, in order to ensure that there can be no confusion for investors, the issuer should firstly make a clear statement that "…it does not have sufficient working capital for its present requirements…."

125. Following the statement that the issuer does not have sufficient working capital there are a number of matters that should be disclosed in order to ensure that investors are fully informed as regards what the issuers actual working capital position is:

126. *Relative timing*: Disclosure of the timing of the working capital issue is needed to understand the urgency of any working capital problem. Disclosure must address the question "when does the issuer expect to run out of working capital?", as this could for example be immediately or in say six months time.

127. *Shortfall:* The quantum of any working capital shortfall should be disclosed, i.e. disclosure must address the question "how much additional funding does the issuer need"?

128. *Action plan:* Disclosure must address the question of how the issuer plans to rectify the current shortfall in working capital. Disclosure should include details of specific proposed actions which could include for example*:*

a) refinancing;
b) the renegotiation of or new credit terms/facilities;
c) decrease in discretionary capital expenditure;
d) revised strategy or acquisition program;
e) or asset sales.

129. It is important that the issuer explains how confident or otherwise they are that these actions will be successful and the timing of the proposed actions.

130. *Implications*: Where relevant, the implications of any of the proposed actions being unsuccessful should be disclosed. For example whether an issuer is likely to enter into administration or receivership and if so, when.

***E. Principles for preparing working capital statements.***

131. A working capital statement should be made with a high degree of confidence. Issuers should ensure that there is very little risk that the basis of such a statement is subsequently called into question. The procedures adopted by issuers in making a statement are expected to be very similar to those adopted by issuers in concluding that the annual accounts should be drawn up on a going concern basis.

132. When giving a working capital statement issuers are expected to have undertaken appropriate procedures to support the statement that is being made. Such procedures would include:

- preparation of unpublished supporting prospective financial information in the form of internally consistent cash flow, profit and loss and balance sheet information;
- business analysis covering both the cash flows of the business and the terms and conditions and commercial considerations associated with banking and other financing relationships;
- consideration of the strategy and plans of the business and the related implementation risks together with checks against external evidence and opinion
- assessment of whether there is sufficient margin or headroom to cover reasonable worst case scenario (sensitivity analysis).

133. Where there is insufficient headroom between required and available funding to cover reasonable alternative scenarios it will not be possible for issuers to make a clean working capital statement. In these circumstances if the issuer is to give a clean statement he will need to reconsider their business plans or to arrange additional financing.

134. *Q: Do you agree with this proposal? If not, please state your reasons.*

## 10. CAPITALISATION AND INDEBTEDNESS

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

135. As much as possible, issuers would be expected to provide the information provided in the form below

1. Disclosure of capitalization and Indebtedness may be presented, as of a date no earlier than 90 days prior to the date of the document, according to the following format:

Total Current debt……..
- Guaranteed[5]…….
- Secured[6]……
- Unguaranteed/ Unsecured …….

Total Non-Current debt (excluding current portion of long –term debt)……
- Guaranteed[5]……..
- Secured[6]……
- Unguaranteed/ Unsecured……..

Shareholder's equity:
a.……Share capital…….
b.…...Legal Reserve……..
c…….Other Reserves…….

Total Shareholder's equity……

* * *

2. Issuers should be provide disclosure of Net indebtedness in the short term and in the medium-long term:

A. Cash……
B. Cash equivalent (Detail)……
C. Trading securities ……..…… ……
**D. Liquidity** (A) + (B)+(C)……

**E. Current Financial Receivable**……

F. Current Bank debt……
G. Current portion of long- term debt……
H. Other current financial debt……
**I. Current Financial Debt (**F)+(G)+(H)

**J. Net Current Financial Indebtedness** (I)-(E)-(D)……

K. Non current Bank loans……
L. Bonds Issued……
M. Other non current loans……..

**N. Long term Financial Indebtedness** (K)+(L)+(M))…….

[5] Description of the types of guarantees
[6] Description of the assets secured

**O. Net Financial Indebtedness** (J)+(N)……

*  *  *

Disclosure of indirect and contingent indebtedness shall also be provided in a separate paragraph. Issuers should indicate the amounts and analyse the nature of Indirect Indebtedness and contingent indebtedness.

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| 136. *Q: Do you agree with this proposal? If not, please state your reasons.* |

# IV NON FINANCIAL INFORMATION ITEMS

## 1. SPECIALIST ISSUERS

**Article 23.1**
Notwithstanding Articles 3 second paragraph and 22.1 second subparagraph, where the issuer's activities fall under one of the categories included in Annex XIX, the competent authority of the home Member State, taking into consideration the specific nature of the activities involved, may ask for adapted information, in addition to the information items included in the schedules and building blocks set out in Articles 4 to 20, including, where appropriate, a valuation or other expert's report on the assets of the issuer, in order to comply with the obligation referred to in Article 5.1 of Directive 2003/71/EC. The competent authority shall forthwith inform the Commission thereof.

**Recital 22**
For some categories of issuers the competent authority should be entitled to require adapted information going beyond the information items included in the schedules and building blocks because of the particular nature of the activities carried out by those issuers. A precise and restrictive list of issuers for which adapted information may be required is necessary. The adapted information requirements for each category of issuers included in this list should be appropriate and proportionate to the type of business involved. The Committee of European Securities Regulators could actively try to reach convergence on these information requirements within the Community. Inclusion of new categories in the list should be restricted to those cases where this can be duly justified.

137. Article 23 of the Regulation states that where the issuer is a

- property company,
- mineral company,
- investment company,
- scientific research based company,
- company with less than three years of existence (start up company),
- shipping company

the competent authority of the home Member State, taking into consideration the specific nature of the activities involved, may ask for adapted information, in addition to the information contained in the schedules and building blocks. This provision is based on article 5.1 of the Directive, which requires inclusion in the prospectus of all information that is necessary to enable investors to assess the merits and risks of the operation presented to them.

138. CESR has previously consulted on these specialist issuers (CESR/02-185b and CESR/02-286) and the general feelings received through consultation (see feedback statement, CESR/03-209) were:

- some support for the idea of building blocks for specialist issuers, but a general impression that it could lead to lack of flexibility;
- a general expectation for an expert's or valuation report, considering that the information obtained from the financial statements provided in the prospectus could not be sufficient to explain the valuation being given to the issuer's securities.

139. Considering the results of consultation, CESR decided not to include advice in relation to specialist issuers but to retain a disclosure requirement for adapted information, including a valuation or other expert's report to be provided where necessary. This approach was reflected by the Commission on article 23 above. Nevertheless, CESR committed itself to provide, at a later stage, additional recommendations on when this adapted information and/ or specific valuation report would be required (see paragraph 75 of CESR/03-209, feedback statement).

140. The additional recommendations are proposed in relation to:

1a – property companies
1b – mineral companies
1c – investment companies
1d – scientific research based companies
1e – start-up companies
1f – shipping companies

141. CESR considers that these additional requirements are recommended to all types of securities being issued by one of these specialist issuers insofar article 23.1 of the Regulation refers to Articles 4 to 20, therefore comprising all its annexes.

142. *Q: Recital 22 of the Prospectus Regulation invites CESR to produce recommendations on the adapted information that competent authorities might require to the categories of issuers set out in Annex XIX of the Regulation. Do you think detailed recommendations are needed for specialist issuers or do you think the special features of these issuers could be addressed mainly by the disclosure requirements set out in the schedules and building blocks of the Regulation?*

### *1a PROPERTY COMPANIES*

#### *Introduction*

143. On document CESR/02-185b, CESR consulted on property companies considering as such those companies that are primarily engaged in property activities, including the

holding of properties, both directly and indirectly and development of properties for letting and retention as an investment, the purchase or development of properties for subsequent sale or the purchase of land for development of properties for retention as investment. For this definition, property means freehold, heritable or leasehold property or any equivalent.

144. Additionally, CESR considered that the specific characteristics of property companies should be dealt in a valuation report to be prepared and disclosed as near as possible of the issuance of the securities, therefore, in the securities note. Bearing in mind that this requirement could make the prospectus too extensive (because some companies might have a large number of properties) CESR is now proposing that for companies that own more than 60 properties, only a condensed report shall be included in the prospectus insofar the entire report is made available as a document on display. CESR is also proposing that an independent expert prepare the report, in line with other requirements for independent expert reports.

***CESR proposed recommendations***

145. **Considering the specific features of property companies and in order to comply with article 5.1 of the Prospectus Directive and 23 of the Regulation, CESR proposes that property companies include in their prospectus (preferably in the securities note) a valuation report.**

146. **Property companies are those issuers that are primarily engaged in property activities, including the holding of properties, both directly and indirectly and development of properties for letting and retention as an investment, the purchase or development of properties for subsequent sale or the purchase of land for development of properties for retention as investment.**

147. **For the purpose of this definition, property means freehold, heritable or leasehold property or any equivalent.**

148. **This valuation report must:**

**1 – be prepared by an independent expert;**
**2 – give the date or dates of inspection of the property;**
**3 – provide all the relevant details in respect of each property necessary for the purposes of the valuation;**
**4 – be dated and state the effective date of valuation for each property, which must not be more than 60 days prior to the date of publication of the prospectus;**
**5 – include a summary showing separately the number of freehold and leasehold properties together with the aggregate of their valuations (negative values must be shown separately and not aggregated with the other valuations; separate totals should be given for properties valued on different bases);**

**6 – include a statement reconciling the valuation figure with the equivalent figure included in the issuer's latest published individual annual accounts or consolidated accounts, if applicable.**

149. **If the company holds more than 60 properties, only a report in a suitably condensed format needs to be included in the prospectus but the full report must be made available as a document on display.**

QUESTIONS

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| 150. *Q: Do you agree with the usefulness of requesting a valuation report in general? Please state your reasons.* |

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| 151. *Q: What rules do you think the report should comply with (such as those of the country of the competent authority that approves the prospectus or other different rules)? Please state your reasons.* |

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| 152. *Q: Do you think that the condensed report should be allowed if the company holds more than 60 properties or would you choose another figure? Please state your reasons.* |

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| 153. *Q: Do you think a valuation report is needed with respect to each property or do you consider a condensed report as sufficient? Please state your reasons.* |

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| 154. *Q: Considering the objective of the report, do you think it can be older than 60 days?* |

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| 155. *Q: Do you agree with the proposed recommendations? If not, please state your reasons.* |

### *1b MINERAL COMPANIES*

#### Introduction

156. On document CESR/02-185b, CESR consulted on mineral companies considering mineral companies those which principal activity is or is planned to be the extraction of mineral resources. Issuers that are involved only in exploration of mineral resources and are not undertaking or propose to undertake their extraction on a commercial scale (i.e. as a business activity) would not be classed as mineral companies. CESR considered that

the specific characteristics of mineral companies should be dealt by requiring additional information.

157. One of the comments CESR received during previous consultation was that the definitions by the Society of Petroleum Engineers should be used instead of the ones presented by CESR. For the time being CESR has decided to retain the definitions provided, which are based in the European Reporting Code and have been used by some Member States in their prospectuses, but has, nevertheless, included a specific question on this matter in the consultation paper. CESR believes that the complexity of this issue requires further analysis and welcomes issuers to present their views on it, so it can be reconsidered after the consultation period. This new consultation will also allow CESR to analyze whether IASB work on exploration for and evaluation of mineral resources can be of use to these recommendations, especially in what regards the definition of the entities within the scope of the recommendations.

158. In Schedule A of Annex I of Directive 34/2001 reference is also made to specific disclosures required for companies devoted to mining, extraction and similar activities (paragraph 4.1.3).

***CESR proposed recommendations***

159. **Considering the specific features of mineral companies and in order to comply with article 5.1 of the Prospectus Directive and 23 of the Regulation, CESR proposes that issuers whose principal activity is or is planned to be the extraction of mineral resources are expected to provide valuation reports in their prospectuses.**

160. **For the purposes of this definition, the following explanations apply:**

- **"extraction" includes mining, production, quarrying or similar activities and the reworking of mine tailings or waste dumps;**
- **"mineral resources" include metallic and non-metallic ores, mineral concentrates, industrial minerals, construction aggregates, mineral oils, natural gases, hydrocarbons and solid fuels, including coal.**

161. **Issuers that are involved only in exploration of mineral resources and are not undertaking or propose to undertake their extraction on a commercial scale (i.e. as a business activity) would not be classed as mineral companies.**

162. **The prospectus should refer to:**

**1. Details of reserves:**

a. **a description of the company's principal mineral interests together with a statement in respect of the company's reserves giving an estimate of the volume, tonnage in place and grades, as appropriate, each split between proven and probable reserves;**
b. **the expected period of working of those reserves;**

c. **an indication of the periods and main terms of any licences or concessions and the economic conditions for working those licences or concessions;**
d. **indications of the progress of actual working; and**
e. **an explanation of any exceptional factors that have influenced (a) to (d) above.**

**2. An issuer that has not been a mineral company for at least the three preceding years is expected to include the following information:**

**a) Where the issuer does not hold controlling interests in a majority (by value) of the properties, fields, mines or other assets in which it has invested, confirmation that it has a reasonable spread of direct interests in mineral resources and has rights to participate actively in their extraction, whether by voting or through other rights which give it influence in decisions over the timing and method of extraction of those resources.**

**b) Financial matters:**
**(i) an estimate of the funding requirements of the company for at least two years following publication of the prospectus;**
**(ii) particulars of estimated cash flow for either the two years following publication of the prospectus or, if greater, the period until the end of the first full financial year in which extraction of mineral resources is expected to be conducted on a commercial scale; such particulars must include details of the relevant mineral resources to be extracted, the expected prices and grade structures of the saleable resources, mineral concentrates or products, the expected extraction costs of the various extraction stages and the evidence and assumptions on which this information is based; and**
**(iii) confirmation by an independent accountant or auditor that the cash flow estimate has been properly prepared on the basis of the assumptions stated and that the basis of accounting used for the estimate is consistent with the accounting standards and policies of the issuer.**

**c) Expert's report:**
**A report from a suitably qualified and experienced independent expert. The report must be dated within six months of the prospectus and updated if there have been material developments since that date. The report must state that the existence of natural resources is substantiated by evidence obtained from site visits and observation acceptable to the expert and is supported by details of drilling results, analyses or other evidence and takes account of all relevant information supplied to the expert by the directors.**
**The expert's report should include:**
a) **Split according to proven and probable reserves, a description of the value, nature and extent, characteristics, methods of exploration or extraction of, and recovery estimates of reserves;**

b) **Maps and plans showing the nature, extent and principal geological characteristics of workings and a surface location plan showing wells, platforms, pipelines, bore holes, sample pits, trenches and other evidence;**
c) **Details of any other mineral resources relevant to the long term future of the company;**
d) **Details of any geophysical and geological evidence used in the estimation of reserves, including information on quality control procedures, the results of drilling and sampling, and the names of the organisations that carried out the investigation and analysis;**
e) **Production schedule.**
f) **The date(s) on which commercial extraction by the applicant was commenced, or is expected to commence, on each major property.**
g) **An indication of the progress of actual working.**
h) **Commentary on the reasonableness of the directors' forecasts (if any in the document) of the rate(s) of extraction of the major properties or fields;**
i) **Commentary on the type, extent, condition and value of plant and equipment which is of material significance to the company's operations which is currently in use on the company's major properties or fields or which will be required to achieve the forecast rates of extraction.**
j) **A statement setting out any additional information required for a proper appraisal of any special factors affecting the exploration or extraction businesses of the company.**

163. **Definitions:**

- **"proven reserves" mean:**

**(i) in respect of mineral companies primarily involved in the extraction of oil and gas resources, those reserves which on the available evidence and taking into account current technical and current economic conditions have a better than 90% chance of being produced; and**

**(ii) in respect of mineral companies other than those primarily involved in the extraction of oil and gas resources, those measured mineral resources (see below) of which detailed technical and economic studies have demonstrated that extraction can be justified at the time of the determination and under specified economic conditions.**

- **"probable reserves" mean:**

**(i) in respect of mineral companies primarily involved in the extraction of oil and gas resources, those reserves which are not yet "proven" but which on the available evidence and taking into account current technical and current economic conditions have a better than 50% chance of being produced; and**

**(ii) in respect of mineral companies other than those primarily involved in the extraction of oil and gas resources, those measured and/or indicated mineral resources (see below), which are not yet "proven" but of which detailed technical and economic studies have demonstrated that extraction**

**can be justified at the time of the determination and under specified economic conditions.**

- **"measured mineral resource" is that portion of a mineral resource for which tonnage or volume can be calculated from outcrops, pits, trenches, drill-holes or mine workings, supported where appropriate by other exploration techniques. The sites used for inspection, sampling and measurement must be so spaced that the geological character, continuity, grades and nature of the material are so well defined that the physical character, size, shape, quality and mineral content will be established with a high degree of certainty.**
- **"indicated mineral resource" is that portion of a mineral resource for which quantity and quality can only be estimated with a lower degree of certainty than for a measured mineral resource because the sites used for inspection, sampling and measurement are too widely or inappropriately spaced to enable the material or its continuity to be defined or its grade throughout to be established.**

QUESTIONS

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| 164. *Q: Do you agree with the usefulness of requesting a valuation report? If yes, do you agree with the content and scope of the reports proposed above? If not, please state your reasons* |

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| 165. *Q: Do you consider the definitions provided in these recommendationsto be adequate? If not, please give your reasons and provide new definitions, explaining the benefits of the change* |

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| 166. *Q: Do you think that issuers that are involved only in exploration of mineral resources and are not undertaking or propose to undertake their extraction on a commercial scale should also be classed as mineral companies? Please state your reasons* |

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| 167. *Q: Do you agree with the proposed recommendations? If not, please state your reasons* |

### *1d INVESTMENT COMPANIES*

#### *Introduction*

168. On document CESR/02-185b, CESR consulted on investment companies. For the purpose of the consultation, an investment company was defined as a company (which is not an open-ended investment company) whose object is to invest its funds wholly or mainly in investments with the object of spreading investment risk. Investments include shares or stock in the share capital of a company (excluding an open-ended investment company), instruments creating indebtedness such as debentures and government bonds, warrants, options futures, contracts for differences and certificates representing securities.

169. Bearing in mind its specific features, CESR designed a specific building block for these issuers. In face of the results of consultation, CESR decided not to include an additional building block, but to provide, at a later stage, some recommendations on these issuers. In doing so, CESR has slightly changed the wording of its previous text to make it more clear and consistent with other requirements and aligned the scope of investment companies with the definition of investment company under the 4th Company Law Directive (Directive 78/660/ECC of 25 July 1978)[7].

***CESR proposed recommendations***

170. **Considering the specific features of investment companies and in order to comply with article 5.1 of the Prospectus Directive and 23 of the Regulation, CESR proposes that issuers that are considered investment companies under article 5 of the Directive 78/660/ECC of 25 July 1978 are expected to disclose the following information in the prospectus:**

**1 – brief details of the experience of the directors of the investment entity and any investment managers in the management of investments;**

**2 – the name of any company or group (if other than the issuer) which manages the investments, together with an indication of the terms and duration of its appointment, the basis of its remuneration and any arrangements relating to the termination of its appointment;**

**3 – relevant details of all investments made (including debt securities and derivatives) that have a value greater than 5% of gross/total assets of the issuer;**

**4 – where applicable, in circumstances where local tax law permits the controlling stakes to be taken in companies or businesses by an investment entity, provide information on the valuation attributed to those investments;**

[7] Article 5.2 of Directive 78/660/EEC. For the purposes of this Directive, "investment companies" shall mean only: (a) those companies the sole object of which is to invest their funds in various securities, real property and other assets with the sole aim of spreading investment risks and giving their shareholders the benefit of the results of the management of their assets; (b) those companies associated with investment companies with fixed capital if the sole object of the companies so associated is to acquire fully paid shares issued by those investment companies without prejudice to the provisions of Article 20 (1) (h) of Directive 77/91/EEC

**5 – description of the dividend policy of the issuer including details of the policy on the distribution of surpluses arising from the performance of investments;**

**6 – a description of the investment policy to be followed, for instance, a statement of the extent to which the issuer proposes to borrow money to achieve its investment objectives, together with an explanation of the risk of the value of the issuer's securities associated with any such borrowing, and, if the issuer also proposes to invest in other investment companies which follow the same or similar investment policy, then the issuer should provide a description of the risk to the value of the company's securities associated with such investments. If it is intended that investments will be made in fewer than 20 companies there should be a statement of that fact.**

QUESTIONS

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| 171. *Q: Do you agree with the proposed recommendations? If not, please state your reasons* |

### *1f SCIENTIFIC RESEARCH BASED COMPANIES*

#### *Introduction*

172. On document CESR/02-185b, CESR consulted on scientific research based companies considering as such issuers who are primarily involved in the laboratory research and development of chemical or biological products or processes, including pharmaceutical companies and those involved in the areas of diagnostics, agriculture and food.

173. For these issuers CESR established a specialist building block (annex H to CESR/02-185b) according to which scientific research based companies were asked to disclose additional information regarding their activities, expertise and experience of key technical staff and products.

174. During consultation, CESR received relevant suggestions to ameliorate this approach.

#### *CESR proposed recommendations*

175. **Considering the specific features of scientific research based companies and in order to comply with article 5.1 of the Prospectus Directive and 23 of the Regulation, CESR proposes that issuers which are primarily involved in the laboratory research and development of chemical or biological products or**

**processes, including pharmaceutical companies and those involved in the areas of diagnostics and agriculture are expected to disclose in their prospectuses:**

**a) details of the issuer's operations in laboratory research and development, including details of patents granted or details of the progress of patents applications and in relation to its products the successful completion of, or the successful progression of significant testing of the effectiveness of the products. If there are no relevant details, a negative statement should be provided. Where applicable, this information shall be provided in the line item of Research and development, patents and licenses;**

**b) details of the relevant expertise and experience of the key technical staff;**

**c) information on whether the issuer has engaged in collaborative research and development agreements with organizations of high standing and repute within the industry. In the absence of such agreements, explanation on how such absence could affect the standing or quality of its research efforts;**

**d) a full description of each product the development of which may have a material effect on the future prospects of the issuer.**

176. **The above information should be provided in addition to information applicable to issuers that have been operating in its current sphere of economic activity for less than three years, if that is the case.**

QUESTIONS

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| 177. *Q: Do you agree with the proposed recommendations? If not, please state your reasons* |

### *1e START-UP COMPANIES*

#### *Introduction*

178. CESR proposed a specific building block schedule for start-up companies in October 2002 (reference: CESR/02-185b). Subject to adjustments due to the Regulation and the disclosure requirements in the Annexes, this previous text has been taken into account when drafting the proposed recommendations.

179. To this end, a start up company is an issuer that has been operating in its current sphere of economic activity for less than three years. The normal case that would fall under this definition is a company that has less than 3 years of existence. Nevertheless, even if the issuer was incorporated more than three years ago, the proposed recommendations would be applicable if the company changed completely its business

less than three years ago, meaning that in fact, it is a totally new company. Special purpose vehicles, as defined in article 2.4 of the Regulation, are not considered start-up companies in fact because they are formed for the purpose of the issuance of securities, not to conduct a business.

180. To encompass the specific nature of start-up companies and the fact that they do not have a relevant track record, CESR intends to propose the inclusion of a business plan and reiterate the general requirement for a report whenever the business plan includes profit forecasts or estimates.

181. In addition to these requirements some CESR members believe that an independent expert report on the services/products of the issuer is relevant for investors insofar start-up issuers do not have a relevant track record and this report would provide investors with additional and relevant information, especially if the activity is unproven. Others think that it will be quite difficult to find a qualified expert able to present meaningful information particularly if the business of the issuer is a very specific one and that this requirement might, in fact, impede start-up issuers from accessing the market. In addition, other CESR members question the level of comfort that such a report could provide for investors. Finally, others think that whenever the activities or products are unproven, the report should be mandatory.

182. Bearing in mind the relevance of such recommendations, CESR decided to present to consultation the various options in order to assess the real market needs. Consultees are, therefore, asked to present their views on whether this report should be mandatory or not and on its content, if required.

***CESR proposed recommendations***

183. **Start-up issuers are expected to provide information in their prospectuses as follows.**

184. **To this end, a start up issuer is a company that has been operating in its current sphere of economic activity for less than three years. Special purpose vehicles, as defined in article 2.4 of the Regulation, are not considered start-up companies in fact because they are formed for the purpose of the issuance of securities, not to conduct a business.**

185. **Strategic objectives:**

**- A discussion of the issuer's strategic objectives (business plan), including the figures, shall be provided together with the key assumptions upon which such plan is based, in particular with respect to the development of new sales and the introduction of new products and/or services during the next two financial years, and a sensitivity analysis of the business plan to variations in the major assumptions.**
**- If the business plan includes profit forecasts, the report referred to in item 13.2 of Annex I to the Regulation should be provided.**

186. **The prospectus shall refer to information such as:**

**a. the extent to which the issuer's business is dependent upon any key individuals' identifying the individuals concerned;**
**b. current and expected market competitors;**
**c. dependence on a limited number of customers or suppliers;**
**d. mention of the assets necessary for production not owned by the issuer.**

QUESTIONS

187. *Q: Do you agree with the specific disclosure requirements set out for start-up companies? If not, please state your reasons and refer to the additional information you think should be required*

188. *Q: Do you agree with the proposed definition of start-up companies? Would you instead prefer that these companies are defined as those that have less than three years of existence? Please state your reasons.*

189. *Q: CESR may recommend to its members one of the following four options. Please state your preference and reasons for your answer:*

*(i) the issuer should always provide an expert's report on the services/products of the issuer;*
*(ii) the issuer should provide an expert's report on the services/products when these are unproven*
*(iii) the expert's report on the services/products of the issuer should be provided unless a very good reason is presented to the competent authority that would impede the report from being provided;*
*(iv) the report would not be mandatory but the issuer would be free to include it.*

190. *Q: When considering whether the report should be mandatory or not, CESR also considered its content and, if required, CESR is proposing that the expert assesses and concludes on:*

*(i) the merits of the issuer's products and/or services;*
*(ii) the issuer's business plan including the critical path and timescale to commercial exploitation and any projections of the market potential for the issuer's products and/or services;*
*(iii) the risk factors which might affect the issuer's business plan.*

*The report should be prepared by an individual or organisation independent of the issuer and of demonstrable high standing, repute and expertise in the field concerned and should confine the opinions expressed to matters within such expertises.*

*Q: Do you agree with the content of the report? If not, please state your reasons and indicate what additional information you would require or delete.*

### *1f SHIPPING COMPANIES*

#### *Introduction*

191. On document CESR/02-286, CESR consulted on shipping companies considering as such those issuers that activates in ocean-going shipping and manages, leases or owns cargo and/or passengers vessels either directly or indirectly, as a main activity.

192. Additionally CESR proposed a dual approach to shipping companies:

- additional information to be included in the registration document;
- a requirement for a valuation report on the value of each vessel, to be included in the securities note.

193. Bearing in mind that this requirement could enlarge the prospectus (because some companies might have a large number of vessels) CESR is now proposing that for companies that own more than 50 vessels, only a condensed report shall be included in the prospectus insofar the entire report is made available as a document on display.

194. During consultation CESR received some comments on shipping companies that have been used to ameliorate the recommendations now provided and has also taken into consideration the requirements that apply to all companies in order to avoid duplications.

#### *CESR proposed recommendations*

195. **Considering the specific features of shipping companies and in order to comply with article 5.1 of the Prospectus Directive and 23 of the Regulation, CESR proposes that issuers that activates in ocean-going shipping and manages, leases or owns cargo and/or passengers vessels either directly or indirectly, as a main activity are expected provide the following information in their prospectus:**

196. **The registration document should refer to:**

**a) the name of any ship management company or group (if other than the issuer) which manages the vessels, if any, together with an indication of the terms and duration of its appointment, the basis of its remuneration and any arrangements relating to the termination of its appointment;**

**b) detailed information regarding each vessel which is managed, leased or owned either directly or indirectly by the issuer, including the type, place of registration of the vessel, shipping owning company, financing terms, capacity and other relevant details;**

**c) if the issuer has contracts to build new vessels or improve existing vessel(s), detailed information regarding each vessel (detailed description of the cost and financing of the vessel – refund, guarantees, letters of commitment -, charter type, dimension, capacity and other relevant details) shall be provided in the appropriate line item of the registration document, such as principal future investments or material contracts;**

**d) description of any relevant insurance policies relating to all vessels leased or owned either directly or indirectly by the issuer.**

197. **In the securities note issuers are expected to include a valuation report which should be prepared by an experienced independent valuer and:**

**a) give the date or dates of inspection of the vessels and by whom it was prepared;**

**b) provide all the relevant details (valuation method) in respect of each vessel necessary for the purposes of the valuation;**

**c) be dated and state the effective date of valuation for each vessel, which must not be more than 90 days prior to the date of publication of the document;**

**d) include a statement reconciling the valuation figure with the equivalent figure included in the issuer's latest published individual annual accounts or consolidated accounts, if applicable.**

198. **The valuation report is not required if the issue does not intend to finance one or more identified new vessels, where there has been no revaluation of any of the vessels for the purpose of the issue, and it is prominently stated that the valuations quoted are as at the date of the initial purchase or charter of the vessel(s).**

199. **If the company holds more than 50 vessels, only a report in a suitably condensed format needs to be included in the prospectus but the full report must be made available as a document on display.**

QUESTIONS

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| 200. *Q: Do you agree with the additional disclosure requirements in the registration document? If not, please state your reasons* |

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| 201. *Q: Do you think the expert valuation report should:*<br><br>*(i) be required for all vessels;* |

*(ii) be required only for material vessels (and if so, what criteria would you choose to define what is material);*
*(iii) be required only for the vessels to be financed through the securities issue;*
*(iv) not be required at all.*

*Please state reasons for your answer.*

202. *Q: Do you agree with the contents of the expert valuation report? If not, please state your reasons.*

203. *Q: What rules do you think the report should comply with (such as those of the country of the competent authority that approves the prospectus or other different rules)? Please state your reasons.*

204. *Q: Considering the objective of the expert valuation report, do you think it can be older than 90 days? Please state your reasons.*

205. *Q: Do you think that the condensed report should be allowed for if the company holds more than 50 vessels or would you choose another figure? Please state your reasons.*

206. *Q: Do you agree with the proposed recommendations? If not, please state your reasons.*

## 2. CLARIFICATION OF ITEMS

***Introduction***

207. In the first consultation process on minimum information under the Prospectus Directive (CESR/02-185b and CESR/02-286), CESR proposed a detailed disclosure regime following the IOSCO International Disclosure Standards for cross-border offerings and initial listings by foreign issuers. This approach did not received much support by market participants, which advocated a lighter regime.

208. Therefore, in reaction to consultations (feedback statement, CESR/03-209, paragraphs 27 and 28), CESR decided to reduce the level of detail of some items required under the IOSCO regime and to examine at a later stage whether recommendations would be necessary, specially on the items where details had been removed. The recommendations aim at coordinating decisions by competent authorities when applying the Prospectus Regulation and to do so, the IOSCO Disclosure regime (which in fact is regarded as one of the basis of level 2 Regulation – article 7.3 of the Prospectus

Directive), together with the practice of the competent authorities involved in CESR, might help to clarify these requirements without adding new ones.

209. As stated above, on a number of items CESR has drafted the recommendations taking into account the IOSCO standards. Notwithstanding, in these cases CESR has changed the IOSCO wording when it was considered appropriate. Under each of the items the paper specifically states to which schedules they refer. Most of the recommendations apply only to the shares and depositary receipts over shares schedules. However, six of these recommendations also apply to the debt and derivatives registration document. From these, where IOSCO had a corresponding standard this was taken into consideration. In other cases, CESR has developed the recommendations according to the experience of its members.

210. *Q. Where there are common information requirements according to the Prospectus Regulation to equity, debt or derivative securities, do you think that the same recommendations are valid?*

211. *Q: Do you think adaptations are necessary with respect to the different needs as regards debts and derivates registrations documents?*

212. As somehow already required in the call for evidence, these recommendations were prepared to help issuers draft their prospectus and for CESR Members to transparently indicate the way in which they will apply the Prospectus Regulation. Therefore, a certain degree of detail should be addressed by issuers with due consideration of their specific circumstances and the securities involved. If not otherwise stated, these explanations are recommended to all line items where the information is required, to facilitate a consistent approach also throughout the several schedules.

213. Furthermore, during work on level 2 and in the call for evidence on the mandate, several items were identified where additional recommendations might be useful.

214. The main topics dealt with by this section are set out below:

2a – Principal investments
2b – Property, plants and equipment
2c – Compensation
2d – Arrangements for involvement of employees
2e – Nature of control and measures in place to avoid it being abused
2f – Related party transactions
2g – Legal and arbitration proceedings
2h – Acquisition rights and undertakings to increase capital
2i – Options agreements
2j – History of share capital
2k – Rules in respect of administrative, management and supervisory bodies
2l – Description of the rights attaching to shares of the issuer
2m – Material contracts
2n – Statements by experts

2o – Information on holdings
2p – Interest of natural and legal persons involved in the issue/offer
2q – Clarification of the terminology used in the collective investment undertakings of the closed-end type schedule

### *2a PRINCIPAL INVESTMENTS*

*Item 5.2 Annex I –Shares RD- and item 5.2 Annex X -Depository Receipts over shares RD*

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| A description, (including the amount) of the issuer's principal investments for each financial year for the period covered by the historical financial information up to the date of the registration document; |
| A description of the issuer's principal investments that are in progress, including the geographic distribution of these investments (home and abroad) and the method of financing (internal or external); |
| Information concerning the issuer's principal future investments on which its management bodies have already made firm commitments. |

*Item 5.2 Annex IV -Debt and Derivative securities RD*

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|---|
| A description of the principal investments made since the date of the last published financial statements. |
| Information concerning the issuer's principal future investments, on which its management bodies have already made firm commitments. |
| Information regarding the anticipated sources of funds needed to fulfill commitments referred to in item 5.2.2. |

### *Introduction*

215. Item 5.2 of Annex I (RD Shares) and item 5.2 Annex X (Depositary receipts over shares) require inclusion in the prospectus of the issuer's principal past, present and future investments. A less detailed requirement can be found in 5.2. of Annex IV (RD debt and derivatives).

216. Paragraph IV.A.5 of IOSCO Disclosure refers also to some of this information, as well as paragraph 4.7 of Schedule A of Annex 1 of the 34/2001 Directive.

217. None of these documents define the concept of principal investment, therefore leaving room for different interpretations. The depth of the description to be given in each of the schedules is dealt on level 2: more detailed information in what concerns shares and depositary receipts over shares; a less detailed description for debt and derivative securities.

***CESR proposed recommendations***

218. **When preparing information on principal investments, issuers are normally expected to bear in mind the following criteria to determine whether or not an investment is envisaged as a "principal investment":**

**a) the amount it represents in the issuer's assets (if the bylaws or statutes of the issuer require a special authorization for such an investment, the threshold that triggers that requirement can be used as an indicator);**
**b) the expected returns of the investment and what it represents when compared with the profits of the issuer;**
**c) the importance of such an investment to the issuer's business plan (an investment that is essential for the issuer to achieve its objectives will usually be considered "principal investment" independently of the amounts it involves).**

QUESTIONS

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| 219. *Q: Do you think recommendations are needed on this matter? If not, please state your reasons* |

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| 220. *Q: Do you agree with the proposed recommendations? If not, please state your reasons* |

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| 221. *Q: Would you prefer a stricter and more objective approach to determine whether an investment should be regarded as a "principal investment", such as a numeric one? Which level would you choose and why?* |

***2b – PROPERTY, PLANTS AND EQUIPMENT***

*Item 8.1 Annex I –Shares RD- and item 8.1 Annex X -Depository Receipts over shares RD*

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| Information regarding any existing or planned material tangible fixed assets, including leased properties, and any major encumbrances thereon. |

***Introduction***

222. Item IV D of the IOSCO Disclosure also requires information on property, plants and equipments, explaining that issuers are expected to refer to *"a description of the size and uses of the property; productive capacity and extent of utilization of the company's facilities; how the assets are held; the products produced and the location. (…) With regard to any material plans to construct, expand or improve facilities, describe the nature of and reason for the plan, an estimate of the amount of expenditures already*

*paid, a description of the method of financing the activity, the estimated dates of start and completion of the activity, and the increase of production capacity anticipated after completion"* in order to adequately reflect the material information for investors.

***CESR proposed recommendations***

223. **In the description to be included in the line item of property, plants and equipment, issuers are normally expected to refer to:**

**a) a description of the size and uses of the property, productive capacity and extent of utilization of the issuer's facilities;**
**b) indication of how the assets are held (for example, by property or leased), the products produced and the location;**
**c) as regards to any material plans to construct, expand or improve facilities, the nature of and reason for the plan, an estimate of the amount of expenditures already paid, a description of the method of financing the activity, the estimated dates of start and completion of the activity, and the increase of production capacity anticipated after completion.**

QUESTION

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| 224. *Q: Do you agree with the usefulness of the proposed recommendations and the level of detail provided for? If not, please state your reasons* |

***2c – COMPENSATION***

*Item 15.1 of Annex I (Shares RD) and Item 15.1 of Annex X (depositary receipts issued over shares RD)*

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| In relation to the last full financial year for those persons referred to in points (a) to (d) [members of the administrative, management and supervisory bodies, partners with unlimited liability, founders (if the issuer has been established for fewer that five years and any senior manager which is relevant to assess the issuer expertise] of the first subparagraph of item 14.1:<br>The amount of remuneration paid (including any contingent or deferred compensation) and benefits in kind granted to such persons by the issuer and its subsidiaries for services in all capacities to the issuer and its subsidiaries by any person.<br>This information must be provided on an individual basis unless individual disclosure is not required in the issuer's home country and not otherwise publicly disclosed by the issuer. |

***Introduction***

225. Paragraph VI B 1 of IOSCO Disclosure requires information on compensation by clarifying that:

a) In relation to contingent or deferred compensation accrued for the year, disclosure is necessary even if the compensation is payable at a later date;
b) If any portion of the compensation was paid:

- pursuant to a bonus or profit-sharing plan, the company should provide a brief description of the plan and the basis upon which such persons participate in the plan;
- in the form of stock options, the company should provide the title amount of securities covered by the options, the exercise price, the purchase price (if any) and the expiration date of the options.

***CESR proposed recommendations***

226. **Issuers are expected to mention in the line item of compensation:**

227. **Contingent or deferred compensation accrued for the year even if the compensation is payable at a later date.**

228. **If any portion of the compensation was paid:**

**- pursuant to a bonus or profit sharing plan, a brief description of the plan and the basis upon which such person participate in the plan is expected to be provided (plan should be understood broadly to include any type of arrangement for compensation, even if the terms of the plan are not contained in a formal document);**
**- in the form of stock options, the title amount of securities covered by the options, the exercise price, the consideration for which the options was or will be created (if any), the period during which options can be exercised and the date in which they expire is expected to be provided.**

QUESTIONS

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| 229. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.* |

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| 230. *Q: Do you think additional information is required? Which one?* |

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| 231. *Do you think information on compensation could be presented in another way? If yes, please provide examples.* |

***2d – ARRANGEMENTS FOR THE INVOLVEMENT OF EMPLOYEES***

*Item 17.3 Annex I –Shares RD- and item 17.3 Annex X -Depository Receipts over shares RD*

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| Description of any arrangements for involving the employees in the capital of the issuer. |

***Introduction***

232. In explaining the contents of a similar line item, item VI E 2 of the IOSCO Disclosure refers to the inclusion of "any arrangements that involves the issue or grant of options or shares or securities of the company".

***CESR proposed recommendations***

233. **In the line item of the description of the arrangements in place to involve employees in the capital of the issuer, a description of any arrangements that involves the issue or grant of options or shares or securities of the issuer is normally expected to be referred to.**

QUESTION

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| 234. *Q: Do you agree with the usefulness of the proposed recommendations and with their content? If not, please state your reasons.* |

***2e - NATURE OF CONTROL AND MEASURES IN PLACE TO AVOID IT BEING ABUSED***

*Item 18.3 of Annex I (RD for shares), item 12.1 of Annex IV (Debt and Derivative securities RD), item 7.1 of Annex VII (Asset Backed securities RD), item 10.1 of Annex IX (Debt and Derivative securities RD), item 18.3 of Annex X (RD for Depository receipts issued over shares) and item 10.1 of Annex XI (Banks RD).*

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| To the extent known to the issuer, state whether the issuer is directly or indirectly owned or controlled and by whom and describe the nature of such control and describe the measures in place to ensure that such control is not abused. |

***Introduction***

235. From paragraph VII.A.3 of IOSCO Disclosure one could note that disclosure is envisaged independently of the nature of the dominant shareholder (i.e. another company or legal person, individually or jointly with other legal persons, governments, natural persons) and includes an indication of the amount and proportion of capital held giving right to vote. Similar requirements can be found in paragraph 3.2.6 of Schedule A of Annex I of Directive 34/2001. Therefore the following recommendations aim basically at explaining how issuers are expected to fulfill this requirement which does not require issuers to reproduce the law applicable to them.

*CESR proposed recommendations*

236. **In order to describe the nature of control, issuers are normally expected, without reproducing the applicable legislation, to refer to:**

**1 - the legal and *de facto* basis on which control is exerted (shareholders agreements, majority of voting rights, right to appoint members of the company's board, pyramid structures, others);**
**2 – whether such control is exerted directly or indirectly, severally or jointly, and, if so, identify each of the entities through which control is exercised;**
**3 –the amount of shares and the proportion of capital giving right to vote held, if different.**

237. **In order to disclose the mechanisms in place to ensure that control is not abused of, issuers are normally expected, without reproducing the applicable legislation, to refer to:**

**1 - all transactions and relationships between the issuer and such controlling corporation(s), government or other person(s) are, and will be, at arm's length and on a normal commercial basis; and**
**2 - such controlling corporation(s), government or other person(s) will not exercise their control against the interests of the issuer.**

QUESTIONS

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| 238. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.* |

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| 239. *Q: Do you think other information is needed to clarify the nature of control or mechanisms in place to avoid control being abused? Please state your reasons.* |

***2f – RELATED PARTIES TRANSACTIONS***

*Item 19 of Annex I (Shares RD)*

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| Details of related party transactions (which for these purposes are those set out in the Standards adopted according to the Regulation (EC) No 1606/2002), that the issuer has entered into during the period covered by the historical financial information and up to the date of the registration document, must be disclosed in accordance with the respective standard adopted according to Regulation (EC) No 1606/2002 if applicable.<br>If such standards do not apply to the issuer the following information must be disclosed:<br>The nature and extent of any transactions which are - as a single transaction or in their entirety - material to the issuer. Where such related party transactions are not concluded at |

arm's length provide an explanation of why these transactions were not concluded at arms length. In the case of outstanding loans including guarantees of any kind indicate the amount outstanding.
The amount or the percentage to which related party transactions form part of the turnover of the issuer.

***Introduction***

240. Following CESR's technical advice, the Regulation established a dual approach:

- for issuers that are subject to IAS/IFRS, these would be the standard (as suggested during the public consultation - see paragraph 52 of CESR/03-209, feedback statement);
- for issuers that are not subject to IAS requirements, a specific requirement was established. Nevertheless, for these issuers, no definition of related parties is provided.

241. International standards require information on related parties transactions on similar basis as those developed under the IAS/IFRS regime and include explanation of who can be considered related party to an issuer.

***CESR proposed recommendations***

242. **In order to ensure consistency with the disclosures made by companies subject to IAS and with international standards, CESR proposes that issuers that are not subject to IAS/IFRS are expected, nevertheless, to disclose information on transactions entered into by legal or natural persons referred to in the IAS/IFRS applicable standard.**

QUESTIONS

243. *Q: Do you think recommendations are needed on this matter? If not, please state your reasons*

244. *Q: Do you agree with the proposed recommendations? If not, please provide examples of what other definitions of who can be considered related party to an issuer could be followed.*

***2g – LEGAL AND ARBITRATION PROCEEDINGS***

*Item 20.8 of Annex I (RD for shares), item 13.6 of Annex IV (Debt and Derivative securities RD), item 8.3 of Annex VII (Asset Backed securities RD), item 11.5 of Annex IX (Debt and*

*Derivative securities RD), item 20.7 of Annex X (RD for depository receipts issued over shares), item 11.6 of Annex XI (Banks RD), item 6 of Annex XVI (securities issued by Member States, third country issuers and their regional and local authorities RD) and item 5 of Annex XVII (securities issued by Public International Bodies and for debt securities guaranteed by a Member State of the OECD RD).*

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| Information on any governmental, legal or arbitration proceedings (including any such proceedings which are pending or threatened of which the issuer is aware), during a period covering at least the previous 12 months which may have, or have had in the recent past significant effects on the issuer and/or group's financial position or profitability, or provide an appropriate negative statement. |

***Introduction***

245. Paragraph VIII.A.7 of IOSCO Disclosure explains, by providing examples of what can be considered legal or arbitration proceedings, that disclosure is expected to cover proceedings such as bankruptcy, receiverships or similar proceedings and those involving a third party. Paragraph 4.4 of Schedule A of Annex 1 of Directive 34/2001 also requires information on legal or arbitration proceedings.

***CESR proposed recommendations***

246. **When preparing disclosure of legal and arbitration proceedings, issuers are normally expected to bear in mind:**

**a) bankruptcy proceedings;**
**b) receiverships proceedings;**
**c) proceedings in relation with the issuer's business;**
**d) composition with creditors or debt restructuring agreements;**
**e) proceedings in relation with environmental, tax or administrative issues.**

**Any settlement agreement the issuer is aware of is also expected to be disclosed.**

QUESTIONS

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| 247. *Q: Do you agree with the level of detail being provided? If not, please state your reasons* |

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| 248. *Q: Do you agree with the proposed recommendations? If not, please state your reasons* |

***2h – ACQUISITION RIGHTS AND UNDERTAKINGS TO INCREASE CAPITAL***

*Item 21.1.5 of Annex I (RD for shares) and item 21.1.5 of Annex X (RD for depository receipts issued over shares).*

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| Information about and terms of any acquisition rights and or obligations over authorised but unissued capital or an undertaking to increase the capital. |

***Introduction***

249. In relation to the disclosure of authorized but unissued capital or undertakings to increase the capital, paragraph X.A.4 of IOSCO Disclosure, specifies the following circumstances that can be regarded as unissued capital or undertakings to increase the capital in the future: *Where there is authorized but unissued capital or an undertaking to increase the capital, for example, in connection with warrants, convertible obligations or other outstanding equity-linked securities, or subscription rights granted, indicate: (i) the amount of outstanding equity-linked securities and of such authorized capital or capital increase and, where appropriate, the duration of the authorization; (ii) the categories of persons having preferential subscription rights for such additional portions of capital; and (iii) the terms, arrangements and procedures for the share issue corresponding to such portions*.

250. Paragraph 3.2.1. of the schedule A of Annex I of Directive 34/2001 requires basically the same information.

***CESR proposed recommendations***

251. **Where there is authorized but unissued capital or an undertaking to increase the capital, for example, in connection with warrants, convertible bonds or other outstanding equity-linked securities, or subscription rights granted, issuers are normally expected to indicate:**

**a) the amount of outstanding equity-linked securities and of such authorized capital or capital increase and, where appropriate, the duration of the authorization;**
**b) the categories of persons having preferential subscription rights for such additional portions of capital; and**
**c) the terms, arrangements and procedures for the share issue corresponding to such portions.**

QUESTION

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| 252. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.* |

## *2i – OPTION AGREEMENTS*

*Item 21.1.6 of Annex I (RD for shares) and item 21.1.6 of Annex X (RD for depository receipts issued over shares).*

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| Information about any capital of any member of the group which is under option or agreed conditionally or unconditionally to be put under option and details of such options including those persons to whom such options relate. |

### *Introduction*

253. Paragraph X.A.5 of IOSCO Disclosure specifies the details that should be given in order to better explain what this line of information means. The following details are given (i) title and amount of securities covered by the options; (ii) the exercise price; (iii) the purchase price, if any; and (iv) the expiration date of the options or an appropriate negative statement.

254. Where options have been granted or agreed to be granted to all the holders of shares or debt securities, or of any class thereof, or to employees under an employees' share scheme, it will be sufficient so far as the names are concerned, to record that fact without giving names.

### *CESR proposed recommendations*

255. **Where any capital of any member of the group (such as companies included in the consolidated accounts of the issuer) is under option or agreed conditionally or unconditionally to be put under option issuers are normally expected to refer to:**

**a) title and amount of securities covered by the options;**
**b) the exercise price;**
**c) the consideration for which the option was or will be created; and**
**d) the period during which options can be exercised and the date in which they expire.**

256. **Where options have been granted or agreed to be granted to all the holders of shares or debt securities, or of any class thereof, or to employees under an employees' share scheme, it will be sufficient so far as the names are concerned, to record that fact without giving names.**

QUESTION

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| 257. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.* |

## *2j – HISTORY OF SHARE CAPITAL*

*Item 21.1.7 of Annex I (RD for shares) and item 21.1.7 of Annex X (RD for depository receipts issued over shares).*

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| A history of share capital, highlighting information about any changes, for the period covered by the historical financial information. |

### *Introduction*

258. Paragraph X.A.6 of IOSCO Disclosure specifies that, in order to effectively highlight the relevant information about changes in the share capital, the following details should be given: (i) identification of the events during such period which have changed the amount of the issued capital and/or the number and classes of shares of which it composed, together with a description of changes in voting rights attached to the various classes of shares during that time (ii) as well as information on the price and terms of any issue including particulars of consideration where this was other than cash (including information regarding discounts, special terms or installment payments). If there are no such issues, an appropriate negative statement must be made. (iii) The reason for any reduction of the amount of capital and the ratio of capital reductions also shall be given.

### *CESR proposed recommendations*

259. **In the line item referring to history of share capital, issuers are normally expected to include the following information for the period covered by the historical financial information:**

**a) identification of the events during such period which have changed the amount of the issued capital and/or the number and classes of shares of which it composed, together with a description of changes in voting rights attached to the various classes of shares during that time;**
**b) information on the price and terms of any issue including particulars of consideration where this was other than cash (including information regarding discounts, special terms or installment payments).**

260. **The reason for any reduction of the amount of capital and the ratio of capital reductions is also expected to be given.**

### QUESTION

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| 261. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.* |

## *2k – RULES IN RESPECT OF ADMINISTRATIVE, MANAGEMENT AND SUPERVISORY BODIES*

*Item 21.2.2 of Annex I (RD for shares) and item 21.2.2 of Annex X (RD for depository receipts issued over shares).*

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| A summary of any provisions of the issuer's articles of association, statutes, charter or bylaws with respect to the members of the administrative, management and supervisory bodies. |

### *Introduction*

262. Paragraph X.B.2 of IOSCO Disclosure highlights the following circumstances that should be summarized to properly characterize the powers of directors: (i) director's power to vote on a proposal, arrangement or contract in which the director is materially interested; (ii) directors' power, in the absence of an independent quorum, to vote compensation to themselves or any members of their body; (iii) borrowing powers exercisable by the directors and how such borrowing powers can be varied; (iv) retirement or non-retirement of directors under an age limit requirement; and (v) number of shares, if any, required for director's qualification.

### *CESR proposed recommendations*

263. **Bearing in mind that some provisions of the issuer's statutes are important to access the issuer corporate governance system and therefore, should be highlighted in the appropriate line item of the rules in respect of members of the administrative, supervisory and administrative bodies, CESR intends to issue recommendations as follows:**

264. **In relation to the members of the administrative, management and supervisory bodies CESR expect issuers to normally summarize from its articles of association, statutes, charter or bylaws references to:**

**a) the power of such members to vote on a proposal, arrangement or contract in which they are materially interested (for example, where a director represents a significant shareholder or when he/she is part in the contract or arrangement being proposed);**
**b) the power of such members, in the absence of an independent quorum, to vote compensation to themselves or any members of their body;**
**c) the borrowing powers exercisable by such members and how such borrowing powers can be varied;**
**d) the retirement or non-retirement of such members under an age limit requirement; and**
**e) the number of shares, if any, required for such members' qualification.**

QUESTION

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| 265. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.* |

### *2l – DESCRIPTION OF THE RIGHTS ATTACHING TO SHARES OF THE ISSUER*

*Item 21.2.3 of Annex I (RD for shares) and item 21.2.3 of Annex X (RD for depository receipts issued over shares).*

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| A description of the rights, preferences and restrictions attaching to each class of the existing shares. |

#### *Introduction*

266. Paragraph X.B.3 of IOSCO Disclosure specifies that the following details should be given in order to explain the rights, preferences and restrictions attaching to each class of shares: (i) dividend rights, including the time limit after which dividend entitlement lapses and an indication of the party in whose favor this entitlement operates; (ii) voting rights, including whether directors stand for re-election at staggered intervals and the impact of that arrangement where cumulative voting is permitted or required; (iii) rights to share in the issuer's profits; (iv) rights to share in any surplus in the event of liquidation; (v) redemption provisions; (vi) sinking fund provisions; (vii) liability to further capital calls by the issuer; and (viii) any provision discriminating against any existing or prospective holder of such securities as a result of such shareholder owning a substantial number of shares.

#### *CESR proposed recommendations*

267. **In order to adequately explain the rights attached to each class of the issuer's shares, CESR would expect issuers to refer to:**

**a) dividend rights, including the time limit after which dividend entitlement lapses and an indication of the party in whose favor this entitlement operates;**
**b) voting rights, including whether directors stand for re-election at staggered intervals and the impact of that arrangement where cumulative voting is permitted or required;**
**c) rights to share in the issuer's profits;**
**d) rights to share in any surplus in the event of liquidation;**
**e) redemption provisions;**
**f) reserves or sinking fund provisions;**
**g) liability to further capital calls by the issuer; and**

**h) any provision discriminating against or favoring any existing or prospective holder of such securities as a result of such shareholder owning a substantial number of shares.**

QUESTION

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| 268. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.* |

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| 269. *Q: Do you see other ways of presenting the information required by the Regulation?* |

### *2m – MATERIAL CONTRACTS*

*Item 22 of Annex I (RD for Shares), item 15 of Annex IV (Debt and derivative securities RD), item 12 of Annex IX (Debt and Derivative securities RD), item 22 of Annex X (RD for Depository receipts issued over shares), item 12 of Annex XI (Banks RD).*

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| A summary of each material contract, other than contracts entered into in the ordinary course of business, to which the issuer or any member of the group is a party, for the two years immediately preceding publication of the registration document.<br>A summary of any other contract (not being a contract entered into in the ordinary course of business) entered into by any member of the group which contains any provision under which any member of the group has any obligation or entitlement which is material to the group as at the date of the registration document. |

#### *Introduction*

270. This item requires issuers to include in the prospectus a summary of certain contracts: (i) those that are material, outside ordinary course of business, to which the issuer is a part and dated of the two previous years; (ii) other contracts, outside ordinary course of business, entered by any member of the group which contains any provision under which any member of the group has any obligation or entitlement which is material to the group as at the date of the registration document.

271. Paragraph X.C of IOSCO Disclosure clarifies that, in order to better understand the nature and substance of the contract, the following details should be given:

a) dates;
b) parties;
c) general nature of the contracts;
d) terms and conditions; and

e) amount of any consideration passing to or from the issuer or any other member of the group.

***CESR proposed recommendations***

272. **Bearing in mind that any substantiated summary of a contract requires indication of the items presented above, CESR proposes to issue recommendations as follows:**

273. **When summarizing a contract that the issuer is requested to refer in the prospectus, issuers are normally expected to mention:**

**a) the dates on which the contracts were entered;**
**b) the parties to the contracts;**
**c) the object of the contracts;**
**d) key terms and conditions of the contracts; and**
**e) amount of any consideration passing to or from the issuer or any other member of the group.**

QUESTION

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| 274. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.* |

***2n – STATEMENTS BY EXPERTS***

*Item 23.1 of Annex I (RD for shares, item 10.3 of Annex III (Shares SN), item 16.1 of Annex IV (Debt and Derivative securities RD), item 7.3 of Annex V (Debt securities SN), item 9.1 of Annex VII (Asset Backed securities RD), item 13.1 of Annex IX (Debt and Derivative securities RD), item 23.1 of Annex X (RD for depository receipts issued over shares), item 13.1 of Annex XI (Banks RD), item 7.3 of Annex XII (Derivative securities SN), item 7.3 of Annex XIII (Debt securities with a denomination of at least EUR 50.000 SN), item 7 of Annex XVI (securities issued by Member States, third country issuers and their regional and local authorities RD) and item 6 of Annex XVII (securities issued by Public International Bodies and for debt securities guaranteed by a Member State of the OECD RD).*

| |
|---|
| Where a statement or report attributed to a person as an expert is included in the Registration Document / Securities Note, provide such persons' name, business address, qualifications and material interest if any in the issuer. If the report has been produced at the issuer's request a statement to the effect that such statement or report is included, in the form and context in which it is included, with the consent of the person who has authorised the contents of that part of the Registration Document / Securities Note. |

***Introduction***

275. This item requires issuers that, where a statement of an expert is included in the prospectus, to disclose his/her "material interest" (if any) in the issuer.

276. This statement provides information on the independence of the expert towards the issuer, which is relevant for investors to assess the merits of the report and its contents.

***CESR proposed recommendations***

277. **In order to ensure a consistent interpretation of the provisions of level 2, CESR proposes to clarify, as follows, the meaning of "material interest":**

278. **When analyzing whether an expert, who has produced a report included in the prospectus, has a material interest in the issuer, issuers are normally expected to consider the following circumstances, among others:**

**a) whether the expert owns securities issued by the issuer or by any company belonging to the same group or has been granted options to acquire or subscribe for securities of the issuer;**
**b) whether the expert is employee or former employee of the issuer or receives or has received any form of compensation from the issuer;**
**c) whether the expert is member of any of the issuer's bodies;**
**d) whether the expert is related to the financial intermediaries involved in the offering or listing of the securities of the issuer.**

279. **The issuer should also clarify that these (or other circumstances) have been taken into account in order to fully describe the material interest (if any) of the expert.**

QUESTIONS

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| 280. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.* |

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| 281. *Q: Are there other circumstances that would qualify as "material interest" in the issuer? Which ones?* |

***2o – INFORMATION ON HOLDINGS***

*Item 25.1 of Annex I (RD for shares) and item 25.1 of Annex X (RD for depository receipts issued over shares).*

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| Information relating to the undertakings in which the issuer holds a proportion of the capital likely to have a significant effect on the assessment of its own assets and liabilities, financial position or profits and losses. |

***Introduction***

282. Paragraph 5.2 of Schedule A of Annex I of Directive 34/2001 specifies that the information on holdings should encompass several items. In the same line, item X.I of IOSCO Disclosure requires a detailed description of significant aspects of holdings. The following information is required:

a) Name and address of the registered office;
b) Field of activity;
c) Proportion of capital held;
d) Issued capital;
e) Reserves;
f) Profit or loss arising out of ordinary activities, after tax, for the last financial year;
g) Value at which the company shows in its accounts the interest held;
h) Any amount still to be paid up on shares held;
i) Amount of dividends received in the course of the last financial year in respect of shares held; and
j) Amount of the debts owed to and by the issuer with regard to the undertaking.

283. The information is required, in any event, for every undertaking in which the issuer has a direct or indirect participating interest, if the book value of that participating interest represents at least 10% of the capital and reserves or accounts for at least 10% of the net profit of the issuer or, in the case of a group, if the book value of that participating interest represents at least 10% of the consolidated assets or accounts for at least 10% of the consolidated net profit or loss of the group.

284. IOSCO Disclosure also sets out some exceptions to this rule. Nevertheless, in relation to holdings in which the issuer holds at least 10% of the capital, the name, registered office and proportion of capital held must be disclosed unless these details are of negligible importance for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer or its group and of the rights attaching to the securities.

285. When the registration document comprise consolidated annual accounts additional disclosure is required:

a) the consolidation principles applied;
b) the names and registered offices of the undertakings included in the consolidation, where that information is important for the purpose of assessing the assets and liabilities, the financial position and the profits and losses of the issuer;
c) for each if the undertakings referred to in (b):

- the total proportion of third-party interests, if annual accounts are consolidated globally;
- the proportion of the consolidation calculated on the basis of interests, if consolidation has been effected on a pro rata basis.

***CESR proposed recommendations***

286. **In the line item of information on holdings, issuers are normally expected to provide the following information:**

**a) Name and registered office of the undertaking;**
**b) Field of activity;**
**c) Proportion of capital and voting power (if different) held;**
**d) Issued capital;**
**e) Reserves;**
**f) Profit or loss arising out of ordinary activities, after tax, for the last financial year;**
**g) Value at which the issuer obliged to publish the registration documents shows shares held in its accounts;**
**h) Amount still to be paid up on shares held;**
**i) Amount of dividends received in the course of the last financial year in respect of shares held;**
**j) Amount of the debts owed to and by the issuer with regard to the undertaking.**

287. **The information is required, in any event, for every undertaking in which the issuer has a direct or indirect participating interest, if the book value of that participating interest represents at least 10% of the capital and reserves of the issuer or the participating interest generates at least 10% of the net profit or loss of the issuer or, in the case of a group, if the book value of that participating interest represents at least 10% of the consolidated net assets or the participating interest generates at least 10% of the consolidated net profit or loss of the group. The information listed need not be given provided that the issuer proves that its holdings is of a purely provisional nature and line items (e) to (f) may be omitted where the undertaking in which a participating interest is held does not publish its annual accounts.**

288. **The competent authority may permit the omission of the information prescribed in points (d) to (j) if the annual accounts of the undertakings in which the participating interests are held are consolidated into the group annual accounts or if the value attributable to the interest under the equity mode is disclosed in the annual accounts, provided that, in the opinion of the competent authority, the omission of the information is not likely to mislead the public with regard to the facts and circumstances, knowledge of which is essential of the assessment of the security in question.**

289. **Information provided under points (g) and (j) may be omitted if, in the opinion of the competent authorities, such omission does not mislead investors.**

290. **In relation to holdings in which the issuer holds at least 10% of the capital, the name, registered office and proportion of capital held must be disclosed unless these details are of negligible importance for the purpose of making an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer or its group and of the rights attaching to the securities.**

QUESTION

291. *Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons and propose the details that you consider appropriate.*

### *2p - INTERESTS OF NATURAL AND LEGAL PERSONS INVOLVED IN THE ISSUE/OFFER*

*Item 3.3 of Annex III (Shares SN), Item 3.1 of Annex V (Debt securities with a denomination per unit of less than 50.000 € SN), Item 31.2.1 of Annex X (Depository Receipts issued over shares) and Item 3.1 of Annex XII (Derivative securities SN)*

A description of any interest, including conflicting ones that is material to the issue/offer, detailing the persons involved and the nature of the interest.

#### *Introduction*

292. International standards require disclosure of interests of experts and advisors such as information on the amount of securities owned in the company or its subsidiaries, direct or indirect material economic interests or the dependency on the success of the offer. Therefore, without requiring additional information, international standards can be used to provide guidance on what can be considered conflict of interests and the persons potentially involved.

#### *CESR proposed recommendations*

293. **To bring in line the requirements already stated in the Regulation with international ones, which explains the nature of the interests, CESR proposes to issue recommendations as follows:**

294. **When preparing the disclosure on interests issuers are expected to bear in mind:**

- **among those persons involved in the offer, those who may have a material interest in the issuer or linked to the offer, such as advisors, financial**

**intermediaries and experts (even if no statement produced by those persons is included in the prospectus);**

- **in relation to the nature of the interests, issuers may consider whether those persons hold their equity securities or equity securities of their subsidiaries, or have a direct or indirect economic interest that depends on the success of the offer/ issue, or have any understanding or arrangement with major shareholders of the issuer.**

QUESTIONS

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| 295. *Q: Do you agree with the level of detail provided for? If not, please provide reasons for your answer.* |

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| 296. *Q: Do you agree with the proposed recommendations? If not, please state your reasons.* |

### *2q – CLARIFICATION OF TERMINOLOGY USED IN THE COLLECTIVE INVESTMENT UNDERTAKINGS OF THE CLOSED-END TYPE SCHEDULE*

#### *Introduction*

297. CESR is of the view that it is necessary to provide recommendations on certain of the disclosure requirements contained in the closed ended investment funds disclosure schedule, "Minimum disclosure requirements for the registration document for securities issued by collective investment undertakings of the closed-end type". Consultees on the call for evidence also requested these additional recommendations.

298. Specifically, CESR considers it appropriate to provide recommendations on the following closed ended investment fund disclosure requirements:

- What disclosure is expected in relation to 'Investment objective and policy' (1.1);
- What is meant by "broadly based and recognised and published index" in the context of an index tracker collective investment undertaking of the closed-end type (2.10);
- What sort of fees, besides fees paid to service providers, should be considered (3.1 and 3.2);
- What is meant by "regulatory status and experience" in the context of the investment manager (4.1);
- What is meant by "a comprehensive and meaningful analysis of the collective investment undertaking's portfolio" (8.2).

#### *CESR proposed recommendations*

*1.1 of Annex XV*

A detailed description of the investment objective and policy which the collective investment undertaking will pursue and a description of how that investment objectives and policy may be varied including any circumstances in which such variation requires the approval of investors. A description of any techniques and instruments that may be used in the management of the collective investment undertaking.

299. **A description of the investment objectives including financial objectives (for example, capital growth or income) and investment policy is expected to provide a description of the investment strategy of the collective investment undertaking and the methodology to be employed in pursuing that strategy, indicating the types of instruments in which the collective investment undertaking will invest, including where material as regards the investment portfolio:**

- **the geographical areas of investment,**
- **industry sectors,**
- **market capitalisation;**
- **credit ratings/investment grades**
- **whether or not admitted to trading on a regulated market**

*2.10 of Annex XV*

Point (a) of item 2.2 does not apply to a collective investment undertaking whose investment objective is to track, without material modification, that of a broadly based and recognized published index. A description of the composition of the index must be provided.

300. **A broadly based, recognised and published index is expected to:**

- **be adequately diversified and representative of the market it refers to;**
- **be calculated with sufficient frequency to ensure appropriate and timely pricing and information on the constituents of the index;**
- **be published widely to ensure its dissemination to the relevant user/investor base**

*3.1 and 3.2 of Annex XV*

The actual or estimated maximum amount of all material fees payable directly or indirectly by the collective investment undertaking for any services under arrangements entered into on or prior to the date of the registration document and a description of how these fees are calculated.

A description of any fee payable directly or indirectly by the collective investment undertaking which cannot be quantified under item 3.1 and which is or may be material.

301. **When referring to fees, collective investment undertakings are expected to consider, as well as fees paid to service providers, among others, the following:**

- **Subscription fees (both guaranteed to the collective investment undertaking or negotiable);**
- **Redemption fees (both guaranteed to the collective investment undertaking or negotiable);**
- **Variable management fees (e.g. performance fees);**
- **Fees associated with changes in the composition of the portfolio**

*4.1 of Annex XV*

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| In respect of any Investment Manager such information as is required to be disclosed under items 5.1.1 to 5.1.4 and, if material, under item 5.1.5 of Annex I together with a description of its regulatory status and experience. |

302. **A description of the Investment Manager's regulatory status is expected to include the name of the regulatory authority by which the Investment Manager is regulated, or if unregulated, a negative statement.**

303. **A description of the Investment Manager's experience is expected to include an indication of the amount of funds the Investment Manager has under third party discretionary management, the relevance of its experience to the investment objective of the collective investment undertaking, and if material to the assessment of the Investment Manager, the experience of the specific personnel who will be involved in the investment management of the collective investment undertaking.**

*8.2 of Annex XV*

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| A comprehensive and meaningful analysis of the collective investment undertaking's portfolio (if un-audited, clearly marked as such). |

304. **A comprehensive and meaningful analysis under 8.2 should include, where material to the assessment of the investment portfolio:**

- **an analysis by broad industrial or commercial sector and geographic area, as applicable; and/or**
- **an analysis between equity shares, convertible securities, fixed income securities, types or categories of derivative products, currencies and other investments, distinguishing between securities which are admitted or not to trading and traded on or off regulated market in the case of derivatives; and/or**
- **an analysis by currency type**

**stating the market value of each section of the portfolio so analyzed.**

QUESTION

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| 305. *Q: What are your views on the proposed recommendations for closed ended investment funds? Please state reasons for your answer.* |

## 3. RECOMMENDATIONS ON ISSUES NOT RELATED TO THE SCHEDULES

### *3a– RECOMMENDATIONS FOR DOCUMENTS CONTAINING INFORMATION ON THE NUMBER AND NATURE OF THE SECURITIES AND THE REASONS FOR AND DETAILS OF THE OFFER, MENTIONED IN ART. 4 OF THE PROSPECTUS DIRECTIVE*

#### *Introduction*

306. Article 4 of the Prospectus Directive regulates the exemptions of publication of a prospectus. Besides other circumstances, the prospectus is exempted for:

- shares offered, allotted, or to be allotted free of charge to existing shareholders or their admission to trading (article 4.1.d and 4.2.e of the Prospectus Directive);
- dividends paid out in the form of shares of the same class as the shares in respect of which the dividends are paid or their admission to trading (article 4.1.d and 4.2.e of the Prospectus Directive);
- securities offered, allotted or to be allotted to existing or former directors or employees by the employer which has securities already admitted to trading on a regulated market or by an affiliated undertaking or their admission to trading (article 4.1.e and 4.2.f of the Prospectus Directive)

provided, in any of the above circumstances, that a document is made available containing information on the number and nature of the securities, and the reasons for and details of the offer. According to the Directive, these documents do not need to be approved or filed with the competent authority.

307. Insofar the Prospectus Directive does not provide for details on the content of this document, CESR deems it important to give additional recommendations on this matter, in order to assist that harmonization is achieved in a higher level.

#### *CESR proposed recommendations*

308. **In relation to the contents of the document referred to in article 4.1.d and e and 4.2.e and f of the Prospectus Directive, CESR proposes the following recommendations:**

309. **CESR would expect the document referred to in articles 4.1.d and 4.2.e and 4.1.e and 4.2.f to include:**

**a) the identification of the issuer and a indication of where additional information on the issuer can be found (such as previously published prospectuses or documents referred to in article 10 of the Prospectus Directive);**
**b) the number and nature of the securities involved in the offer or admission to trading, including a summarized description of the rights attaching to those securities;**
**c) an explanation of the reasons of the offer or admission to trading;**
**d) details of the offer (for instance, those referred to in the related items of the securities note schedules), including the nature of the offer (offer to issue or to sale securities), conditions upon which the securities will be issued or admitted to trading, price of the securities, if any,**
**e) indication of the specific provision of the Directive under which the exemption applies.**

QUESTIONS

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| 310. *Q: Do you think recommendations are needed on this matter? If not, please state your reasons.* |

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| 311. *Q: Do you agree with the level of detail provided for? If not, please provide reasons for your answer.* |

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| 312. *Q: Do you think that CESR should issue recommendations on the language regime applicable to the document referred to in article 4.1.d and e and 4.2.e and f of the Prospectus Directive and on its modalities of publication (i.e. when and by which means should it be made available)?If not, please state your reasons. If so, which language regime would you deem applicable and which modalities of publication would you choose?* |

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| 313. *Q: Do you agree with the proposed recommendations? If not, please state your reasons.* |

## *3b - IDENTIFICATION OF THE COMPETENT AUTHORITY FOR THE APPROVAL OF BASE PROSPECTUSES COMPILED IN A SINGLE DOCUMENT AND BASE PROSPECTUS COMPRISING DIFFERENT SECURITIES*

### *Introduction*

314. In its September 2003 Technical Advice on Level 2 Implementing Measures for the Prospectus Directive CESR acknowledged that a complex problem might arise as to which will be the competent authority in case of a multi-issuer program with issuers from different home Member States. The same question might arise in cases of multi-products programs offered by a single issuer.

315. As these issues were not covered by the mandates requesting Technical Advice on Level 2 Implementing Measures for the Prospectus Directive CESR decided not to give advice on these subjects at the stage of Level 2 Implementing Measures for the Prospectus Directive but further recommendations could eventually be given at a later stage.

***CESR proposed recommendations***

316. **According to the Prospectus Directive and the Commission Regulation 809/2004 of 29 April the approval of a base prospectus either or not compiled in a single document might fall within the competence of more than one competent authority in the following two cases:**

**1 - A base prospectus is related to different securities and, thus, covers more than one product.**
**2 - Two or more base prospectuses are compiled in one single document.**

**1 - One base prospectus related to different securities**

317. **Article 26.6 of the Commission Regulation implementing the Directive explicitly states that a base prospectus might be related to different securities. The approval of a base prospectus will be given by the home Member State's competent authority (Article 2.1.q) Prospectus Directive). According to the Directive the home Member State, depending on the type of securities issued, is either the Member State where the issuer has its registered office or the Member State chosen by the issuer between the Member State where the issuer has its registered office or where the securities were or are to be admitted to trading on a regulated market or where the securities are offered to the public.**

318. **According to article 2.1.m) of the Directive, the issuer's choice exists for issues of non-equity securities whose denomination per unit amounts to at least EUR 1 000 and, for issues of non-equity securities giving the right to acquire any transferable securities or to receive a cash amount, as a consequence of their being converted or the rights conferred by them being exercised, provided that the issuer of the non-equity securities is not the issuer of the underlying securities or an entity belonging to the group of the latter issuer.**

319. **In relation to a base prospectus relating to different securities, more than one authority might be competent e.g. in the following cases:**

- **When securities binding the issuer to the Member State where it has its registered office and securities giving a choice of the issuer are included in the same base prospectus, and the issuer exercises its choice with the result that at least one Member State different from the Member State where the issuer has its registered office will be chosen to be the home Member State.**

- **When a base prospectus only contains securities providing for the issuer's choice and the issuer exercises its choice in a way that at least two different home Member States will exist.**

320. **A multiple products base prospectus cannot be divided for the purpose of its approval since the approval has to encompass the base prospectus as a whole. If several securities which in case of being filed separately might have different home Member States are included in the same base prospectus more than one authority might be competent. CESR recommends interpreting such inclusion as follows: The issuer might only choose a Member State which is common to all securities offered under the same base prospectus as its home Member State. Therefore, if the base prospectus only includes securities providing for an issuer's choice and it is possible to choose among several home Member States which are common to all securities in the same base prospectus, there still might be an issuer's choice. In other cases the Member State where the issuer has its registered office will be the home Member State, also following the logic of having as Competent Authority one which is common to all securities offered under the same base prospectus.**

321. **The same principle applies to third country issuers which already chose their home Member State pursuant to Article 2.1. m) (iii) Prospectus Directive.**

**2 - More than one base prospectus compiled in the same document**

322. **The possibility to compile in one single document two or more different base prospectuses is explicitly stated by Article 26.8 of the Commission Regulation, although the number of issuers contained in a single base prospectus is restricted to one.**

323. **Recital 27 of the Commission Regulation states that where a single document includes more than one base prospectus and each base prospectus would require approval by a different home competent authority, the respective competent authorities should act in cooperation and, where appropriate, transfer the approval of the prospectus in accordance with Article 13.5 of Directive 2003/71/EC, so that all the base prospectuses compiled in the single document are approved by the same competent authority.**

324. **However, this does not mean that base prospectuses that are compiled into a single document are exempt from the general rule according to which each base prospectus requires an approval of its competent authority. Hence, the application of the Directive and the Regulation require that in the case of a multi-issuer**

**program an approval for each base prospectus compiled into a single document needs to be obtained before the whole single document can be published.**

325. **Therefore, recital 27 only points out an additional procedure that may be used in the case of a single document compiling more that one base prospectus. Issuers of multi-issuer programs may suggest this additional procedure to the involved competent authorities but a base prospectus approval's transfer shall only occur if the transfer will be appropriate and the competent authority to which the approval would be transferred will accept the transfer.**

326. **The appropriateness of a base prospectus approval's transfer cannot be generally evaluated in advance since the specific context of the base prospectuses at stake need to be taken into account although the competent authorities may decide on a common understanding about the transfer of a base prospectus's approval.**

327. **Finally, CESR recommends that all base prospectuses included in the single document shall be submitted to their competent authority for approval at the same time.**

328. *Q: Do you agree with the proposed recommendations for the base prospectus relating to different securities? If not, please state your reasons.*

329. *Q: Do you agree with the proposed recommendations for the single document compiling more than one base prospectus? If not, please state your reasons.*

### *3c – CONTENT OF A DISCLAIMER WHEN PROSPECTUS IS PUBLISHED IN AN ELECTRONIC FORMAT*

#### *Introduction*

330. The publication of prospectuses and base prospectuses on web-sites of issuers and/or competent authorities/regulated markets under Article 29 raises several issues, key of which is the contravention of the securities laws of other jurisdictions where an offer of securities is not intended to be made.

331. It is the responsibility of issuers and their advisers to ensure that by publishing a prospectus on a web-site, they do not infringe upon the securities laws of member states or third countries where an offer is not intended to be made. Appropriate disclaimers should be included in all such prospectuses and base prospectuses.

#### *CESR proposed recommendations*

332. **Issuers whose prospectuses and/or base prospectuses are published on a web-site in accordance with Article 14 of the Directive and Article 29 of the Regulations are expected to include a disclaimer which makes clear that:**

**(a) the offering of securities is only being directed at legal or natural persons of specified jurisdictions in accordance with the laws of those jurisdictions;**
**(b) the securities being offered are not being offered and will not be transferred or sold, directly or indirectly, to any legal or natural person in any other jurisdiction.**

QUESTION

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| 333. *Q: Do you agree with the proposed recommendations? If not, please state your reasons.* |

# ANNEXES TO THE CONSULTATION PAPER

## ANNEX A

**Call for Evidence – summary of main points made**

CESR published a Call for Evidence on 4 March 2004 (Ref: CESR/04-057) inviting all interested parties to submit views on which areas in the prospectus schedules might benefit from CESR's recommendations. CESR received 13 submissions and these can be viewed on the CESR's website.

The following is a summary of the principal recurrent issues which emerged in the responses to the Call for Evidence and CESR's reaction to them. A full list of those who responded can be found at the end of this paper.

Most of the issues proposed by the respondents have been taken into account when drafting the proposals set out in this consultation paper. Some of the most recurrent issues raised that have been included in the consultation paper are **selected financial information, profit forecast and estimates, related party transactions and material contracts.**

Nevertheless, CESR has decided not to propose recommendations at this stage on some of the issues that were suggested. The reasons behind the approach adopted by CESR are explained below.

Firstly, some of the demands were beyond the scope of this paper and CESR's powers under its level three role. This work is restricted to ensure co-ordination of decisions by CESR's members when applying the level one and level two measures. Therefore the recommendations cannot impose additional or different rules from those included in the Prospectus Directive or the Regulation that implements it. For example, some respondents asked for a particular treatment to be reserved for **dual listing** of issuers from the USA, in case of securities already admitted to trading on another EU regulated market. CESR considered that it could not produce any recommendations on this subject as it is already covered by level 1.

In some other cases the recommendations suggested by some respondents could go beyond the content of level 2 provisions. For example, CESR considered the possibility of issuing recommendations on **principal markets**, as anticipated in the call for evidence and also as requested by some market participants. After analysing the responses, CESR's view is that the disclosures requested by some market participants (such as seasonality of the issuers activity, description of the sources and availability of raw materials, marketing channels, principal competitors, type of clients and price strategy) could not, in fact, be considered as recommendations on the level 2 provision dealing with principal markets. Therefore CESR considered that the item of the Regulation "Principal markets" was sufficiently clear and that, unless the experience proved otherwise, no recommendations were needed at this stage.

Some other topics raised in the call for evidence, such as **Administrative, management and supervisory bodies conflicts of interests**, have not been included in the proposals because CESR thinks it would be more appropriate to draw conclusions from the practical experience of the application of the requirement before issuing any recommendations. Similarly, in the case of **Risk factors**, a categorization of risks factors was suggested to CESR as a matter that

could deserve further reflection. CESR has given some thoughts on this and came to the conclusion that this would be very difficult to achieve at this stage, due to different nature of the issuers and securities, that such a categorization could even be misleading and may not catch all the relevant risks that could be highlighted for a specific offer/listing.

Some other issues suggested by the market participants, such as clarification of the **terminology used in the Asset Backed Securities schedules**, are not covered in this consultation paper because CESR thinks it would be necessary to gather more input from the market and/or experience on the application of the schedules and building blocks before deciding whether recommendations are necessary.

Finally, the Fédération des Experts Comptables Européens (FEE) commented on the fact that they are aware that existing market practice in addressing what might be described as **complex financial histories** is quite diverse and interacts with the requirements in some member states concerning pro forma financial information. The FEE provided some examples of such complex financial histories, such as when a new holding company is established immediately prior to the public offer or admission to trading going effective; more than one business or entity not previously under common control are brought together for the purposes of the public offer or admission to trading; the business of the issuer whilst having operated for three years has been the subject of a change in ownership or financial structure, amongst other cases**.**

CESR considered whether recommendations should be provided in these and the other situations of complex financial histories during the period for which historical financial information is required to be provided in a prospectus, as set out by the FEE in its response to the call for evidence. The CESR members however could not reach a consensus at this juncture on the nature of the recommendations to be provided.

## Respondents to the Call for Evidence

Regulated markets, exchanges & trading systems

Borsa Italiana
TLX s.p.a.
Societé de la Bourse de Luxembourg
Euronext

Legal & Accountancy

Fédération des Experts Comptables (FEE)
Pricewaterhouse Coopers
Finnish Institute of Authorised Public Accountants

Banking

IPMA
Zentraler Kreditausschuss

Government, regulatory & enforcement

The Polish Securities and Exchange Commission

Issuers

MEDEF

Insurance, pension & asset management

Assogestioni

Individuals

Wolfgang Gerhardt

## ANNEX B

## Members of the Consultative Working Group

**Ms Carmen Barrenechea Fernández,** Intermoney Titulización, SGFT and member of the European Securitisation Forum Executive Committee

**Mr François Bavoillot,** ACELOR

**Ms Deborah ter Beek,** ABN AMRO Rothschild

**Ms Catherine Denis-Dendauw,** the High Council of the Economic professions and the Commission for Accounting Standards and of the sub-Commission IAS/IFRS.

**Mr Kevin Desmond,** Price Waterhouse Coopers

**Mr Axel Forster,** Luxembourg Stock Exchange

**Mr Wolfgang Gerhardt,** Sal. Oppenheim jr. & Cie. KgaA, Frankfurt am Main

**Mr Alain Gouverneyre,** Ernst & Young France

**Mr Svante Johansson,** Stockholm University and Linklaters, Stockholm office

**Mr Spyros Lorentziadis,** Ernst & Young Southeast Europe

**Ms Eva Maria Sattlegger,** Raiffeisenzentralbank

**Mr Nunzio Visciano,** Italian Stock Exchange