THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/05-055b

CESR's consultation for the consistent implementation of the European Commission's Regulation on Prospectuses n° 809/2004

FEEDBACK STATEMENT

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BACKGROUND

1. 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 no later than 1 July 2005.

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

3. 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.

4. 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.

5. 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.

6. 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.

7. On June 2004 CESR published a consultation paper on its proposed recommendations for the consistent implementation of the Commission's Regulation on prospectuses inviting interested parties to submit comments until 18 October. CESR received around 48 submissions and these can be viewed on the CESR's website.

8. To facilitate the consultation process, CESR held an open hearing on 7 September 2004 at the CESR premises.

9. The document published by CESR to which this feedback statement refers is the Consultation Paper released in June 2004 (Ref: CESR/04-225b).

10. The final proposals by CESR after said consultation are set out in the Recommendations for the consistent implementation of the European Commission's Regulation on Propectuses nº 809/2004 (Ref: CESR/05-054) published in January 2005.

I. FINANCIAL INFORMATION ITEMS

COMPLEX FINANCIAL HISTORIES

1. CESR stated in its consultation paper published in June 2004 that CESR members could not reach a consensus on the nature of the recommendations to be provided in respect of issuers with 'complex financial histories'. Therefore no recommendations were included on this issue in the consultation paper.

2. Notwithstanding this, there were strong concerns raised mainly, but not only, by representatives of the accountancy profession. They felt that the lack of CESR's recommendations on complex financial histories would result in a risk that the prospectus

would not provide appropriate historical financial information for all the required period (3 years for equity securities; 2 years for debt securities). In their view, this would be the case, especially when the issuer is either a newly incorporated holding company inserted over an established business or a new issuer acquiring a part of a pre-existing business (e.g.: carve out).

3. In particular, these respondents strongly encouraged CESR to provide recommendations on the issue of complex financial histories. They believe it is essential: (i) for consistent implementation of the Prospectus Directive; and (ii) because otherwise, the CESR's recommendations on historical financial information would be deficient. They consider that a strict interpretation of the requirement of item 20.1 of Annex I may lead to omission of material information concerning the economic results, the financial position and assets of the issuer's group at the time of admission/offering. The historical statutory financial statements would not reflect the perimeter of activity to which the prospectus relates for the whole of the period under review and such omission could be misleading within the context of a prospectus.

4. The lack of CESR's recommendations in this area was primarily based on fact that CESR members could not reach a consensus in this area and that, in addition, the European Commission and some CESR members are of the opinion that paragraph 20.1 of Annex I only gives the possibility to require financial information on the issuer as defined in the Prospectus Directive. The European Commission also noted that Member States do not have the ability to add new requirements going beyond the items included in the schedules and building blocks provided in the Regulation, which, in their view, would be the case in the situation of complex financial histories. Setting additional requirements for issuers with complex financial histories would require changes to the schedules attached to Regulation 809/2004/EC implementing Prospectus Directive.

5. After careful consideration of both the European Commission's opinion and the concerns expressed by respondents, CESR has decided to analyse further what the current practice is in the different EU Member States and has prepared a brief questionnaire that will be circulated among its members. Following the fact finding exercise, CESR will analyse the results and assess which recommendation can be made to the European Commission as an amendment to the Level 2 Regulation.

6. CESR believes that this is necessary in order to avoid the possibility of deficient historical financial information in prospectuses which would be contrary to the investor protection objectives of the Prospectus Directive.

SELECTED FINANCIAL INFORMATION

7. Most of the respondents commenting on this section asked for a clarification whether selected financial information should be extracted only from the historical or interim financial information or as to whether any financial data otherwise disclosed in the prospectus can be included in selected financial data. In addition some of them thought that paragraph 24 of the consultation paper might be inconsistent with paragraphs 25, 27 and 100 to 102 of the consultation paper. In order to take into account these comments CESR decided to clarify its recommendation. As minimum selected financial information issuers are expected to provide financial data directly extracted from the historical or interim financial information. On a voluntary basis issuers are free to highlight other additional financial figures. These additional financial figures might be calculated from, or elaborated based on, the figures directly extracted from the historical and interim financial information. They might also be extracted from other parts of the prospectus. However, the

actual historical and interim financial information should be given greater prominence than those additional figures.

8. Moreover, some respondents argued that the examples should be deleted because they give no added value. However, it can be considered that examples are helpful for issuers in order to understand what sort of information might be provided as selected financial information. CESR, therefore, decided to maintain examples but to clarify that they are not binding to issuers.

9. Furthermore, some respondents thought the meaning of "ordinary equity holders" and "total equity" should be clarified. Those expressions are taken out directly from IAS/IFRS with definitions stated on that framework. CESR decided to redraft the point j) in order to not misunderstand the context of this examples, and made a reference to minority interests (which complements the information provided on point i)).

10. Some respondents thought that the general principles for non-GAAP figures (figures calculated from, or elaborated based on, the figures directly extracted from the historical and interim financial information) needs to be deleted because it could lead to a misunderstanding that such general description is only applicable for the respective paragraph, but not for the overall rules on prospectus disclosure requirements. The overall rule on prospectus disclosure requirements set out in Art. 5 (1) of the Directive 2003/71/EC applies to all information disclosed in the prospectus, including non-GAAP figures. In addition to this requirement the general description provided by the recommendations is only applicable to non-GAAP figures included in a prospectus as selected financial data. CESR, therefore, decided to maintain the description.

11. Some responses argued that the description regarding comparability is impossible to comply with. Taking into account this comment CESR decided to replace "comparable" by "reconcilable".

12. Finally a few respondents pointed out that the type of security being offered or issued is a specific circumstance that needs to be taken into account when choosing selected financial data for a prospectus. CESR amended its recommendation in order to take into account the preceding comment.

OPERATING AND FINANCIAL REVIEW ('OFR')

13. Several respondents stated that the OFR should not include a prospective review. They stated that the level 2 regulation limits the OFR to periods for which historical financial information is required. On the basis of these responses CESR has modified its recommendations. CESR does not recommend including a prospective view in the OFR. In addition, CESR has adjusted the wording with regard to "comparability". The comparability refers to periods for which historical financial information has to be provided only.

14. Some respondents suggested that issuers should be able to choose the indicators. Bearing in mind this suggestion, CESR has modified the recommendation. The recommended indicators are now described in a generic way. This enables issuers to adapt them to their situation without missing the substance of the indicators.

15. Other respondents suggested deleting the section on OFR all together. According to them, Directive 2003/51/EC already contains the requirements for an OFR. CESR acknowledges that whenever the information (e.g. management reports) provided in accordance with this Directive fulfils the requirements of the Prospectus Regulation, this information could be used to satisfy the requirements. However, CESR's preference is to retain the section on OFR

on the basis that it helps issuers and their advisers to present the OFR in a way which is in line with the requirements of the level 2 regulation.

16. Two respondents pointed out that the audience of the OFR depends on the type of transaction for which it is prepared. Therefore it was not always directed to retail investors. CESR prefers to keep the recommendation on audience without modification. An OFR is required in case of the issue of shares only and in general, a public offer or admission to trading of such securities are also aimed at retail investors.

CAPITAL RESOURCES

17. Many respondents commented that there was a duplication of some of the recommendations when compared with IFRS. Accordingly, CESR has amended the text and stated that as far as this information is substantially provided elsewhere in the financial statements of the issuer, there is no need to repeat the information in the prospectus. However, CESR considers, that issuers should provide the information in the recommendations regardless of whether the company is producing its accounts to IFRS or not.

18. Many respondents were critical of the requirement of prospective information ("short and long term funding plans"). CESR has clarified the text so that no prospective information is required except on the funding of the future commitments, which is a requirement in the Level 2 Regulation. CESR has used an expression of "existing long term capital resources" and "existing liquidity" in its proposed recommendation. CESR considers the expression "existing" to refer to the information in the latest financial statements or the subsequent interim financial information if there has been no material changes thereafter.

19. Some respondents also considered the expression "period under review" was too vague. CESR has clarified that this means the latest financial period and any subsequent period thereafter and amended the text accordingly.

20. Some respondents considered the proposed recommendations to be too detailed especially in relation to the requirement to publish confidential information. A breach of covenants or negotiations relating to them was considered to be detrimental to the issuer. CESR recognises that an issuer may be able to rely on article 8 of the Regulation. This article allows the competent authority to authorise the omission from the prospectus of certain information, if it considers that disclosure of such information would be seriously detrimental to the issuer.

21. A number of respondents also stated that information on negotiations expected to take place was considered to be too a vague definition. CESR has amended the text by deleting the "expected" negotiations and clearly limiting the scope to relevant negotiations taking place and relating to covenants which can have material effect.

PROFIT FORECATS OR ESTIMATES

22. Most respondents were in favour of the proposed guidance. Some of them also welcomed the general principles set out in paragraphs 43 and 44 of the consultation paper.

23. Many respondents urged CESR not to give examples of profit forecasts or estimates. Nonetheless, some respondents noted that there was a need for guidelines to provide legal certainty and consistent treatment among all the Member States. Some of them suggested to

apply here the same approached followed in the recommendations related to working capital statements.

24. Accordingly, CESR has decided to publish guidelines on this subject.

25. Most of the respondents suggested that paragraph 46 of the consultation paper should be amended on the basis that profit forecasts should be voluntary. Taking into account these comments, the paragraph has been amended. Although CESR acknowledges that in principle this is correct, it also believes that Article 5 of the Prospectus Directive should be considered in determining whether an issuer should include a profit forecast in its prospectus. Accordingly, CESR considers that if the issuer releases profit forecasts or estimates outside a prospectus, the information would normally be considered to be material in respect of shares issues (according to some of the respondents' suggestions). The paragraph has been redrafted to reflect this.

26. Some respondents suggested that CESR should specify that the wording "correct" in the proposed recommendations should be defined as the opposite of "no longer valid". CESR agrees with this suggestion and has added this clarification.

27. Some respondents asked for clarification as to how to distinguish between estimates and forecasts. CESR considers that Article 2 (10) and (11) of the Regulation already gives appropriate definitions.

HISTORICAL FINANCIAL INFORMATION

28. Most comments on the section "Historical Financial Information" of CESR's proposed recommendation were related to the implementation of the requirements of the Prospectus Regulation in relation to audit of historical information in particular cases.

29. Taking account of comments received, CESR's recommendation has been improved on a number of points.

1. Absence of comparative information

30. A first series of comments was related to situations where, in accordance with Prospectus Regulation it is not required to include comparative information whereas such comparative information would be required by applicable accounting standards. This is the case in two situations.

- Under item 13.1 of Annex IV of Regulation relating to debt and derivative securities registration document, the issuer is only required to present its *most recent year's* historical financial information in a form consistent with that which will be adopted in the issuer's next published annual financial statements (e.g. IFRSs). This means that only one financial year has to be restated under IFRSs, without comparatives.

- The corresponding requirement for share issuers is two years' restated financial information, pursuant to item 20.1 of Annex I of Regulation. However, the same problem may affect equity issuers until the 31 December 2005 if they want to make use of transitional provision of article 35.2 of the Prospectus Regulation which states that "*the obligation to restate in a prospectus historical financial information does not apply to any period earlier than 1 January 2004 or, where an issuer has securities admitted to trading on a regulated market on 1 July 2005,*

until the issuer has published its first consolidated annual accounts with accordance with Regulation (EC) No 1606/2002".

31. The respondents pointed out that historical financial information presented on the basis of IFRSs without comparatives would not show a true and fair view pursuant to IAS/IFRS as IFRS 1 *First-time Adoption of International Financial Reporting Standards* requires at least one year of comparative information under IFRSs (IFRS 1, par 36). Now, as indicated above, the Prospectus Regulation requires historical financial information to be audited or reported on as to whether or not, for the purpose of the prospectus, it "gives a true and fair view".

32. CESR believes that this problem cannot be addressed by requiring inclusion of comparative information as this would clearly go beyond the provisions of Prospectus Regulation.

33. CESR is of the opinion that, in these cases where the issuer, in accordance with Prospectus Regulation, does not provide comparative information under IFRSs, the one year IFRS financial statement included in the prospectus cannot be considered as first time adoption accounts. Whilst CESR would expect such information to be presented, as far as possible on a basis consistent with the comparative information in the first time adoption accounts, CESR believes there must be some flexibility in the application of IFRS1 to such financial information produced for the purposes of the prospectus. CESR notes that this financial information does not constitute general purpose financial statements under the IFRS framework and that special purpose financial reports are outside its scope.

34. The lack of comparative information, in connection with reporting for the purposes of the prospectus where comparative information is not required, should not in itself, result in a lack of a true and fair view.

35. As regards the audit of restated historical information which does not include comparative information, auditors will be expected to duly follow the relevant applicable auditing standards and to report accordingly. In this regard, CESR understands that the historical financial information in question is not the primary financial statements of the entity and, consequently, should be considered additional financial information drawn up for the sole purpose of the prospectus. The auditor should report on this information through a special purpose audit report, including an opinion on the "true and fair view" as required by the Prospectus Regulation.

36. These elements have been clarified in the recommendation.

2. Distinction between "audited" and "reported on"

37. Paragraph 5 of item 20.1 of Annex I states that: "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."

38. One question is to know what the difference is between "audited" and "reported on". In its draft recommendation, CESR indicated that "audited" referred to the statutory audit of financial statements as regulated by existing EU Directives on audit, whereas "reported on" was rather related to situations where the historical financial information included in prospectus is "restated" in accordance with item 20.1 of Annex I. In the later case, the expectation would be that an equivalent level of assurance should be given to investors in

case of restated financial information (in accordance with national audit provisions) as with audit of statutory financial statements.

39. After due consideration of comments received, CESR believes that additional research is needed before finalising its views on this point. CESR will subsequently communicate on this.

3. Audit of additional statements

40. Application of the paragraph 5 of item 20.1 of annex I of the Prospectus Regulation (historical financial information) also raised some concerns. Pursuant to this provision, historical financial information must be audited as to whether or not, for the purpose of the prospectus, it "gives a true and fair view".

41. Some respondents asked how to apply this requirement when the statutory financial statements prepared on the basis of national GAAP do not include all statements whose disclosure in prospectus is required under paragraph 4 of item 20.1 (e.g. cash flow statements whose presentation is not required by all national GAAP). These respondents argued that it might not be possible for a single statement, as a cash flow statement, to show a true and fair view in isolation from the financial statements of which it forms part.

42. CESR observes that a more fundamental question is to know whether such additional statements do actually have to be audited or reported on. On request of CESR, the European Commission agreed to clarify this point of interpretation of the Prospectus Regulation. CESR will subsequently re-assess and communicate on this issue, depending on the response of the Commission and has provisionally kept aside the indications contained in this regard in the consultation paper.

PRO-FORMA FINANCIAL INFORMATION

43. In the consultation paper, CESR requested examples of indicators of size for determining what transactions should constitute 'a significant gross change' for a company. There were a large number of respondents who provided some indicators of size. The most common indicators provided were turnover, total assets, and net profit. There were a couple of respondents who provided detailed indicators. On the other hand there were a few respondents who believed that indicators of size should be key figures derived from the issuer's balance sheet and profit & loss statement. Other respondents believed that the indicators of size should depend on the company's specific industry and that there should be flexibility to adjust indicators of size and/or substitute with other relevant indicators, especially where the calculations produce anomalous results or are inappropriate to sphere of activity of the issuer.

44. On the question concerning the appropriate definitions of indicators of size, the respondents were split into 3 groups. The first preferred IAS/IFRS figures, the second, relevant reporting standards (local GAAP) and the third group, figures as published or last audited accounts. There were also some arguments that the results of the indicators of size could have anomalous results when using different GAAP.

45. CESR has considered these comments and has decided to provide 3 indicators of size in its recommendations which are not exhaustive: Total Assets, Revenue and the profit *or* loss. Other indicators of size can be applied, especially where the stated indicators of size

produce an anomalous result or are inappropriate to the specific industry of the issuer, in these cases the issuers should address these anomalies by agreement of the competent authority in order to achieve the overall objective of providing useful information to investors.

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

46. Most of the respondents were in favour of the proposed guidance.

47. Some respondents noted that there is an overlap between the draft recommendation on selected financial information and the recommendations included under this section of the consultation paper and suggested that those paragraphs should be made consistent. A few respondents suggested that the text should be amended and that historical financial information should be given "at least equal prominence" or "no less prominence" to any forecasts, estimated or pro forma figures. They stated that on some occasions information not extracted from the issuer's audited financial statements may be of more relevance and as it is not clear how "greater prominence" might be achieved for audited information. CESR has decided to retain the text on the basis that it believes that historical financial information should be given "greater prominence" than any financial data not extracted from the issuers audited financial statements since the former is compiled with the assistance of independent auditors.

48. One respondent believed that the recommendation regarding a statement that investors should read the whole prospectus and not just rely on key or summarised information belongs to the section dealing with "selected financial information". CESR agrees with that suggestion.

INTERIM FINANCIAL INFORMATION

49. Most of the respondents pointed out that a general reference to the Transparency Directive would be sufficient. Only a reference to Art. 5 of the Transparency Directive excludes the existence of the grandfathering provision (Art. 26 Transparency Directive). Having taken into account this comment CESR decided to amend its recommendation in order to enable issuers to benefit from the transitional provisions of the Transparency Directive. CESR, therefore, introduced a general reference to the Transparency Directive for issuers already admitted to trading on a regulated market. CESR also clarified that issuers seeking admission on a regulated market and publishing consolidated accounts will be able to benefit from transitional provisions of the Transparency Directive, if this applies to them once admitted to trading on a regulated market.

50. Some respondents argued that new issuers should present their interim financial information in accordance with the implementation of the Transparency Directive in their Member State or IAS 34 and that paragraph 109 in the consultation paper should apply to issuers not trading on a regulated market. CESR concluded from these comments that there has been a misunderstanding on how CESR intended to use the term "new issuer" in its recommendation. CESR, therefore, decided replace the term "new issuer" by "issuer not admitted to trading on a regulated market".

51. In addition, a few respondents made suggestions reading a different content of interim financial information or demanded some more flexibility whether to include interim

information or asked for a clarification on whether a copy of the auditors report or comfort letter should be provided etc.

52. With regard to these respondents CESR would like to point out that, according to the Commission's Regulation No 809/2004, the registration documents for shares, for debt and derivative securities with a denomination per unit of less than EUR 50 000 and for depositary receipts issued over shares must contain interim financial information, if the registration document is dated more than nine months after the end of the last audited financial year. In these cases the Commission's Regulation does not leave flexibility whether to require interim financial information in a prospectus or not. CESR believes that the recommended content of interim financial information adequately addresses the different circumstances of issuers and sufficiently updates investors on the financial position and performance of the issuer. With regard to interim financial information already published by issuers CESR believes that the requirement of the Commission's Regulation is sufficient clear and, thus, no further recommendations will be provided.

WORKING CAPITAL STATEMENT

53. The comments on the working capital draft recommendations were generally supportive. The main areas that respondents tended to focus on are discussed below.

"Clean" working capital statements

54. Some respondents disagreed with CESR's presumption that if the issuer is unable to make the statement required by the Regulation, then it must be the issuers opinion that it does not have sufficient working capital, as they believed this was too restrictive. Respondents wanted the possibility to include details of risk factors, caveats and to disclose other detailed assumptions underlying the statement. CESR considered this, and remains of the opinion that the wording of the regulation is clear – the requirement is to either provide the required statement or explain how additional working capital will be provided. A working capital statement will always be subject to assumptions and it is for the issuer to make an assessment of the various factors and reach an opinion as to whether it believes it has sufficient working capital for its present requirements. The disclosure of caveats, risk factors and assumption would detract from the value of the statement as investors would themselves be put in the position of having to reach there own conclusions based on what the issuer has decided to disclose.

Present requirements

55. Some commentators questioned CESR's recommendation that present requirements should be considered as being a minimum of 12 months from the date of the prospectus but did not provide any acceptable alternatives. CESR considered this issue and for the reasons set out in the recommendation and in light of other respondents support and the lack of any acceptable alternative proposal, CESR continues to believe that 12 months represents a reasonable time period over which working capital adequacy should be considered.

Reliability

56. A number of respondents commented that the reliability was too high a standard of expectation to attach to a working capital statement.

57. The working capital statement is forward looking in nature and this therefore requires issuers to make judgements about risks and uncertainties as the actual working capital

position will be dependant upon events and circumstances that will occur in the future. CESR recognises that there are factors that could cause the actual results and developments to differ materially from those underlying the working capital assumptions. As outlined in the recommendations, in making the working capital statement issuers are expected to have undertaken appropriate procedures to support the statement that is being made. The working capital statement given should be based on a faithful representation of the issuers views as at the date of the document taking into account all reasonable alternative scenarios.

CAPITALISATION AND INDEBTEDNESS

58. A number of respondents had concerns on whether there should be any recommendations on the capitalisation and indebtedness requirement. They stated that such a prescriptive recommendation is inconsistent with the general approach to prospectus disclosure. Furthermore, respondents expressed the view that issuers should be provided with flexibility in respect of the inclusion of a capitalisation and indebtedness table. In addition, some respondents also stated that financial institutions such as banks and insurance companies might have some difficulty in meeting these requirements.

59. CESR believes that the presentation form allows the investors a better understanding and is useful in promoting the harmonisation of the information requested in the prospectus.

60. Some respondents stated that the recommendations should address the question of the measurement of capitalisation and indebtedness by reference to GAAP being applied by an issuer in its financial statements. Others wanted CESR to include the recommendation that the information to be disclosed should be on the basis of the issuer's accounting policies. CESR has not provided any recommendations in this area but would agree with respondents that the figures in the capitalisation and indebtedness table should be based on the accounting standard and accounting policy being used by the issuer in its financial statements.

61. Many respondents stated that the 90 day requirement was too restrictive and would lead to a substantial operational risk as issuers may have to prepare a report simply for the purpose of a prospectus. CESR's view on this issue is that the 90 day requirement has been set in the Regulation and cannot be altered by CESR. Nevertheless, CESR has clarified that the information provided in the capitalisation statement should be derived from the last published financial information of the issuer. If any of the information is more than 90 days and there has been a material change since the last published financial information, the issuer should update the information. This is in line with the best international practices.

62. In addition some respondents wanted clarity as to whether the profit and loss account reserve is intended to be included in the shareholder's equity and concerns were expressed that this would imply a considerable amount of work in order to disclose the information. Furthermore, disclosure of this information could cause investors to construe this figure as a profit forecast. CESR has therefore clarified in its recommendations that a profit and loss reserve can be omitted from shareholder's capital. However, if this is done, issuers should make it clear on the table that it is omitted so as not to make the table misleading to investors.

63. Some respondents required CESR to clarify what the date of the document meant. 'Date of the document' means the date of approval of the document.

II. NON FINANCIAL INFORMATION ITEMS

SPECIALIST ISSUERS

64. CESR asked consultees whether recommendations were needed in relation to specialist issuers. One must recall that CESR consulted previously on specialist issuers but decided not to include additional building blocks for specialist issuers. Instead it was decided 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 of the Prospectus Regulation. 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.

65. Consultees came out with split views on CESR's proposal on specialist issuers. Some of them considered that recommendations could be useful at least regarding certain specialist issuers; one suggested that additional building blocks would be preferable and some of them argued that the recommendations were not necessary because issuers should retain some freedom to establish, under Article 5.1 of the Directive, the contents of the prospectus. Consultees which did not agree with the recommendations also argued that it will be impossible to cover all the industries under these specialist issuers and that the competent authorities should retain the power to require additional information or to exempt issuers from following the recommendations and that the schedules and building blocks of the Regulation are already very comprehensive.

66. CESR considered these arguments and amended to some extent the draft recommendations. CESR points out that the priority of the Recommendations should be to avoid any ambiguity and to assist competent authorities in clarifying unclear provisions of the level 2 Regulation. This is of particular need, as Article 23 of the Regulation contains no obligation for issuers to include additional information. The provision only enables the competent authority to ask for adapted information.

PROPERTY COMPANIES

67. Although some respondents disagreed with the request of a valuation report, most of them generally supported the proposed requirement of requesting a valuation report. However, of those who agreed with the request of a valuation report, most thought that the report should only be condensed.

68. It appeared from the responses received that many respondents thought a valuation of each property could be very time- and cost-consuming and did not give an investor a comprehensive overview. In their opinion, a condensed report would be sufficient. Furthermore, some respondents did not think a fixed number was considered relevant in relation to whether a report should be condensed or not. It was stated that investors are interested in the valuation of the material properties and therefore a report should only contain valuations of the material properties considering the issuer in question. Generally, flexibility was requested. The recommendation has been amended in order to reflect these considerations and now only a condensed report is required.

69. In addition, some respondents noted that a valuation report may not be relevant in issues of all types of securities and that due consideration should be given to the different nature of the securities when requesting a valuation report. Taking these comments into consideration, CESR has analysed whether the requirement of a valuation report should be

differentiated in accordance with the nature of the securities and has concluded that some distinction has to be made. For this reason, the scope has been changed in such a way that only issuers preparing a prospectus for the public offering or the admission to trading of shares, debt securities with a denomination of less than 50.000 Euros (including convertible debt) secured by the properties, and depository receipts with a denomination of less than 50.000 Euros are covered by the recommendation. The distinction in relation to the denomination of debt securities and depositary receipts was made to encompass the fact that professional investors do not require the same information as retail investors.

70. The responses received regarding which rules the report should comply with were very divided. Some respondents supported the idea of the rules of the country of the competent authority. Others suggested that accepted international valuation standard should be followed. Finally, some respondents had the opinion that the rules in the country were the property is located should be applied. Also in this matter flexibility was requested. Due to the lack of agreement in this matter, CESR has decided not to make any recommendations regarding which rules the report should comply with, but to leave it to the competent authority. Almost every respondent thought that the valuation report could be older than 60 days because of the low volatility in values of property. Some respondents suggested a time limit of 1 year but also 90 or 120 days were suggested. The time limit has therefore been extended in the amended text to 1 year. Since the time period has been considerable enlarged, and in order to ensure that the valuation report is still meaningful when included in the prospectus, CESR has decided to amend the recommendation to require a statement from the issuer that no material changes have occurred since the date of the valuation.

MINERAL COMPANIES

71. CESR included a specific question in the consultation paper regarding the definitions provided in that paper, as CESR had received a comment in a previous consultation suggesting the use of definitions by the Society of Petroleum Engineers instead of those provided in the consultation paper. CESR also wanted to analyze whether the IASB work on exploration for and evaluation of mineral resources could be of use to the recommendations.

72. The IASB is still considering definitions for the extractive industries, and CESR will consider these when the work is completed.

73. Many of the respondents asked for harmonised and widely adopted standards/definitions. Others had no comments on the definitions. Two of the respondents suggested applying the definitions/classification presented by the United Nations Social and Economic Council's Resolution 2004/233. However, some CESR members had different views on which definitions to apply in the recommendations; the definitions provided in the consultation paper or the definitions presented by the above-mentioned UN Resolution. This was mainly due to the fact that there were differing opinions/practices in those Member States. CESR has therefore decided to provide high level requirements and to withdraw the detailed definitions from the recommendations. Accordingly, appropriate definitions would have to be agreed with the competent authority. Once the IASB definitions are finalised CESR could assess the convenience of adopting them.

74. In regard to a request for an expert report (valuation report) for an issuer that has not been a mineral company for at least the three preceding years; those respondents commenting on this question almost unanimously agreed that such a report would be useful. However, there were a couple of respondents suggesting altering the recommendations for the content of such a report. Due to the responses and to the fact that the content of the report in certain extent involves definitions of reserves, CESR decided only to keep the

requirement for an expert report, saying that the content of the report should be agreed with the competent authority.

75. On the question whether issuers that are only involved in exploration of mineral resources and are not undertaking or propose to undertake their extraction on a commercial scale, should be classed as mineral companies, there was some divergence among those responding. CESR has decided to keep the recommendations as they stand and to provide that the recommendations do not apply to exploration companies that are not undertaking or propose to undertake their extraction on a commercial scale.

76. A couple of respondents questioned the requirement for a confirmation by an independent auditor or accountant that the cash flow estimate has been properly prepared. On the basis of the given comments, CESR decided to alter the recommendation.

INVESTMENT COMPANIES

77. Most of the respondents could not support the draft recommendations on investments companies. In particular, the respondents did not agree with the definition of "investment company". They criticised that the scope of the definition of "investment company" was not clear. In their view the proposed definition did not draw a proper distinction between investment companies and other investment entities such as closed end funds, issuers of asset backed securities or UCITS.

78. In addition, consultees pointed out that structure and nature of investment companies might substantially differ from one to another with the result that adaptations (within the meaning of Art. 23 of Regulation No 809/2004) concerning different schedules might need to be done on a case by case basis. Taking into account the preceding comments CESR decided not to issue general recommendations on "investment companies". In accordance with Art. 23 of Regulation No 809/2004 the competent authority of the home member state may ask for adapted information taking into account the specific nature of the activity involved.

SCIENTIFIC RESEARCH BASED COMPANIES

79. CESR received few responses to this recommendation. Most of the respondents who answered supported the recommendation but considered that the recommendation should be less detailed.

80. Some suggested that disclosure requirements regarding key personnel should be deleted. They argued that this could be sensitive information and instead proposed that details of the relevant expertise and experience should be provided about the company as an entity. CESR has taken these comments on board and has amended the recommendation to specify that only details of the collective expertise and experience of the key technical staff should be included in the prospectus.

81. Furthermore, concerns where raised on the fact that information which is of confidential nature should be required to be disclosed in the prospectus. They considered that that requirement to disclose information about research and developments at very early stages could have a negative impact for the issuer for competitive reasons and therefore, CESR should not require this disclosure in the prospectus. CESR has amended the text in order to reflect these concerns.

82. Furthermore, taking into account the consultation responses that considered that the requirements for specialist issuers should be adapted to the nature of the securities being offered or admitted to trading, CESR has clarified that only scientific research based

companies preparing prospectuses for the public offering or admission to trading of shares and that are start up companies are expected to disclose the information recommended in their prospectuses. CESR considers these recommendations to be of special importance for those "new" scientific researched companies that do not have a past performance in this activity and are therefore, more dependent on their key staff, or new developing products. Therefore, investors are to have more detailed disclosure on these aspects. In addition, since in most cases these companies will access to the market through the issuance of shares, CESR has decided to restrict the scope of the recommendations only to this case.

START-UP COMPANIES

83. Several consultees commented and presented suggestions in relation to the specific disclosure requirements set out for start-up companies. Most of the comments are in relation to risk factors (need to explain clearly the risks of the start-up company), the need to include figures in the business plan as these would be contrary to the uncertain future of a start-up company. It was stated that the figures would be unreliable (as issuers tend to present "best case scenarios") and included elements of hypothetical strategies, as these figures might give rise to liability, that it was too burdensome to be presented for two future years and that it may lead investors to give unjustified confidence on the information.

84. Another one argued that in general, stock exchanges should have sufficient flexibility and be in the position to establish specific market segments for start-up companies.

85. CESR has reviewed its approach in relation to this issue and the Recommendation has been amended in order to reflect that issuers are not obliged to include a business plan with figures.

86. In relation to the proposed definition of start-up companies, some consultees agreed with it, but the following remarks were also made: that the definition should be more precise (and exclude holding companies of existing business), that it should be focused on the business or on whether the company was generating revenues. One consultee presented a proposed definition and another one preferred the definition based on 3 years of existence as it is a more objective criteria.

87. Taking into account some of these comments, CESR has altered the definition and has excluded holding companies of existing business of the scope of the definition.

88. In relation to the expert's report, most of the consultees stated that the expert report should not be mandatory but the issuer should be free to include one. The arguments vary and the following were presented: the difficulty of finding a suitable expert 'of demonstrable high standing, repute and expertise in the field concerned' for traditional businesses, that the expert reports may not assist in making such investments less risky and could present limited benefits and can lead to the impression that an investment is safer than it actually is. One consultee also suggested that the expert report should not be required for companies with a straightforward, traditional businesses e.g. office cleaning companies, estate agents, retail.

89. Other consultee commented that it would be difficult to guarantee the independence of the expert. Consultees noted that CESR had not addressed the question of what is meant by the concept of "independence" of the expert.

90. To conclude, most consultees do not believe that expert's reports can provide any useful assessment in this respect and would view the requirement of such a report as an unnecessary burden on issuers.
91. In the light of the concerns expressed during the consultation, CESR has decided that the expert's report on the services/products of the issuer would not be mandatory.

92. Some comments were received on what the expert assesses and concludes on. CESR received a suggestion pointing out that the issuer tailors the report to the circumstances of the particular issuer and offering of securities and that CESR should not issue recommendations on the content of the report. One consultee suggested that it should include comments on the business plan and the risks.

93. Based upon the comments received, CESR has decided not to provide detailed recommendations on the contents of the report.

94. Although there were no specific comments on the scope of the recommendation of start-up companies, CESR has decided to take into consideration the general comments made on the need to adapt the recommendation taking into account the nature of the securities and has limited the scope so as to clarify that the above recommendations should only apply to shares.

SHIPPING COMPANIES

95. A few comments were made in relation to the fact that CESR was providing recommendations for shipping companies, while no guidance was being provided for other types of companies that could also be considered as "specialist issuers" because of the special nature of their activities (ie. airlines). Article 23.1 of the Regulation clearly restricts competent authorities', and therefore CESR's, possibility to ask for adapted information for the issuers that fall under one of the categories included in Annex XIX of the Regulation.

96. On the definition of shipping companies provided in the recommendations, most respondents seemed to agree with CESR's proposal. However, some commentators believed that clearer recommendations should be given as to when a company should be considered to be a shipping company. One proposal was made to include a reference to the fact that) the majority of its operating expenses and revenues is incurred as a direct result of or derived from, as the case may be, shipping activities.

97. CESR has considered these comments, but has decided to leave the definition as included in the consultation paper with some minor changes. CESR believes that the suggestions made can be encompassed under the broad definition proposed and would prefer not to establish a very narrow definition that might leave out companies that should be under these requirements. The reference included to "principal activity" seeks to keep the definition broad and, for example, can be understood in the sense pointed out by the consultee in the above paragraph.

98. In addition, and in response to the consultation suggestions, CESR has limited the scope of the recommendations for shipping companies in the same way as proposed for property companies. Only issuers preparing prospectuses for the public offering or admission to trading of shares, debt securities (including convertible debt) secured by the vessels, and depositary receipts with a denomination of less that 50.000 Euros are covered by the recommendations.

99. On the recommendations referring to disclosure requirements in the registration documents some consultees considered that disclosure requirements were too detailed. In response to that, CESR has deleted the previous requirement to describe any relevant

insurance policies in so far this can be covered under the requirement of including all relevant information in relation to material vessels.

100. In addition, several consultees suggested that these requirements should only be provided for material vessels and not for each vessel.

101. In the light of some of these concerns, CESR has amended indents b and d to limit these requirements only for material vessels and not for all vessels.

102. On the question of the requirement of a valuation report, some consultees considered that a general requirement should not be introduced and that the requirement of a valuation report should be decided on a case by case basis. On the other hand some consultees were in favour of requesting this report and even one consultee added that valuation report should cover all the existing vessels and, separately, any vessels whose acquisition is to be financed through the securities issue.

103. In general, those who supported the requirement thought that a condensed report should be allowed for if the company holds more than 50 vessels. As with other valuation reports, many consultees believed that it is only necessary for the condensed report to be included in a prospectus, regardless of the amount of vessels the issuer holds

104. The text has been amended in order to reflect these considerations. Only a condensed report should be included in the securities note. The last sentence of the proposed recommendations has been deleted.

105. Concerning the question on what rules should the valuation report follow several comments where made. One consultee argued this valuation report should comply with local practice and if there are not any domestic rules, the report should comply with any available international valuation standards for vessels. Another one argued this valuation report should comply with home member state of the issuer or international standards / rules. A last one believed the valuation report should not be subject to the rules of the competent authority reviewing the prospectus. As the rules of any particular competent authority may be inappropriate in one or more respects. Companies should be able to use reports prepared in accordance with international standards, regardless of whether those standards originate from an EU jurisdiction or not.

106. In lack of agreement in this matter, CESR has decided not to make any recommendations on what rules should the valuation report comply with.

107. Many consultees commented on the proposed 90 timeframe included in the recommendations. Most of them, considered that if there has not been any dramatic change in the market the report can be older than 90 days, arguing that
   - issuers who possessed a large volume of ships (for example some vessels may well be at sea at the time)will have a difficult time in complying with this obligation.
   - already due to the low volatility of the assets to be valued, the underlying valuations of the last financial statements (annual financial statement, potentially the interim financial information) may be used as a basis.
   - besides, the cost/benefit ratio of the valuation requirements should be reviewed.

108. Based upon the comments received, CESR has decided to extend the time limit to one year provided that the issuer affirms that no material changes has occurred since the date of valuation.

CLARIFICATION OF ITEMS

109. When preparing its draft recommendations for the clarification of certain items included in the schedules, CESR analysed the need to differentiate its recommendation bearing in mind that although some of the line items in the schedules refer to the same wording they are applicable to different types of securities. CESR decided to include a question on whether recommending the same regardless of the security in question would be appropriate. CESR also questioned consultees whether adaptations to the recommendations were necessary to take account of the different types of securities.

110. Most of the consultees did not differentiate both questions, but the majority of answers received supported a differentiation between equity on the one side and debt and derivative securities on the other side. These respondents argued that investors of debt and derivative securities are more interested in the terms and conditions of the investment than in information on the issuer. In addition, some of these respondents stated that this suggestion is in line with Article 5.1 of the Directive which specifies that different information may be needed depending on the nature of the issue and of the securities offered or admitted to trading in order to enable investors to make an informed assessment. It also corresponds with Article 7.2 of the Directive that specifically provides to take account of various types of information needed by investors relating to equity securities as compared with non-equity securities. This even applies if the Regulation sets out similar or same requirements. One consultee argue that in principle, where the requirement is similar regardless of the type of security, the information to be provided should be the same, although adoptions might be desirable in special cases. Two others stated that this general principle is acceptable but some adaptations might be needed to take account of the different needs of investors for different securities.

111. CESR has considered its approach and established some differentiation in the different recommendations, defining its scope by taking into consideration the nature of the securities.

PRINCIPAL INVESTMENTS

112. In the June consultation CESR asked respondents whether or not guidance was needed in relation to principal investments and if so whether they agreed with the guidance proposed by CESR.

113. Most respondents felt that guidance was not necessary in this area. They argued that the issue of what constituted a principal investment would vary from business to business and a list of criteria to be considered in determining what might constitute a principal investment would be too broad. Further, most felt that the management of an issuer was best placed to determine what might constitute a principal investment as regards its own business.

114. Having considered the responses to consultation CESR has decided to delete the draft guidance.

PROPERTY, PLANTS AND EQUIPMENT

115. Almost all of the respondents found the requirements as proposed too detailed, especially item c. Under item c issuers are normally expected to refer 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". Further some of the respondents were questioning the usefulness of the level of detail for investors. Also some respondents found that the recommendations should be limited to available information. Finally, one respondent answered that these aspects which are proposed at Level 3 were strongly contested at Level 2. The respondent is opposed to the reintroduction of IOSCO standards at Level 3 which seems to suggest that these international standards are a minimum basis which the legislator can request to be followed.

116. CESR has taken the responses into consideration and has decided to amend the recommendation by deleting item c.

COMPENSATION

117. Some of the respondents agreed with the usefulness of the proposed recommendations and the level of detail being provided for the line item compensation. One respondent found the level of detail to high, whilst another respondent found that the requirements should go further than the proposed recommendations. Two respondents noted that this line item is already covered by IFRS and that this item will be concluded in the financial statements, so no additional information should be required and presented in a different way. Another respondent noted that to avoid privacy and confidentiality issues, the information to be disclosed in relation to this section should be information which is available from public sources and that such information should not have to be provided if it is not required by the issuer's home country legislation or not otherwise publicly disclosed by the issuer.

118. Most of the respondents were of the opinion that additional information for this line item is not required. However, two respondents made suggestions for additional requirements.

119. In reaction to several comments made by the consultees, CESR has analysed whether the recommendation is covered by IFRS and has come to the conclusion that IFRS do not require to disclose compensation on an individual basis but in aggregate form for the key management personnel.

120. The recommendation asks for the period during which options can be exercised and the date in which they expire. Although some respondents considered this to be a duplication, CESR believes this has not the same meaning because the period when options can be exercised is something different from its maturity: the exercise period is when an option can be exercised (which can be at maturity or before that); the maturity refers to the date upon which the option expires.

121. Nevertheless, on reflection, CESR has amended its proposal by deleting the recommendation to mention in the line item of compensation the contingent or deferred compensation accrued for the year even if the compensation is payable at a later date because this is already covered by the Regulation.

122. Furthermore CESR has added a recommendation for "benefits in kind", to make clear what issuers are expected to mention in the line item of compensation.

ARRANGEMENTS FOR THE INVOLVEMENT OF EMPLOYEES

123. One respondent suggested that every outstanding incentive program based upon the value of shares should be described. Another respondent suggested that disclosure should also include participation of employees to dividend without involvement in the capital, where permitted by applicable law. A majority of respondents, however, proposed that

the recommendation be deleted since Level 2 Regulation provides for a clear disclosure requirement, or since the subject is already covered by IFRS standards.

124. Based upon the comments received, CESR has decided to withdraw its draft recommendations on this matter.

NATURE OF CONTROL AND MEASURES IN PLACE TO AVOID IT BEING ABUSED

125. A vast majority of respondents suggested that the level 3 advice should be deleted. The reasons for such standpoint were that the current matter is dealt with in the accounting directives and in pending draft directives submitted to the Council and that the recommendations are not necessary or go beyond the provision of the Regulation. Furthermore, some respondents argue that the recommendation is inappropriate for debt and derivative instruments.

126. CESR acknowledges that the interpretation of "nature of control" differs in member states, and that it might not be practical to have the same disclosure requirement in all jurisdictions. In the light of the concerns expressed during the consultation, CESR has decided to withdraw its recommendations on this matter.

RELATED PARTIES TRANSACTIONS

127. Several consultees agreed with the proposed recommendations regarding the recommendations on related parties transactions. Nevertheless some other respondents pointed out that IAS/IFRS is not required for all companies. Related parties transactions could be covered by IFRS and national GAAP. In order to clarify that it was not CESR's intention to require the application of IFRS to all companies, CESR has amended its recommendations. Therefore, IFRS only applies as far as the definitions of related parties.

LEGAL AND ARBITRATION PROCEEDINGS

128. A majority of the respondents considered that CESR's proposals in relation to legal and arbitration proceedings were too detailed and that the requirement was self-explanatory and there was, therefore, no need to provide additional guidance. Some respondents also stated that requiring disclosure 'in relation to the issuer's business' was going beyond Level 2 and should be deleted. In addition, they stated that there should be no requirement to disclose settled litigation since this is usually a confidential bilateral agreement between the parties to the litigation and furthermore, the purpose of disclosing litigation is to disclose risk and for settled litigation, there is no longer any risk.

129. CESR considered these views and decided that the recommendation was not necessary.

ACQUISITION RIGHTS AND UNDERTAKINGS TO INCREASE CAPITAL

130. CESR questioned whether the consultees agreed with the level of detail being provided. Few answers were received on this recommendation. The result from consultation showed split views on the usefulness of the proposed recommendation.

131. The majority of the consultees agreed with the recommendation making no particular comment on this point.

132. Some respondents suggested the Level 2 requirement is sufficiently clear and no further explanation is necessary.

133. One argument of those who did not support the need to have recommendations on this issue was that explanation could lead to the misleading interpretation that "authorized" capital is primarily relating to equity-linked securities.

134. One of the consultees that agreed with the recommendation suggested that the required disclosure should be considered in the context of the nature of securities being offered to the public or admitted to trading and that the level of detail should also be limited so that such information is only required to the extent it is material.

135. As most of the respondents agreed with the recommendation, CESR kept the information already being required for, replacing "outstanding equity-linked securities" by "all outstanding securities giving access to share capital" in order to clarify what CESR intended to make reference to when including the term "equity-linked securities" in the draft recommendation.

OPTION AGREEMENTS

136. Only a few respondents made comments on this recommendation but some of those who did, stated that CESR should not require a disclosure of the exercise price and dates for all options but instead, there should be a disclosure of a range, otherwise it would be too costly for issuers. CESR recommendations have been amended to reflect the fact that a range of exercise price and dates could be provided for situations where there are numerous options.

HISTORY OF SHARE CAPITAL

137. Respondents were generally in favour of CESR's guidance on History of Share Capital and therefore CESR has retained the recommendation with only slight amendments. Under indent b) of the draft recommendation reference was made to "terms of any issue". This has been changed to "material details such as tranches" in order to have a more clear wording.

RULES IN RESPECT OF ADMINISTRATIVE, MANAGEMENT AND SUPERVISORY BODIES

138. Most the respondents were of the opinion that this recommendation is not necessary and that it provides for too much detail. In addition they considered that the level 2 provision is self explanatory and that no guidance is needed. One respondent suggested that it should only be necessary to provide this information if the Articles of Association differ from the rules provided for under national law.

139. CESR's intention, when making the proposed recommendation, was to highlight the most frequent provisions included in the articles of association, statues etc. in relation to the members of the administrative, management and supervisory bodies of the issuer. However, CESR has reconsidered this recommendation and has decided not to give guidance on this aspect as it agrees with those consultees that consider that item 21.2.2 to be quite clear.

DESCRIPTION OF THE RIGHTS ATTACHING TO SHARES OF THE ISSUER

140. Only very few responses were received regarding this recommendation. One respondent did not consider it necessary as it is market standard to disclose information of the rights. Two respondents suggested that the "description of the rights" is contained in the prospectus if it is material information to investors. Furthermore it was suggested that the information was contained in a condensed form.

141. The recommendations do not correspond exactly to the disclosure requirements in item 4.5 in the Share Securities Note regarding the description of the rights. The requirement in the Share Registration Document concerns each class of the existing shares whereas the Share Securities Note contains more detailed disclosure requirements concerning the securities to be offered or admitted to trading.

142. CESR has decided to keep the proposed recommendations, but following the some consultation responses has amended indent b). Under voting rights, the part of the proposal that recommended the inclusion of an explanation on whether directors stand for re-election at staggered intervals and the impact of that arrangement where cumulative voting is permitted or required, has been deleted.

2m – MATERIAL CONTRACTS

143. Some respondents suggested a definition of the term "material contracts". As for other items, some respondents highlighted that the Regulation provides for a different level of disclosure requirements for shares on the one hand and debt and derivative instruments on the other hand and that this ought to be taken into consideration when proposing recommendations. In addition, most of the respondents emphasised that the fulfilment of the disclosure requirements could violate contractual confidentiality of undertakings and bank secrecy laws and that the regulators should have the possibility to grant exceptions from the disclosure requirements in such cases.

144. CESR has taken the responses under consideration, in particular the references to the confidentiality clauses, and has decided to leave to a case by case basis the decision on how to fulfil the Level 2 provision. Consequently, the recommendation has been deleted.

STATEMENTS BY EXPERTS

145. The respondents had diverse opinions on this issue that went from deletion of the recommendations to giving more details and even diverse interpretations of the recommendations.

146. In order to make it's proposal more straightforward CESR would like to clarify that the list of circumstances to be considered when analyzing whether an expert has "a material interest" in the issuer, is not exhaustive, nor does it mean that an expert automatically has a material interest if it applies to one of the circumstances. The list gives some indication of what is expected to be considered as a "material interest".

147. CESR does not think a threshold of the ownership of securities should be inserted, as the issuer has to consider if the particular ownership creates a "material interest".

148. Some consultees requested clarification on whether an auditor is to be considered as an expert or not. CESR is of the opinion that an auditor is an expert, but does not consider necessary to include such clarification in the recommendations.

149. Pursuant to the request made by some respondents, CESR has added that the description of the expert is "to the best of the issuer's knowledge".

INFORMATION ON HOLDINGS

150. Most of respondents argued that the recommendation was too detailed and to some extent, might raise confidentiality issues. CESR considers that indents g) and j) cover, in

most cases, public information: g) refers to the value at which the holding is presented in the accounts of the issuer and j) refers to the amounts in debt between the issuer and the undertakings. Insofar this information is already required under the existing Directive 34/2001, CESR cannot see how it can be considered confidential information. In relation to the level of detail, CESR wishes to point out that the recommendation is almost the same as currently required and that the aim of harmonisation requires this level of detail in order to ensure that the same information will appear in all prospectuses throughout Europe.

151. One respondent argued that the information on capital (c), reserves (e) and profits (f) is unnecessary because the issuer has no power to dispose of it. CESR wishes to point out that information is important even if the issuer cannot dispose of the capital, reserves and profit because it gives indications of the financial status of the undertaking, thus helping to understand the financial status of the issuer itself. The same respondent also suggested that if the undertaking is material, financial information on such undertaking should be provided. CESR points out that this would go further than the scope of recommendations and therefore cannot advice such an additional requirement.

152. Others commented that the information required was already available elsewhere (namely, in the financial information) or simply that the information would not be relevant to investors. To some extent, information required can be found in the annual accounts (such as information required under a), c), d), f) and g)). As a general point, CESR assumes that whenever information required is available in the prospectus, issuers are not required to include it again, but can simply refer to where information can be found. Notwithstanding, CESR considers that it would be important to keep this information aggregated in one place, for the sake of clarity and to make it easier for investors to look at the information.

153. One respondent suggested that CESR issue specific guidance on the situations where the competent authorities can deviate from the recommendations, allowing for the omission of information. CESR believes this can be a way of further developing the recommendations in the future. For the time being, CESR considers it important to take note of how the market reacts and makes use of the recommendations.

154. One respondent suggested that indents from e) to j) should be deleted. CESR considers the information to be important for investors because it is presented in an aggregated format (so it is easy to understand and to consult on) and some of it can only be found in this line item. CESR points out that this information is relevant for investors because it allows them to have a clear understanding of the structure of holdings of the issuer and the relationship that is established between the issuer and its undertakings and their financial situation.

155. One respondent suggested generalising the possibility of omission of certain indents (paragraph 289 in the consultation paper). CESR considers that, as a general point, the information to be disclosed in the prospectus is always subject to the materiality test, so there is no need to refer it at each point. Secondly, if paragraph 289 in the consultation paper was generalised, it would contradict what is stated in paragraph 287, which recommends in relation to which undertakings information should be provided. CESR has also aligned the scope of the test of materiality to be made under paragraphs 289 and 290, and again in response to a suggestion that was presented has made the wording clearer as to the nature of the requirement.

156. One respondent questioned the relation between paragraphs 290 and 286 and 287. in the consultation paper CESR considers that 287 refer to the undertakings on which information should be provided. Paragraph 286 refers to the content of information

which is recommended and 290 refer to the circumstances where the undertaking is at least held in 10% by the issuer and refers also to the information that should be provided on such undertaking.

157. Two respondents suggested replacing registered office by a reference to the place of incorporation. CESR considers that these are different information insofar these can point out to different places. In addition, the registered office is already required under Community law as a means of identifying the company, therefore CESR has retained the registered office.

158. One respondent suggested that "relevant" should be added to paragraph 289 in the consultation paper. Insofar there will be just one competent authority, CESR does not deem this to be necessary.

159. Some respondents considered adequate the recommendation and the level of detail provided by CESR. To take account of these views, CESR has amended the recommendations, but kept most of the information already being recommended.

160. This recommendation also aims to maintain accepted market practices such as the omission of certain items of information if the issuer considers that such omission does not mislead investors.

INTERESTS OF NATURAL AND LEGAL PERSONS INVOLVED IN THE ISSUE/OFFER

161. Most of the respondents agreed with the recommendations and some respondents considered that the recommendations should be more precise.

162. CESR acknowledges the fact that there might be many other aspects that issuers could need to bear in mind when preparing the disclosure required under this provision. However, this would probably need to be analysed on a case by case basis. In its recommendation CESR has tried to reflect the most common aspects relating to people that might have an interest and the nature of the interest. This is not intended to be exhaustive.

CLARIFICATION OF TERMINOLOGY USED IN THE COLLECTIVE INVESTMENT UNDERTAKINGS OF THE CLOSED-END TYPE SCHEDULE

163. Respondents were generally in favour of the guidance in relation to *investment objectives and policies*. Some respondents suggested that additional items be specified for example, whether the investment manager intended to pursue an active or passive strategy or whether any leverage limits applied to the collective investment undertaking. CESR agrees with the suggestion in relation to whether the investment manager will adopt a passive or an active strategy and has amended the guidance accordingly. The issue of a leverage limit is dealt with in paragraph 1.2 of Annex XV of Commission Regulation (EC) no 809/2004 and therefore guidance is not necessary.

164. CESR would like to clarify that the information in relation to the investment objective may be given in relation to the portfolio as a whole and need not be given in relation to every security held by the fund.

165. In relation to what constitutes a broadly based, recognised and published index respondents felt that the guidance should make it clear that an undertaking could not construct its own index as a means of avoiding more onerous disclosure requirements that it might otherwise have had to comply with. A number of suggestions were received

to prevent this state of affairs from arising namely that the index be recognised by the competent authority, that it be calculated independently or that the index be available for purposes other than for the calculation of the return on the fund. CESR has decided to include additional wording to take on board the concerns of respondents and has amended its guidance accordingly.

166. On the question of what fees issuers should consider when making disclosures in line with Annex XV paragraphs 3.1 & 3.2 respondents suggested that CESR should include details of distribution and placement fees. CESR has included these fees in its revised recommendation.

167. A number of respondents suggested that information on soft commissions and fee sharing arrangements should be disclosed. While CESR was not asked to give further guidance in relation to paragraph 3.3 of Annex XV it believes that disclosure of soft commission and fee sharing agreements should be disclosed under that heading.

168. Respondents were generally in favour of CESR's guidance on the regulatory status and experience of the investment manager. CESR would like to clarify that this information should be given in relation to any entity which has investment discretion over the undertaking's assets. This requirement to include the regulatory status of the investment manager should not be confused with the requirement under paragraph 1.2 of Annex XV to include details of the regulatory status of the collective investment undertaking. CESR does not propose to make any changes to its guidance.

169. CESR would like to clarify that a comprehensive and meaningful analysis of the portfolio does not require a security by security analysis rather the requirement may be satisfied by giving a breakdown of the portfolio under the headings set out in CESR's guidance. CESR does not propose to make any changes to its guidance.

RECOMMENDATIONS ON ISSUES NOT RELATED TO THE SCHEDULES

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

170. In relation to the document to which reference is made in Article 4.1.d and e and 4.2.e and f of the Prospectus Directive, CESR questioned whether recommendations were needed. The results from consultation showed split views on this matter.

171. One argument of those who did not support the need to have recommendations on this issue was that this matter was outside of the scope of the mandate to CESR. On Level 3, the mandate is defined by CESR, therefore, this matter should not be considered outside its powers.

172. Other argument against this recommendation was that it went further than the Directive itself. CESR considers that the recommendation is within the scope of the Directive. The Directive refers to a document containing information on the number and nature of the securities, and the reasons for and details of the offer. CESR considers that the information which inclusion is recommended is within these broad lines.

173. CESR recommends inclusion of the name of the issuer and where information on the issuer can be found. The identity of the issuer is necessary in order to enable investors to make an informed assessment of the securities.

174. CESR recommends inclusion of the number and nature of the securities involved in the offer or admission to trading, including a summarised description of the rights attaching to the securities. CESR considers that these are details of the securities being offered, therefore, this is information covered already by the Directive in the reference to the nature of the security and details of the offer.

175. CESR recommends the inclusion of an explanation of the reasons of the offer or admission to trading and details on the offer, which are also covered by the Directive.

176. CESR recommends an indication of the specific provision of the Directive under which the exemption was granted. This is also something that can be considered to be related to the nature of the offer insofar that it is on the basis of a description of certain types of offers that the exemption is granted.

177. CESR points out that the main objective of these recommendations is to provide a certain degree of certainty to the market in order to ensure a harmonised content of the document across Europe and to avoid the temptation of having a huge document, which CESR considers not to be the objective of the Directive.

178. One of the consultees that agreed with the recommendation suggested that CESR should provide additional guidance in relation to other documents referred to in Article 4. CESR considers that this might be considered in the future, but for the time being, it would be preferable just to issue recommendations on these types of operations.

179. CESR also questioned whether the content of the recommendation was appropriate. Those who supported the need of this recommendation agreed with its content. As stated above, one of the arguments of those who did not agreed with this recommendation was its content.

180. One respondent suggested that the following should be included: (i) name and address of issuer; (ii) nature and number of the employees securities offer plan; (iii) purpose of the plan and basis of employee participation (voluntary); (iv) where to get further information on the plan; (v) conditions if any (eligibility, investment caps, right to receive dividends, etc). CESR considers that this proposed content is in line with the one proposed by CESR, so proposes to retain the content of the recommendation as presented.

181. CESR has considered whether the recommendation should also cover matters such as the language regime of the document and the means of its publication. Consultees shown again some split views on this.

182. Those that considered CESR should issue recommendations on the language regime suggested both the use of the language of the seat of the issuer or the language accepted by the relevant competent authority (and the language customary in the field of international finance). CESR retains these comments for future reference, but by the time being, considers advisable to restrict the recommendation to its original scope bearing in mind that the language regime for this document is not covered by the Directive. CESR acknowledges that current practices may continue as such and if problems arise, CESR will consider them in the light of investor's and market's protection. In relation to the availability of the document, CESR would expect this document to be made available to its addressees, although publication is not required.

183. On the question of whether consultees agreed with the recommendation, only three answers were received, but from answers to the previous questions one can anticipate that those who agreed with the content of the recommendation would agree with its release, as well as those who did not agree with its content, would be pleased if no recommendation was issued. For the sake of harmonisation, CESR considers that the recommendation should be kept.

IDENTIFICATION OF THE COMPETENT AUTHORITY FOR THE APPROVAL OF BASE PROSPECTUSES COMPILED IN A SINGLE DOCUMENT AND BASE PROSPECTUS COMPRISING DIFFERENT SECURITIES

184. Market participants had split views with respect to the draft recommendations on "base prospectuses comprising different securities". Some agreed with the proposed recommendations whereas others considered the draft to be ambiguous. A couple of respondents favoured a free choice for issuers and several others could not see any added value in the draft.

185. Regarding the draft recommendations on "identification of the competent authority for the approval of base prospectuses compiled in a single document" no respondent dealing with this section could agree with the recommendations. Most of the responses preferred the solution to grant issuers a free choice regarding the competent authority. A couple of respondents were also in favour of one competent authority to be determined in advance by CESR.

186. CESR also took into account the argument that because of investor's protection reasons, the appropriateness of a base prospectus approval's transfer might need to be evaluated in the specific context of the base prospectus at stake.

187. CESR, therefore, decided to withdraw these sections of the recommendations. However, CESR will ensure an effective co-operation of competent authorities within the CESR network and the framework provided for in the Prospectus Directive and the Regulation in order to obtain a suitable approach for the above mentioned base prospectuses.

CONTENT OF A DISCLAIMER WHEN PROSPECTUS IS PUBLISHED IN AN ELECTRONIC FORMAT

188. Most of the respondents considered that there should be no recommendation in this area as there may be conflicts with the regulation in other jurisdictions. They also stated that it was up to the issuer to decide which disclaimer was appropriate in their particular circumstances and that the recommendation as drafted was too prescriptive. CESR has therefore decided to delete the proposed recommendation and recommend that issuers should provide a suitable disclaimer when publishing prospectuses on their website.