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**Frequently asked questions regarding Prospectuses:
Common positions agreed by CESR Members
Updated version February 2007**

INTRODUCTION ~ The context and status of this 'Q and A':

EU Legislation:

The Prospectus Directive 2003/71/EC and the Commission's Regulation on Prospectuses (EC 809/2004) became effective on 1 July 2005. The Prospectus Directive and accompanying Regulation establishes a harmonised format for Prospectus in Europe and allows companies to use this Prospectus to list on all European markets without having to re-apply for approval from the local regulator and by doing so, it is intended to help companies avoid the inherent delays and cost that this may involve. As a result of this new legislation, consumers can also be assured of more consistent and standardised information which will enable them to compare more effectively the various securities offers available from a wider number of European companies.

Level 3 work to provide supervisory convergence in day-to day implementation across the EU and clarity for market participants:

As a result of the Directive and Regulation, the scope for interaction between competent authorities has increased because of the passport and it is therefore essential that supervisors achieve convergence across the EU in their approach to handling the day-to-day implementation of this legislation.

To this end, CESR has developed, at the request of market participants, a number of clarifications which may prove useful to market participants. These are:

- **CESR Recommendations** (Ref.CESR/05-054b) to provide greater clarity for issuing companies regarding the provision to disclose information on a range of areas and to promote greater transparency in the way in which supervisors will apply the Regulation, without imposing further obligations on issuers. CESR consulted market participants in the development of this and the responses and feedback statement can be accessed on the website under 'Consultations' and 'Expert Groups/Prospectus Level 3'.
- **This consolidated 'Q and A' publication (Ref.CESR/07-110) which is intended** to provide market participants with responses in a quick and efficient manner, to 'everyday' questions which are commonly posed to the CESR secretariat or CESR Members. CESR responses do not contain standards, guidelines or recommendations, and therefore no prior consultation process has been followed. It is CESR's intention to operate in a way that will enable its Members to react quickly and efficiently if any aspect of the common positions published need to be modified or the responses clarified further. The views of the Commission Services on some of the issues discussed were sought. However, the Commission Services note that only the European Court of Justice can give a legally binding interpretation of provisions of EU legislation. Moreover, the views expressed in the paper do not bind the European Commission as an institution, and the Commission would be entitled to take a position different to that set out in this 'Q and A' guide in any future judicial proceedings concerning the relevant provisions.

This paper adds new Q&A to those included in the document CESR published on 18 July 2006 (CESR/06-296d). After each question an indication of the date of its first publication has been included to ease the identification of the new Q&A.



The CESR group meets regularly to discuss the questions that might be raised by market participants. Please send these directly to the relevant competent authority you are dealing with including the CESR secretariat (prospectus@cesr.eu). The pace of the future publications will depend on the amount of new questions identified and how long it takes to analyse the issues raised and to develop common positions.

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1. Information from issuers to host competent authorities	<i>July 2006</i>
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Q) Should the issuer notify/file with the host competent authorities the following information:

- a) The price and/or amount of the securities omitted in stand alone prospectuses as permitted by Article 8.1 of the Directive¹?**
- b) Final terms of base prospectuses once they are filed with the home competent authority pursuant to the last paragraph of Article 5.4 of the Directive²?**

A) The issuer is obliged by the Prospectus Directive to file the above mentioned information (a and b) with the home competent authority (Articles 8.1 and 5.4 of the Directive).

The Directive does not specifically require that the above information is filed with all the host competent authorities.

Notwithstanding the above, the host authorities would expect to receive the said information from the issuer and the home competent authority will inform the issuer during the approval process or generally by any other means of that fact.

- c) Should the issuer notify/file with the host competent authorities the means of publication of the prospectus chosen by the issuer?**

A) The Directive does not require the issuer to inform the host authorities of the means of publication it has chosen.

The competent authority of Germany is of the opinion that the legislation in relation to the notice of the host Member State also applies to prospectuses approved and passported by competent authorities from other Member States.

2. Notice	<i>July 2006</i>
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Q) Can a host Member State require the issuer to publish a notice in its jurisdiction in relation to a prospectus that has been passported into its jurisdiction?

A) No. A Member State might require in its national legislation that issuers have to publish a notice stating how the prospectus has been made available and where it can be obtained by the public (Article 14.3 of the Directive). If a Member State has made use of this option, the obligation will apply to the public offers or admissions to trading where its competent authority has acted in its capacity of home competent authority.

The competent authorities of Austria and Germany consider that the legislation in relation to the notice of the host Member State also applies to prospectuses approved and passported by competent authorities from other Member States.

¹ Article 8.1 of the Directive allows issuers to omit in the prospectus the final offer price and amount of the securities where they cannot be included in the prospectus. The final offer price and amount of securities shall be filed with the home competent authority and published in accordance with the arrangements provided for in Article 14.2.

² If the final terms of the offer are not included in either the base prospectus or a supplement, the final terms shall be provided to investors and filed with the competent authority when each public offer is made as soon as practicable and if possible in advance of the beginning of the offer. The provisions of Article 8.1 a) shall be applicable in any such case.

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

3. Publication of a prospectus in the host Member states

February 2007

Q) Is the host competent authority entitled to intervene in the publication of the prospectus?

A) CESR considers that if the issuer complies with the publication requirements set out in Article 14.2 of the Prospectus Directive, the host authority is not entitled to intervene in the publication of the prospectus.

Article 14 of the Directive sets a list of means of publication of the prospectus all of which are valid for all the investors across the EU (in the home member state and in the host member states).

Article 30 of the Regulation sets a specific rule for publication in newspapers, meaning that the specific needs of investors in the host member states have to be taken into account. According to the second paragraph of this Article, the home competent authority shall determine a newspaper whose circulation is deemed appropriate if it is of the opinion that the newspaper chosen by the issuer does not comply with the requirements of paragraph 1 in relation to the circulation of the newspaper. In particular, CESR considers that in such a case, the home competent authority might require the publication of the prospectus (or any translations thereof) in a newspaper of the host member state.

Finally, the home competent authority has to publish on its website either all the prospectuses approved or, at least, the list of prospectus approved. In the latter case, if applicable, it would include a hyperlink to the website of the issuer or of the regulated market where the prospectus has been published. In addition, article 32 of the Regulation requires the home competent authority to mention in the list how the prospectuses have been made available and where they can be obtained.

4. Prospectuses published on the Competent Authority's website - disclaimer *February 2007*

Q) In case that the competent authority decides to publish on its website all the prospectuses approved, is it obliged to take measures to avoid targeting residents in Member States or third countries where the offer of securities to the public does not take place, for example insertion of a disclaimer³?

A) CESR considers that in the case described the competent authority is not making a public offer and therefore it does not need to post any disclaimer.

5. Employee share option schemes

July 2006

Q) Are non-transferable options covered by the Prospectus Directive? Even if they are not, would the exercise of those options constitute an offer of the underlying shares?

A) CESR Members agreed that non-transferable options granted to employees do not fall under the Prospectus Directive as the Directive only applies to transferable securities (Article 2.1 a)).

³ Please note that according to article 29.2 of the Regulation 809/2004 the issuers, financial intermediaries and regulated markets must take measures such as the insertion of the above disclaimer in order to avoid targeting residents in Member States or third countries where the offer of securities to the public does not take place, if the prospectus is made available on their websites.

Concerning the exercise of non-transferable options in relation to employee share schemes, at the time of the conversion or exercise there is no public offer within the meaning of Article 2.1 d) of the Prospectus Directive since it is just the execution of a previous offer.

The competent authority of Germany considers it is possible to structure non-transferable options granted to employees in a way that they do not fall under the Prospectus Directive. However, this does not mean that there is no public offer within the meaning of Article 2.1 d) of the Prospectus Directive with respect to the securities granted by these options. It rather depends on the circumstances of the case at what time the public offer of the securities granted by these options starts.

The competent authority of Italy does not agree with the opinion expressed in the first two paragraphs of this item. It considers that such transactions (the offer of non-transferable options and the exercise of such options) should be assessed as part of a single financial operation. When the offer of non-transferable share options is launched there is a simultaneous announcement of an offering (whose execution will be deferred) of the shares which the person entitled will acquire when the options are exercised. Such shares are in fact, securities which are freely transferable and fall within the scope of the Directive. Therefore, where this type of offer reflects the requirements provided for by Article 4.1 e), a document containing the relevant information on the securities offered and the details of the offer must be provided. Otherwise a prospectus should be submitted for the approval of the competent authority.

The competent authority of Poland considers that such transactions (the offer of non-transferable options and the exercise of such options) should be assessed as part of a single financial operation. When the offer of non-transferable share options is launched there is a simultaneous announcement of an offering (whose execution will be deferred) of the shares which the person entitled will acquire when the options are exercised. Therefore, where this type of offer reflects the requirements provided for by Article 4.1 e), a document containing the relevant information on the securities offered and the details of the offer must be provided. Otherwise a prospectus should be submitted for the approval of the competent authority.

6. Free offers

July 2006

Q) Can free offers be considered outside the definition of public offer (for example options granted to employees for no consideration)? If they fall under the definition, could it be considered that they have a total consideration of zero and, therefore, fall outside the scope of the Prospectus Directive? (see Article 1.2 h) offers where the total consideration is less than 2.500.000 EUR).

A) CESR considers that where securities are generally allotted free of charge no prospectus should be required and has sought the views of the Commission Services on the correct legal basis for this conclusion. The views of the Commission Services are included in the following three paragraphs:

In the case of allocations of securities (almost invariably free of charge) where there is no element of choice on the part of the recipient, including no right to repudiate the allocation, there is no "offer of securities to the public" within the meaning of Article 2.1 d) PD. This is because the definition refers to a communication containing sufficient information "to enable an investor to decide to" purchase or subscribe for the securities. Where no decision is made by the recipient of the securities, there is no offer for the purposes of the Directive. Such allocations will therefore fall outside the scope of PD.

Offers of free shares, where the recipient decides whether to accept the offer, are properly regarded as an offer for zero consideration. As such, they would fall within the excluded offers under Article 1.2 h), but are also subject to the exemption for offers of less than 100.000 EUR so no prospectus can be required.

This analysis does not prevent competent authorities from assessing whether an offer presented as an offer of free shares in fact disguises a "hidden" consideration. However, the Commission Services take the view that in most cases where free shares are offered in the context of an employee share scheme, where shares are not offered in lieu of remuneration that the employee would otherwise receive, it would be incorrect to find "hidden" consideration in the employment relationship, for example by

claiming that the employees would have a higher salary if an equity participation scheme were not available to them. Such reasoning would be speculative, and the "hidden" consideration difficult to prove, let alone quantify. However, if the shares are expressly offered in the place of quantifiable financial benefits in another form, then it might be appropriate to identify consideration to the value of the benefits that the employee would otherwise have been entitled to receive.

7. Languages of the documents incorporated by reference⁴

July 2006

Q) Is it possible to incorporate by reference the translation of a document that has been approved or filed with the competent authority in a different language? For instance, a Spanish issuer has drawn up its prospectus in English, can it have its annual report translated into English and incorporate it by reference into the prospectus?

A) The translation of a document may be incorporated by reference as long as it complies with Article 11 and 19 of the Directive.

8. Order of the information in the prospectus

July 2006

Q) Articles 25 and 26 of the Prospectus Regulation provide that the elements of a prospectus shall be structured in the following order 1) a table of contents, 2) the summary, 3) the risk factors and 4) the other information items included in the schedules and building blocks according to which the prospectus is drawn up. Would be possible to have certain items not following this order?

For example, issuers are asking whether the responsibility statement could be inserted before the table of contents; whether the section "general description of the programme" could be inserted between the table of contents and the summary or whether disclaimers may be inserted before the table of contents.

Also the question arises in relation to issuers that are using their annual report as registration document. The annual report as approved by the shareholders does not necessarily follow the order prescribed by these Articles.

A) The order prescribed by Articles 25 and 26 is mandatory. This does not mean that the issuer may not include a cover note which has general information about the issuer before the items prescribed in Articles 25 and 26 are stated in the prospectus.

9. Prospectus composed of separate documents: duplication of information

February 2007

Q) Can cross-references be made between the different documents which compose a prospectus (registration document and securities note), even if these documents are published separately, when there is duplication of information⁵?

A) Theoretically, duplication between information in the securities note and information in the registration document shouldn't happen as the Commissions Regulation clearly separates the information that has to be provided in each of these documents so there are no duplicated items. However, if this duplication occurs, a cross-reference list can be provided.

⁴ Article 28.8 of the Regulation provides that the documents containing information that may be incorporated by reference in a prospectus shall be drawn up following the provisions of article 19 of the Directive (use of languages).

⁵ Recital 4 of the Regulation: "Care should be taken that, in those cases where a prospectus is composed of separate documents, duplication of information is avoided".

10. Risk factors section

July 2006

Q) Is it possible to omit the risk factors section from the prospectus on the basis of Article 23.4 of the Prospectus Regulation?

A) *No, the prospectus must always include a description of the risk factors.*

11. Notification which third country issuers are required to make under Article 30.1 of the Directive

July 2006

Q) This provision applies to third country issuers who already have securities admitted to trading on a regulated market as at 1st July 2005. Such issuers are required to choose their home Member State in accordance with Article 2.1 m) (iii) of the Prospectus Directive, and to notify the CA of that chosen State by 31st December 2005.

One of the questions that market participants have raised is what are the consequences if a third country issuer who falls within Article 30.1 fails to make the required notification. The most important practical question is how the home MS is then assigned to that issuer. The Directive is entirely silent on this point, both as to the possible penalties for a failure to notify (enforcement being a matter for Member States) and as to what happens when such an issuer subsequently needs to deal with a home CA - for example, to make a filing under Article 10 of the Directive, or when it wishes to offer or admit to trading equity securities or low denomination debt at some point in the future.

A) *If the third country issuer that hasn't chosen its competent authority by 31st December 2005 fulfils the following two conditions:*

- *it has not made any public offer after the Prospectus Directive entered into force, and*
 - *it has its securities admitted to trading only in a regulated market from one Member State,*
- then the competent authority of that Member State will automatically be its home CA.*

If a third country issuer that has not notified its choice of home MS to the competent authority by 31st December has either:

- *securities admitted to trading on regulated markets in more than one MS; or*
- *securities admitted to trading on a regulated market in only one MS, but has made an offer to the public which is capable of determining its home MS between the date when the PD entered into force and 31st December 2005, then that issuer should notify its choice to the chosen CA. That CA will accept and give effect to a notification made after the deadline set out in Article 30.1 of the Directive provided that the choice would have been valid if made in time. This does not affect any penalty to which the issuer might be subject as a result of that late notification. It was also accepted that, in case where an issuer had not notified a choice of home Member State before 31st December in accordance with Article 30.1 but subsequently made a filing under Article 10.1 with a particular competent authority, that filing would be treated as notification of the choice of home MS.*

12. Nearly equivalence of Euro 1.000 (Article 2.1m)(ii) of the Directive)

July 2006

Q) When determining the home CA, the figure 1.000 euros is a key element. CESR Members discussed how the second sentence of Article 2.1m)(ii) of the Directive, in particular the term "nearly equivalent to EUR 1.000", is applied in practice to cases where the securities are denominated in a currency other than euro.

A) *The decision regarding which CA should approve the prospectus on the basis of the denomination of the non equity securities according to Article 2.1 m)(ii) of the Directive should be made at the time of the submission of the draft prospectus. At that time, "nearly equivalent" doesn't mean exactly 1.000 euros.*

Q1) The 1st paragraph of item 20.1 requires issuers to disclose audited historical financial information covering the latest 3 financial years and the audit report in respect of each year. If historical information has not been restated and the issuer decides to present the historical financial information for the last 3 years in a columnar format and an accountants report is provided for the purposes of the prospectus, would this meet the requirements of the Regulation?

A) The issuer has the right to choose the format of the historical financial information as far as the minimum information required by item 20.1 is included.

Q2) If the statutory financial information has been reviewed by a competent authority and the competent authority has requested additional disclosures or even a restatement of the accounts, how should this additional information be included in the prospectus? Should an audit report be requested on the new information?

A) It is necessary to distinguish between:

- *A restatement made by the issuer according to item 20.1 of the Annex: in this case, CESR's recommendations for the consistent implementation of EC Regulation 809/2004 (CESR/05-054b) apply.*
- *A restatement made by the issuer following an enforcement procedure: in this case, the restated information should be included along with the original accounts, except if the original accounts are officially corrected. The restated information doesn't necessarily have to be audited as this would depend on the circumstances of the case.*

Q3) How should last paragraph of item 20.1 be applied? Should this statement/ declaration by the auditor be given for all prospectuses even if historical financial information has been incorporated by reference? What is the difference of this statement and that required by item 20.4.1 of Annex I?

A) The audit report may be incorporated by reference. Last paragraph of item 20.1 of Annex I contains a requirement on the historical financial information whilst item 20.4.1 of Annex I requires the issuer to make a statement in the prospectus.

14. Item 20.1 Annex I of the Regulation: historical financial information of issuers that have been operating in its current sphere of economic activity for less than one year

February 2007

Qa) How should the expression "that period" included in the third paragraph of item 20.1 of Annex I be interpreted?

A) According to section 20.1 third paragraph of Annex I, an issuer which has been operating in its current sphere of economic activity for less than one year has to prepare audited historical financial information in accordance with the standards applicable to annual financial statements for the issuer covering that period.

To answer this question CESR analyzed the case of an issuer that started up its operations in 1 November 2005 and prepared audited historical financial information as of 31 December 2005 (as required by national accounting legislation). In June 2006 the issuer produces a prospectus.

Theoretically it would be possible to understand the expression "that period" (which is less than one year) included in the third paragraph of item 20.1 of Annex I in two ways:

1. *From the date of incorporation of the issuer (or the date where it started its operations in its current sphere of economic activity, if different from the date of incorporation) until the end of the financial year chosen by the issuer according to its national accounting legislation. In the example of question a), the financial year of the issuer is from January to December, so the period referred to in paragraph 3 of item 20.1 would be two months: from 1 November 2005 until 31 December 2005.*

2. *From the date of incorporation of the issuer (or the date where it started its operations in its current sphere of economic activity, if different from the date of incorporation) until the most practicable date before the publication of the prospectus. This means that the historical financial information should be prepared by the issuer just for the purposes of the prospectus and the period it would cover would not be consistent with the future reports produced according to the accounting legislation. For example, in the case described the period could be from 1 November 2005 until 31 March 2006.*

As regards interim financial information, in the example described above, the issuer would not be obliged by the Prospectus Regulation to include it:

- i) as it would not have elapsed more than 9 months since the end of the last audited financial year until the date of the prospectus or the registration document (item 20.6.2 of Annex I of the Regulation);*
- ii) as the issuer would not have published yet the half-yearly financial report, the draft prospectus being submitted for approval in June (item 20.6.1 of Annex I of the Regulation).*

Concerning quarterly information, the issuer would have published the interim management statement for the first quarter if allowed or required by national legislation (Article 6.2 of the Transparency Directive).

Interpretation 1 has the advantage of keeping consistency between the historical financial information required by the accounting and the prospectus rules whilst interpretation 2 would oblige the issuer to produce financial statements just for the purposes of the prospectus and having a closing date that would not be consistent with future reports or with those from other companies.

CESR considers that when the issuer has already published the historical financial information required by national legislation, this should be normally the only one required to comply with item 20.1, third paragraph, of Annex I of the Prospectus Regulation (interpretation 1 above). CESR considers that inclusion of the historical financial information required by national legislation together with requirements under item 20.9 of Annex I⁶ and the recommendations published for start-up companies by CESR (see paragraphs 135 to 139 of CESR/05-054b) will normally provide investors with the relevant information in the prospectus and enable issuers to comply with Article 5.1 of the Prospectus Directive. This treatment would be the most appropriate to the example described above.

However, CESR thinks that in exceptional circumstances (such as the absence of interim financial information in the prospectus combined with a significant amount of months elapsed since the end of the last audited financial statements) interpretation 2 would be more appropriate to comply with Article 5.1 of the Prospectus Directive.

Qb) Further, if an issuer being incorporated in January 2006 produces a prospectus in June 2006 (no 1) and a new prospectus in November 2006 (no 2), should audited historical financial information be prepared both for the period from January to the most recent practicable date before publication of prospectus no 1 and for an additional period in connection with prospectus no 2?

A) In this example the issuer has not yet produced financial statements according to its national accounting legislation. Therefore, the prospectus number 1 should include audited financial statements for the current period (from the date of incorporation to the most recent practicable date before publication of the prospectus) prepared for the purpose of the prospectus according to item 20.1 of Annex I of the Prospectus Regulation (interpretation 2 to the previous question).

Regarding the second prospectus, CESR considers that the audited historical financial information produced for the first prospectus (together with the half yearly report that the issuer will have published by the end of August) would be sufficient under normal circumstances.

⁶ *Significant change in the issuer's financial or trading position*

A description of any significant change in the financial or trading position of the group which has occurred since the end of the last financial period for which either the audited financial information or the interim financial information have been published, or provide an appropriate negative statement.

Qc) Does this requirement apply in all cases where the issuing entity has been operating in its current sphere of economic activity for less than one year, i.e. also in cases where the issuer is a newly incorporated holding company inserted over an established business? Or is the requirement applicable only if the business considered as a whole has less than one year of history?

A) Item 20.1, first paragraph, of the Prospectus Regulation applies where the issuer has been operating in its current sphere of economic activity for one year or more.

Item 20.1, third paragraph, of the Prospectus Regulation applies where the issuer has been operating in its current sphere of economic activity for less than one year.

The information that has to be provided in these two cases applies to the legal group of the issuer.

Additionally, when the entire business undertaking at the time of the prospectus is not accurately represented in the historical financial information required under item 20.1, then the issuer will have to assess whether pro-forma information or complex financial histories information (once the adopted amendment of the Regulation on this last area becomes effective) is needed.

15. Application of the different schedules of the Regulation	<i>July 2006</i>
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Q) Which schedule should be applicable to public offers of securities named “real estate certificates”, being debt securities that give right to the income, proceeds and realisation value of one or more real estate properties that are identified at the time of the public offer? At the moment of the public offer, no mortgage is granted on the real properties in favour of the holders of the real estate certificates, but a mandate to take a mortgage in their favour is, in some cases, given to a third party:

- Can these debt securities be defined as ABS? This question implies an interpretation of the words "are secured by assets", laid down in Article 2.5 b) of the Commission Regulation: are securities secured by assets if an underlying asset that generates proceeds exists or is it necessary to have a legal guarantee/security on the underlying asset (like a mortgage (or a mandate to take a mortgage?) or a pledge).
- If these debt securities cannot be defined as ABS, would it nevertheless be acceptable to apply the schedules/building blocks applicable to ABS, interpreted in function of, or adapted to, the deviating characteristics of real estate certificates.

A) Where the security to which the prospectus refers is not the same but comparable to the various types of securities mentioned in the table of combinations set out in Annex XVIII of the Commission Regulation, the issuer shall add the relevant information items from another securities note schedule, taking into account the relevant characteristics of the securities being offered (Article 23.2 of the Commission Regulation).

16. Supplement of a prospectus: interim financial information	<i>July 2006</i>
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Q) Is the publication of interim financial statements considered as a significant new factor that requires the publication of a supplement in accordance with Article 16 of the Directive?

A) There is no systematic requirement to supplement the prospectus when interim financial statements are produced. This will depend on the circumstances of the case, in particular the relevance of the information included in the interim financial statements (such as any significant deviation in relation to previous financial information) or the type of securities to which the prospectus refers. In case of doubt CESR Members recommend issuers to produce the supplement.

17. Supplement to the prospectus: profit forecast

February 2007

Q) Is the publication of a profit forecast before the final closing of the offer, a significant new factor that requires the publication of a supplement in accordance with Article 16, given that, under the Regulation, the insertion of a profit forecast in a prospectus is optional?

A) Paragraph 44 of CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses n° 809/2004 states:

“CESR considers that there is a presumption that an outstanding forecast made other than in a previous prospectus will be material in the case of shares issues (especially in the context of an IPO). This is not necessarily the presumption in case of non-equity securities”.

Although it is up to the issuer to decide when a supplement is needed, according to that statement, there would be a presumption in the case described in the CESR's recommendations that the publication of a profit forecast before the final closing of the offer would constitute material information. Therefore, in such a case a supplement should be prepared including the profit forecast and complying with item 13 of Annex I of the Regulation.

18. Non relevant information in relation to a published prospectus that doesn't trigger the obligation to publish a supplement

July 2006

Q) CESR Members considered how to deal with information that arises after the publication of the prospectus which is not significant in the Prospectus Directive meaning (is not capable of affecting significantly the assessment of the securities and therefore do not requires a supplement), but could be useful for investors.

A) The PD states that the text and the format of the prospectus, and/or the supplements to the prospectus, published or made available to the public, shall at all times be identical to the original version approved by the home CA (Art. 14.6). Moreover, according to Article 16.1, every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities shall be published through a supplement to the prospectus. There are cases when the information is not significant in the PD meaning, however could be useful for investors. For example, where the prospectus contains mistakes or inaccuracies which are not material.

As prescribed by Article 14, the prospectus approved by the competent authority can not be subsequently modified (apart from the supplement procedure). However, in case the prospectus contains a mistake or inaccuracy that is not material or significant pursuant to Article 16 of the Directive, the issuer should be entitled to make an announcement to the market explaining the mistake or inaccuracy.

The above comments are without prejudice to the obligations imposed to issuers having their securities admitted to trading on a regulated market by other Directives, in particular Directive 2003/6/EC on Market Abuse.

The competent authority of Poland considers that also in case of new factors that refer only to the organisation of the subscription or admission to trading of the securities, that are not material or significant pursuant to Article 16 of the Directive, the issuer is entitled to make an announcement to the market explaining that new factor.

19. Interim financial information included in the prospectus

July 2006

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

A) *Two different situations can be envisaged:*

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

b) *An issuer files a prospectus on October 30th. The issuer has published information on the third quarter and half-yearly financial information (30 June): In that case the latest interim financial information is not sufficient and the issuer should include in its prospectus both quarterly (Q3) and half-yearly financial information provided that there is no duplication of information.*

20. Profit forecasts

July 2006

Q) The combination of paragraph 13.1 of Annex I and paragraph 44 of the CESR’s Recommendations for the consistent application of EC Regulation (CESR/05-054b) means that equity issuers are always required to include any outstanding forecast on the record in a prospectus and report on it or disclaim such forecast in accordance with paragraph 13.4 on Annex I.

CESR Members discussed whether there could ever be circumstances where this approach was not followed so that an issuer of shares was not required to reproduce an outstanding forecast in a prospectus or disclaim such forecast (for example, because a Stock Exchange required such forecasts to be published).

A) *Paragraphs 43 and 44 of CESR’s Recommendations (CESR/05-054b) state that there is a presumption that an outstanding forecast made in another document than in a previous prospectus will be material in the case of share issues.*

When the rules applicable to the issuer require the publication of profit forecasts, CESR Members consider that they will be open to discuss the interpretation of paragraphs 43 and 44 of CESR’s Recommendations on a case by case basis.

21. Way of calculation of the limit in Article 1.2 h) of the Directive.

July 2006

Q) The limit of 2.500.000 EUR set in Article 1.2 h) of the Directive; should the total consideration of the offer be calculated on EEA-wide basis or country by country basis?

A) *The Commission Services consider that the limit should be calculated on EEA-wide basis.*

22. Convertible or exchangeable securities.

July 2006

Q) CESR Members discussed the correct interpretation of the exemption under Article 4.2 g) of the Directive. Under this rule it would appear that an issuer who issues a convertible security, which is not admitted to a regulated market, could admit the underlying securities without producing a prospectus for either the convertible or the shares (even if they represent more than 10% of the number of shares



of the same class already admitted to trading on the same regulated market). Potentially, this means that any issuer could structure a transaction in such a way that a prospectus would never be required for a further issue of shares simply by the interposition of an artificial convertible security. This seems to sit uncomfortably with Article 4.2 a) and in effect potentially could result in this rule being redundant.

For the case described in the previous paragraph to happen all the following conditions should be met:

- Offer of the convertible/exchangeable securities without a prospectus
- Subsequently not admitted to a regulated market: without prospectus
- Admission of more than 10% of the shares without prospectus

The possibility that more than 10% of the capital of the issuer is admitted without a prospectus is theoretically also accepted by the Directive under other exemptions of Article 4.2 such as shares free of charge (4.2 e) or shares allotted to employees (4.2 f).

A) CESR Members agreed that no restrictions should be applied to Article 4.2 g) in the case described above. However, they intend to monitor the market developments relying on the national regulations and laws in order to avoid any circumvention of the Directive. If an issuer should abuse this exemption, then competent authorities are free to take enforcement actions, were appropriate, or cancel the transactions.

23. Exemption provided for in article 4.2 g)

February 2007

Q) Does the exemption provided for in article 4.2 g) of the Directive⁷ includes cases where non-transferable securities are converted into shares?

A) CESR considers that the exemption in article 4.2 g) of the Directive does not apply to cases of non-transferable securities converted into shares. The Prospectus Directive specifically defines “securities” as “transferable securities” and does not give room to consider that article 4.2 g) applies to the conversion of non-transferable securities (especially taking into consideration that this relates to an exemption of publishing a prospectus).

24. Quality of translations of passported prospectuses

February 2007

There is no provision in the Prospectus Directive dealing with the quality of the translation of a prospectus. Therefore, the following practical aspects have to be tackled:

Qa) Should the quality of the translations be left entirely to the responsibility of the issuer?

A) Yes. CESR considers that the person responsible for the prospectus is also responsible for any translation of the approved prospectus.

Qb) Notwithstanding last sentence of Article 17.1 of the Prospectus Directive, would it be possible or desirable that host competent authority scrutinises the quality of the translation of a prospectus to its own language?

A) No.

⁷ According to Article 4.2 g) of the PD the obligation to publish a prospectus shall not apply to trading on a regulated market of “shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market.”

Qc) If the host authority decided to undertake that task voluntarily, would it mean that the offer cannot proceed until the translation has been accepted or checked by the host competent authority?

A) No, the passport process may not be stopped. However, if the host competent authority finds that a translation is not accurate, it could refer its findings to the competent authority of the home member state as envisaged in article 23 of the Directive (precautionary measures).

CESR recommends issuers to insert in any translation of a prospectus a statement that clarifies that the document is a translation of the approved prospectus made under the sole responsibility of the person responsible for the approved prospectus.

25. Updating of the prospectus

February 2007

Q) What are the updating obligations of a prospectus? Is the issuer entitled to use its prospectus drawn up as a single document to make several offers?

A) CESR discussed the updating of a prospectus different than a base prospectus, distinguishing between a prospectus drawn up as a single document and prospectus consisting of separate documents.

- *Article 9.1: a prospectus drawn up as a single document has to be updated through a supplement if any of the situations described under article 16 arises or is noted before the final closing of the offer.*
- *Article 9.4: a prospectus consisting of separate documents. The registration document is updated through the securities note published each time the issuer wishes to offer securities.*

The following example illustrates CESR's position. In October 2005 the issuer had a prospectus drawn up as a single document approved in order to make a public offer of securities at that time. Subsequently, in June 2006 it decides to make another offer of securities. For this new offer, the issuer would have to produce a new prospectus in June 2006. This could be done by producing a prospectus to which the information related to the issuer included in the October 2005 prospectus could be incorporated by reference. Any necessary updates of the information related to the issuer should be included in the prospectus produced in June 2006.

Issuers having an outstanding prospectus published as a single document and wishing to make a subsequent offer without the need to publish a new prospectus have to consider whether the published prospectus contains the information required by the Regulation in relation to the second offer. In particular, if the terms and conditions disclosed in the published prospectus under item 5 of Annex III of the Regulation change for the new offer, this seems to imply that that prospectus may not be used for the second offer as it does not contain the relevant information for investors.

Article 16 of the Directive envisages the update of a prospectus in case of a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public.

According to Article 16, the supplement doesn't seem to be the appropriate way to convey the information on the new offer to investors. The supplement may only be published in respect of an offer whose offering period is open, which is not the case for the second offer whose offering period has not commenced yet.

Notwithstanding, even if the issuer has to publish a new prospectus for the second offer, incorporation by reference of all the information in the previous prospectus (except the details on the offer) will ease this process.

26. Precautionary measures (Article 23 Prospectus Directive)

February 2007

Q) Do the irregularities and breaches referred to in article 23 of the Directive⁸ relate to obligations under the Prospectus Directive (as implemented into the national legislation of the host member state) or do they refer to any other legislation or regulation of the host?

A) CESR agreed that as the Prospectus Directive only harmonises the aspects included in it, the irregularities and breaches mentioned in article 23 refer only to obligations under the Prospectus Directive as transposed into the host national legislation.

27. Offering programmes

February 2007

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

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

28. Validity of prospectuses under Article 9.3 of the Prospectus Directive

February 2007

Q) Can under Article 9.3 a prospectus be valid for more than 12 months if the securities concerned are issued in a continuous or repeated manner during a period longer than 12 months?

A) Yes the prospectus will be valid until the securities concerned are no longer issued in a continuous or repeated manner. Issuers should bear in mind that in these cases the updating requirements in the Directive apply during the whole period of the validity of the prospectus.

29. Scope of Article 1.2 j) of the Prospectus Directive

February 2007

Q) Do redeemable debt securities - cases where the issuer has the right to redeem the security before maturity⁹ - fall under the scope of Article 1.2 j) of the Directive?

A) CESR considers that Article 1.2 j) of the Prospectus Directive includes offers of redeemable debt securities (as defined above) whose total consideration is less than EUR 50.000.000 issued by credit institutions and whose characteristics comply with other conditions provided by this article.

CESR's view is that the reference to a derivative instrument in the last subparagraph of letter j) of article 1.2 refers only to a derivative component that affects the right of the investor and not to the coverage of the issuer. Therefore, the fact that in this type of securities the issuer enters into a derivative contract in order to cover its risk does not exclude them from the scope of article 1.2 j).

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

February 2007

Qa) Which is the annex applicable to Depository Receipts over shares?

A) Article 13 of the Prospectus Regulation expressly states that Annex X is applicable for Depository Receipts over shares. For the determination of the applicable annex there is no need to determine whether said Depository Receipts are equity or non-equity securities.

⁸ According to article 23 of the Directive the host competent authority is to refer to the home CA any findings on "irregularities" or "breaches of the obligations attaching to the issuer by reason of the fact that the securities are admitted to trading on a regulated market".

⁹ In this type of securities the issuer normally enters into a derivative contract in order to cover its risk.

Qb) How should the home Member State be determined in the following situation: a company with its registered office in Germany is issuing shares which will be the underlying of the Depository Receipts and offers them to a Trust. The Trust has its registered office in another Member State than Germany and will issue and offer the Depository Receipts.

A) The rules for determining the Home Member State set in article 2.1 m) of the Prospectus Directive should apply to this situation. For the specific case of Depository Receipts, the following aspects should be taken into account:

- According to recital 12 of the Prospectus Directive, Depository Receipts “fall within the definition of non-equity securities set out in this Directive”.*
- The “issuer” is the issuer of the Depository Receipts (in the abovementioned case, the trust) and not the issuer of the underlying shares.¹⁰*

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

31. Total consideration in warrants	<i>February 2007</i>
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Q) In cases of offers of warrants (and other derivative securities) how should ‘total consideration’ be calculated in respect to the EUR 50.000 (article 3.2 c)) and EUR 2.500.000 (article 1.2 h)) limits? Should only the consideration for the warrants (if any) be counted, or should the strike price for the underlying securities be added?

A) Total consideration relates only to the consideration for the warrants, and not to the strike price for the underlying securities.

32. Inclusion of a summary in the prospectus on a voluntary basis	<i>February 2007</i>
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Q) Although for prospectuses that relate to the admission to trading on a regulated market of non-equity securities having a denomination of at least EUR 50.000 there is no requirement to provide a summary, can an issuer provide such a summary on a voluntary basis? If yes, should such a summary be vetted as a summary in a normal prospectus?

A) The issuer can include voluntary information in the prospectus. This voluntary information must comply with the Prospectus Directive and Regulation and, in particular, it must be vetted in the same way as the rest of the prospectus.

If the issuer wants to name this voluntary information as “summary” (as referred to under the Prospectus Directive), it will have to comply with the specific provisions of the Prospectus Directive and Regulation that deal with the summary.

¹⁰ Although the issuer of the underlying shares is the person responsible for the continuing obligations under the Transparency Directive (Article 2.1 d of the TD).

33. Rights issue: communication by a custodian to its clients in one member state about pre-emption rights in relation to a public offer of new shares taking place in another EEA member state
February 2007

Q) Is the communication made by a custodian to its clients (normally under its contractual duty to inform them) in respect of a rights issue in another EEA member state (where a prospectus has been approved) in itself an "offer of securities to the public" and therefore would not be permitted unless a passport had been obtained in order to make public offers into the EEA member state of the clients of the custodian?

A) *The minutes of the 4th Informal Meeting on the Transposition of the Prospectus Directive deal with this issue including the following:*

"The group discussed whether it constitutes an offer of securities to the public, within the meaning of the Directive, where a custodian bank informs shareholders in one Member State about pre-emption rights in relation to a public offer of new shares taking place in another Member State (which would almost certainly trigger the obligation to publish a prospectus in this latter Member State). The Commission did not take a definite view on this question but indicated that it might issue further guidance after having consulted its Legal Service. However, the Commission recognised that the Directive should not operate as an instrument to limit cross-border share ownership, or effectively to restrict shareholders' ability to exercise pre-emption rights; but noted that where a prospectus is published in connection with an offer of securities in one Member State, it may be used to offer those securities in any other Member State (subject only to a translation of the summary if that is required by the CA of the host State)."

CESR agrees with the Commission that the Directive should not be interpreted in a way that limits cross-border share ownership or restricts the ability of custodians to comply with their contractual duties.

CESR considers that a communication of a custodian bank informing its clients in one Member State about their pre-emption rights in relation to a public offer of new shares taking place in another Member State or in a third country does not mean that the custodian is making a public offer in the former Member State.

Such a communication would constitute a public offer by the custodian only if it meets the following two conditions:

- *It provides to the shareholders with the terms of the offer and the shares that would enable them to decide to subscribe the shares **and***
- *It acts on behalf of the offeror or issuer when making such a communication.*