



THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref: CESR/03-208

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

**July 2003**



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According to the Provisional Mandates published on March 21, 2002 and February 7, 2003, CESR presents here its final advice to the European Commission on those issues for which the initial deadline of 31 March 2003 had been fixed<sup>1</sup>.

The efforts of all parties involved in this work have been exemplary. In particular, CESR Members who participated in the deliberations of the Expert Group have shown great commitment in forging consensus. Similarly, the contribution at each stage of the consultation process of market participants and other interested parties, has been valuable in reaching common solutions.

I believe this work represents a finalized high quality outcome in response to the mandate received. Despite the fact that some regulatory differences may still persist in the various jurisdictions, CESR has sought in its advice to assemble all indispensable elements for an efficient European regulatory framework on the areas covered, and to achieve harmonization.

## INTRODUCTION

1. On October 1, 2002, CESR initiated a consultation process on its proposed advice to the European Commission regarding technical implementing measures for the directive on the "*Prospectus to be published when securities are offered to the public or admitted to trading*" ("*Prospectus Directive*"). Following a number of stages the first part of the advice is now in its final form. The introductory section explains the process which CESR has followed in arriving at its final advice.

### Background

2. On 27 March 2002, the Commission published its *Provisional request for Technical Advice on Possible Implementing Measures on the Future Directive on the prospectus to be published when securities are offered to the public or admitted to trading* (the "*Provisional Request*"). The Commission asked CESR to deliver its technical advice by 31 March 2003.
3. CESR published a Call for Evidence on 27 March 2002, (Ref: CESR 02-048) inviting all interested parties to submit views by 17 May 2002 on what CESR should consider in its advice to the Commission. CESR received around five submissions. The issues covered by these submissions were taken into account in the preparation of the consultation document.
4. CESR's Expert Group on Prospectuses, chaired by Pr. Fernando Teixeira dos Santos, Chairman of the Portuguese Securities Commission and supported by Ms Silvia Ulissi and Mr Javier Ruiz of the CESR Secretariat, has been responsible for the drafting of the consultation paper and the development of the technical advice in response to consultation.

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<sup>1</sup> With a letter dated March 31<sup>st</sup>, 2003, the DG Internal Market of the EU Commission granted CESR an extension of the above mentioned deadline until July 31<sup>st</sup>, 2003, in order to take into account the evolution of the second reading in Parliament.



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. The members of the Group are the following: Ann Fitzgerald, Wolfgang Gerhardt, Daniel Hurstel, Pierre Lebeau, Lars Milberg, Victor Pisante, Regis Ramseyer, Kaarina Stalberg, Torkild Varran, Stefano Vincenzi, Jaap Winter. The Expert Group has met the CWG three times and several members of CWG have sent written contributions.
6. Following publication of its consultation paper on October 2002, CESR gave market participants and other interested parties a deadline of 31 December 2002. To facilitate the consultation process, CESR held an open meeting on 26 November 2002 in Paris at the CESR premises. Over 50 people attended the meeting. In addition a number of bilateral meetings were held with individual industry representatives to discuss specific aspects of the proposals.
7. Over ninety responses were received, some of them after the closing date. The responses came from a wide range of market participants with a large number of banks. Regulated markets and exchanges as well as asset managers and accountancy firms also responded to the consultation paper.
8. Since the first consultation paper did not deal with all the issues raised in the Provisional Request, CESR published on December 2002 an "Addendum to the Consultation Paper" (the "Addendum").
9. CESR gave market participants and other interested parties a deadline of 6 February 2003 to answer the additional consultation paper and held an open meeting on 24 January 2003 in Paris at the CESR premises. Over 50 persons attended the hearing.
10. Almost sixty responses to the Addendum have been received, some of them also after the closing date. A significant number of answers as for the first consultation paper have come from banks, both individual ones and associations.
11. All responses to the Consultation Papers which are public are on the CESR website.
12. The Expert Group carefully considered all comments received and, throughout the following months, worked on redrafting the consultation paper. Details on this process can be found in the Feedback Statement.
13. On 7 February 2003, the European Commission published an "*Additional Provisional Mandate to CESR for Technical Advice on Possible Implementing Measures concerning the future Directive on the Prospectus to be published when Securities are offered to the Public or Admitted to Trading*" (the "Additional Mandate"). This Additional Mandate, also in consideration of the amendments to the text of the Directive suggested by the Council, supplemented the first provisional mandate that remained valid for the areas which were not subject to change or were not revoked by the Additional Mandate.
14. The Additional Mandate set a new and different series of mandates and fixed four different deadlines for CESR's Technical Advice to the EU Commission: 31 March 2003, 31 July 2003, 30 September 2003 and December 2003.
15. On 7 February 2003, CESR published a Second Call for Evidence (Ref: CESR 03-038) inviting all interested parties to submit views by 31 March 2003. Twenty responses were received. These came both from European and national federations representing issuers and financial services providers, as well as regulated markets,



individual issuers and regulatory agencies. All responses which are public can be viewed on the CESR website.

16. On 31 March, 2003 the Commission informed CESR that, in consideration of the fact that the European Parliament had not started the second reading on the prospectus proposal and in order to allow CESR to take into account the work in the Parliament before finalising its work, the technical advice on issues initially required for 31 March, 2003 could be submitted by July 31, 2003.
17. CESR therefore held on 27 May an additional open hearing with market participants to discuss its proposed modifications to its original proposals in the October consultation paper and Addendum. Around 40 people attended the meeting. For this purpose, CESR had previously released the draft working papers of its final advice (document CESR/03-066b on 25 April and CESR/03-128 on 6 May). These redrafts took into account a significant number of comments received by respondents, where these appeared to CESR to raise valid regulatory concerns. Points which were not accepted, as well as the rationale for those which were accepted, were discussed in the preliminary feedback statements to the above mentioned draft working papers (respectively, CESR/03-067b and CESR/03-129)
18. Following this meeting, a number of further written contributions were submitted. This new consultation period on the draft technical advice closed on 16 June and 30 responses were received. All contributions which were public can be viewed on the CESR website. Final modifications were made to the revised advice as a result of this last consultation. A final feedback statement has been published (CESR/03-209) to supplement the original statements and explain any further changes which have occurred.

#### References

19. The Provisional Request asks that CESR's advice take into account, among other things, certain principles, resolutions and statements as follows:
  - the Commission Proposal (for a directive on prospectuses);
  - developments in the Council of the European Union and European Parliament regarding the Commission Proposal;
  - the principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001 (the "Stockholm Resolution"); and
  - the Parliament's resolution on the implementation of financial services legislation (5 February 2002) and the Commission's formal declaration in response.
20. Papers published by CESR in this area are:
  - *A European Passport for Issuers – A report for the European Commission* – January 2001 (Ref. FESCO/00-138b)
  - *A European Passport for Issuers: an additional submission to the European Commission* – August 2001 – (Ref. FESCO/01-045)
  - *Stabilisation and Allotment, a European Supervisory Approach* – April 2002 (Ref. CESR/02-020b)

## PART ONE - MINIMUM INFORMATION

### Extract from provisional request

21. According the above mentioned Provisional Requests, CESR is asked to “provide technical advice on possible disclosure requirements based on the basic structure and typical main features of different types of securities (“building block approach”) involving at least the following types of transferable securities:
- (1) Shares: shares in companies and other securities equivalent to shares in companies which are negotiable on a regulated market;
  - (2) Bonds: bonds and other forms of securitized debt which are negotiable on a regulated market;
  - (3) Any other securities normally dealt in giving the right to acquire transferable securities under (1) and (2) by subscription or exchange or giving rise to cash settlement, excluding instruments of payment.

*“This list may need to be amended as discussions evolve in Council and Parliament.*

*“The draft schedules should be structured respecting the new format of the prospectus (registration document, securities note and summary note).*

*“The draft schedules should be based on the information items required in the IOSCO Disclosure Standards for cross-border offering and initial listings (Part I) and the existing schedules of the Directive 80/390/EEC1. The elements concerning the financial information should be in line with the EU accounting strategy and international accounting and auditing standards.”*

According to the Additional Provisional Mandate, the deadlines for certain aspects of the previous mandate have been moved to either 31 July, 2003 (i.e. specific schedules for certain kinds of issuers or aimed at wholesale investors) or 30 September, 2003 (i.e.. schedules for derivative securities, format and content of base prospectus).

### Introduction

22. CESR has tried to keep as close as possible to the principles laid down in the Provisional request. Accordingly, its work has been organized on the basis of the following principles:
- (1) the draft schedules are based on the information items required in the IOSCO Disclosure Standards for cross-border offering and initial listings (Part I) and on the existing schedules of the Directive 80/390/EEC which has been replaced by Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities;
  - (2) the draft schedules are based on the option for issuers to produce prospectuses consisting of separate documents (registration document, securities note and summary note);
  - (3) the building block approach.

- (4) The need to take into account the latest developments at level one. In particular the agreement at second reading between the European Parliament and the Council that was voted by the Parliament on 2 July and by the Ecofin of 15 July.
23. This Technical Advice concerns the disclosure requirements for equity securities, retail debt securities, depository receipts issued over shares and asset backed securities. It also includes a registration document for wholesale debt securities and non equity securities issued by banks. These requirements have been prepared in the form of requirements for the registration document and the securities note. According to the Additional Provisional mandate CESR's advice on the format of the prospectus as a single document and the content of the summary note shall be submitted by 30 September 2003.
24. CESR is aware of the fact that not all securities can easily be defined as strictly belonging to one type of securities for which a schedule is drafted. This is the reason why the building block approach is favoured. Additional advice on how to combine the schedules and the blocks will be also provided by 30 September 2003.
25. Three different deadlines for CESR's Technical Advice to the EU Commission have been set: 31 July 2003, 30 September 2003 and December 2003. This paper only addresses the first one but some of the areas covered here are linked to the pending submissions that are still subject to consultation. For instance, the scope of each set of disclosure requirements is still subject to consultation (document CESR/03-162 published on June 2003). Therefore, an adaptation of some of the items included in this paper could be necessary after completion of the next steps.
26. Also, the historical financial information that EU and non-EU issuers have to include in prospectuses, as set out in the Annexes to this paper, has been taken from the proposal CESR has released in its Consultation Paper CESR/03-210. CESR is to submit its final advice to the Commission on this item by 31 December, 2003.
27. In general, CESR understands the Lamfalussy system as a dynamic process. The proposals included in this document should not be seen as the final say on each area for a number of years. Some of the disclosure requirements might need adaptations in the future according to developments in the financial markets. CESR will have to assess in the future when it might be appropriate to alert the European Commission on the need to consider adapting the Level 2 implementing measures of the prospectus directive. Disclosure requirements for issuers of specific types or sectors might be one of the cases where such a future assessment could be necessary.

#### **International Accounting Standards**

28. According to the Regulation of the European Parliament and of the Council on the application of the IAS approved on the 7 June 2002:
- (i) For each financial year starting on or after the 1 January 2005, the consolidated financial statements of all EU companies whose securities are admitted to trading on a EU regulated market should be prepared in accordance with the Standards adopted pursuant to Regulation 1606/2002 of 19 July 2002 (subject to transitional provisions set out in Article 9 of said Regulation);
- (ii) Member States may permit or require (Article 5):



- the EU companies with securities admitted to trading on a regulated market to prepare their annual financial statements in conformity with the standards adopted pursuant to the said Regulation;
  - other companies to prepare their consolidated and/or their annual financial statements in conformity with the above mentioned standards.
29. Thus, on the basis of the above provisions, after 1 January 2005, the following scenario can be envisaged:
30. If no special provisions are given by the Member States, the issuer may prepare its annual and consolidated financial statements not necessarily in conformity with the standards adopted pursuant to the IAS Regulation before the public offer, but only in accordance with the relevant company law Directive. Since no admission to trading on a regulated market is sought, the issuer may continue to prepare its annual and consolidated financial statements according to the provisions given by its Member State.
31. If no special provisions are given by the Member States, the issuer may prepare its annual and consolidated financial statements not necessarily in conformity with the standards adopted pursuant to the IAS Regulation, but only in accordance with the relevant company law Directives. As a consequence, the financial statements included in the prospectus, in the case of an application for admission to trading, could have been prepared according to accounting principles different from those adopted pursuant to the IAS Regulation.
32. Considering that the issuer should apply the standards adopted pursuant to the IAS Regulation in its consolidated financial statements after its admission to trading, it would seem sensible that its consolidated financial statements (included in the prospectus) for the previous year or possibly two years be restated or reconciled according to the standards adopted pursuant to the IAS Regulation. This would ensure the high level of transparency and comparability of the company's financial reporting, which is, according to European Regulation, a necessary condition for building an integrated capital market which operates effectively, smoothly and efficiently.
33. CESR believes that the application of the standards adopted pursuant to the IAS Regulation to the financial information contained in prospectuses has to be considered together with their general application to financial statements produced by issuers operating in the EU. To do otherwise would have the effect of determining the content of financial statements for issuers which should instead be addressed through the implementation of the Regulation no. 1606/2002.
34. For the purposes of this Technical Advice when reference to IAS Regulation is made within the paper it should be taken as a reference to the relevant standard or the whole body of those standards adopted pursuant to Regulation 1606/2002 of 19 July 2002 of the European Parliament and the Council on the application of international accounting standards.



## EXPLANATORY TEXT – EQUITY SECURITIES – REGISTRATION DOCUMENT

35. The minimum disclosure requirements CESR deems necessary for the registration document concerning equity securities as defined in the prospectus directive are set out in Annex “A” to this paper. In paragraph 20.3 it is stated that “if the issuer prepares both own and consolidated annual financial statements, it shall include at least consolidated annual financial statements in the registration document”. This implies that if the issuer doesn’t prepare consolidated financial statements the registration document shall contain own financial statements.
36. CESR acknowledges the fact that in certain Member States the disclosure of information required under paragraph 14.1 (ii), of Annex A may cause legal difficulties in the application of national privacy laws.
37. In the following paragraphs CESR illustrates two aspects of the proposed disclosure requirements that require specific explanation: pro forma financial information and profit forecasts.

### **Pro-forma information**

38. In specific circumstances, as explained in the subsequent paragraphs, issuers are used to publishing results or other financial data on the basis of methodologies different than that of Generally Accepted Accounting Principles (GAAP). These types of statements are often referred to as “pro-forma” financial information. The release of non GAAP financial information raises obvious investor protection concerns. If not prepared with due care, pro forma statements might confuse or even mislead investors, for example by hiding or disguising GAAP results or by highlighting only the favorable items. Notwithstanding this, pro forma financial information can be very useful for investors if accompanied of cautionary warnings and disclosures about the assumptions the information is based on and how it compares with GAAP results.
39. In particular, CESR considers that pro forma financial information will normally be required in case of a significant gross change in the size of a company, due to a particular transaction (with the exception of those few situations where merger accounting is required). A significant gross change would normally be a variation of more than 25% relative to one or more indicators of the size of the issuer’s business.
40. However, it is also vital that readers of prospectus should be absolutely clear as to the nature of any pro forma financial information presented and of its purpose. To achieve this, any pro forma financial information should be prefaced by an introductory explanatory paragraph that states in clear terms the purpose of preparing the information. The reader should then be warned that the information prepared is for illustrative purposes only and therefore may not represent the issuer’s actual financial position or results. In addition, the actual historical financial information should be given greater prominence in the document containing the pro forma information.
41. CESR believes that it is important to have a standard format for pro forma information which would allow easier pan-European comparison. For this reason it recommends a columnar approach which separately identifies the unadjusted information (normally that of the issuer), the pro forma adjustments (normally the

target or other transaction specific adjustments) and the resulting pro-forma financial information in the final column.

42. CESR is of the opinion that more consistent quality of the financial information presented in the pro-forma statement can be achieved by restricting the financial periods for which pro-forma financial information may be presented. In addition, the only allowable adjustments should be those directly relevant to the transaction concerned and should not relate to future events or decisions. Adjustments should also be factually supportable.
43. The existence of an independent report made by an auditor, which can be the company's auditor or reporting accountant (an auditor independent of the issuer), on the pro-forma financial information provides readers of the prospectus with a level of comfort that a certain level of due diligence has been undertaken on the issues specifically referred to in the report. The issuer's reporting accountants or auditor should provide an opinion as to whether the information has been properly compiled on the basis stated and, to ensure consistency and comparability, in accordance with the accounting policies of the issuer.
44. The requirements relating to pro forma information are set out in the Pro-Forma Financial Information Building Block (Annex "B"). These would form part of the disclosure requirements set out in paragraph 20.2 of the Minimum Disclosure Requirements for Equity Registration Document (Annex "A").

#### **Profit Forecasts**

45. Profit forecasts and other future prospects are a controversial issue. On the one hand, if prepared with due diligence and on well-founded basis, these forecasts and prospects may help investors to make a reasoned assessment on the issuer and the expected economic profit relating to it. On the other hand, the profit forecasts and other disclosed future prospects may, in the worst case, be even misleading. In addition, prospects and profit forecasts disclosed in a prospectus are linked to the requirements of regular reporting and ad-hoc disclosure, especially when because of subsequent events or decisions the prospects or forecasts prove to be wrong or outdated.
46. CESR believes that quantitative information about a company's level of profits at the end of the current financial year might be useful for investors. Accordingly, CESR proposes to allow this kind of disclosure in prospectuses, with the scope and limits set out in paragraph 13 of the Minimum Disclosure Requirements for Equity Registration Document (Annex "A"). Alongside these voluntary quantitative projections, disclosure of known trends or other factual data with material impact on the issuers' prospects should continue to be mandatory.
47. While profit forecasts are considered voluntary, issuers should be able to stop making forecasts or to resume such forecasts after having ceased to make them. However, the disclosure policy of profit forecasts and other numeric projections should be consistent from time to time. Thus, issuers are expected to provide an explanation of any changes in disclosure policy when updating the prospectus.
48. Also in order to ensure comparability, the profit or any other quantitative forecast should be prepared on a basis comparable with a number reported in its audited financial statements, so that the forecast can be easily compared with both historical information and the next set of audited accounts. The disclosure policy of these forecasted items should be consistent. CESR recommends that issuers should be

restricted to making a forecast which is co-terminus with their own reporting period. In order to ensure the highest standards of care in the preparation of such information, CESR deems necessary the involvement of the issuer's management at the top level.

49. In addition, any profit forecast should be accompanied by a statement prepared by independent accountants or auditors that the forecast has been properly prepared on the basis stated and that the basis of accounting is consistent with the accounting policies of the issuer.
50. If subsequent events or decisions prove the forecasts to be wrong, a listed issuer is obliged to update the information under requirements of regular reporting and ad-hoc disclosure. In addition, if these events or decisions occur before the closure of the offer or the admission to trading, the issuer is obliged to supplement the prospectus in accordance with the Prospectus Directive.
51. Finally, when the issuer has published a profit forecast which is still outstanding, then it should provide a statement setting out whether or not the forecast is still correct or an explanation of why the forecast is no longer valid.

#### **EXPLANATORY TEXT – EQUITY SECURITIES - SECURITIES NOTE**

52. The minimum disclosure requirements CESR deems necessary for the securities note concerning equity securities are set out in Annex “C” to this paper. Equity securities for the purposes of this securities note are “shares and other transferable securities equivalent to shares”.
53. This schedule is applicable to any class of shares since it considers information regarding a description of the rights attached to the securities and the procedure for the exercise of any rights attached to the securities (paragraph 4.5 of the Minimum disclosure requirements for the Equity Securities Note in Annex “C”). Under the description of the rights attached to the securities, CESR has listed the most common rights attached to shares of different classes and the main features of such rights. In particular, the reference to “redemption provisions” is included because in certain jurisdictions it is legally possible to issue redeemable shares, i.e. shares that may be redeemed either at the option of the issuer or at the option of the holder.
54. As a general principle, CESR has tried to adapt the disclosure requirements to the type of securities considered. Illustrations of this principle for equity securities can be found under the paragraphs 5.2 (Plan of distribution and Allotment), 5.3 (Pricing) and 6.5 (Stabilization) of the securities note schedule concerning equity securities.

#### **EXPLANATORY TEXT – DEBT SECURITIES - REGISTRATION DOCUMENT**

55. CESR envisages that a registration document for equity that already exists could be used by the issuer to meet its disclosure obligations in relation to an issue of other securities including debt securities.
56. Despite this, CESR decided to approach the question of disclosure requirements for debt securities from first principles. In general, the interests of investors in equity and the interests of investors in debt securities will have different focuses. The

investor in equity will be more interested in the income stream from the shares and the capital growth of the company (and hence the value of the shares). An investor in debt securities will be primarily interested in the risk that the income stream and/or the capital will not be repaid. Greater capital growth may reduce the risk of default, but will not necessarily increase the return to the investor. These investor interests are likely to be most closely aligned when the issuer of the debt security is also an equity issuer.

57. The disclosure requirements for the debt registration document are set out in Annex “D” to this paper. These disclosure requirements are applicable to retail corporate debt intended as: “The security which is aimed at both retail and wholesale investors and where the issuer has an obligation arising on issue to pay the investor 100% of the investor’s capital “the capital return element”, in addition to which there may also be an interest payment.”

#### **EXPLANATORY TEXT – DEBT SECURITIES - SECURITIES NOTE**

58. The disclosure requirements for the debt securities note are set out in Annex “E” to this paper. It applies to retail corporate debt as defined in the previous paragraph.
59. Here also, CESR has tried to adapt the disclosure requirements to the securities envisaged. Examples of this are the requirements to disclose the yield (paragraph 4.9) and the rating (paragraph 8.5). The latter requirement is new compared with the Directive 2001/34 and the IOSCO Disclosure Standards. CESR is also of the opinion that some items of the securities note schedule concerning equity securities may be omitted for debt securities, like paragraph 3.1 (Working Capital Statement) and paragraph 3.2 (Capitalization and Indebtedness).
60. As already mentioned above, not all securities can be defined as strictly belonging to a type for which a schedule is drafted. Some securities, for example structured bonds, could be construed as a debt security which incorporates also certain elements of a derivative security, in particular concerning the return investors might receive.
61. CESR does not consider appropriate the creation of a specific building block for these securities and has therefore introduced certain additional disclosure requirements in the schedule for the debt securities note, such as those relating to the interest rate (paragraph 4.7 in Annex “E”). However, some questions linked to the derivative character of these securities might need to be reviewed following the outcome of the consultation paper (CESR/03-162) on derivatives.

#### **EXPLANATORY TEXT – GUARANTEE BUILDING BLOCK**

62. A different approach instead has been followed for the information concerning guarantees. In this case CESR believes that these disclosure requirements should form a separate building block as this building block may be added also to other schedules besides the one for the debt securities note. A guarantee can in fact be applied to any obligation in relation to any kind of security. For this reason for example, the wording adopted in paragraph 1 of the said building block reads “a description of any arrangement intended to ensure that any obligation material to the issue will be duly serviced...”.



63. The disclosure requirements for the Guarantees building block are set out in Annex “F” to this paper.

#### **EXPLANATORY TEXT – ASSET BACKED SECURITIES – REGISTRATION DOCUMENT AND SECURITIES NOTE**

64. The Minimum disclosure requirements for the Asset Backed Securities Registration Document set out under Annex “G” to this paper shall apply to the issuers of asset backed securities. An issuer of asset backed securities is only required to comply with these disclosure requirements for the purpose of its Registration Document.
65. The ‘Asset Backed Securities – Securities Note Building Block’ disclosure requirements set out under Annex “H” to this paper shall apply to asset backed securities. These however are not intended to apply to non-equity securities as defined in Article 5.4(b) of the Prospectus Directive or covered bonds. For the purposes of this paper asset backed securities are intended as securities of a type which either represent an interest in assets (including any rights designed to assure servicing, or the receipt or timeliness of receipts by holders of assets of amounts payable thereunder); or are secured by assets and the securities by their terms provide for payments which relate to payments or reasonable projections of payments calculated by reference to identified or identifiable assets.
66. This building block will normally be combined with the retail or wholesale debt Securities Note (CESR will submit to the European Commission its advice in relation to a wholesale debt Securities Note by 30 September).

#### **EXPLANATORY TEXT – WHOLESALE DEBT REGISTRATION DOCUMENT**

67. On Annex D of this paper, CESR sets out the disclosure obligations for issuers of corporate retail debt. These disclosure obligations would be regarded as the “high-water” mark for disclosure requirements for debt issuers. On Annex I CESR sets out the proposed disclosure requirements for **debt securities aimed at those investors who purchase debt securities with a denomination per unit of at least EUR 50,000** (as set out in Article 7.1 (b) of the Prospectus Directive). **Such investors are referred to throughout this document as “wholesale investors”.**
68. A differentiated disclosure regime for debt securities aimed at “wholesale investors” has been successfully operated in a number of Member States across the EU, without giving raise to significant complaints about a lack of information contained in the prospectus. CESR’s approach in relation to a differentiated set of disclosure obligations has been to try and identify those disclosure obligations which require information that will be of little value to “wholesale investors” when making their investment decision. To require issuers to produce this information simply adds to their costs without giving raise to any investor protection benefits.



#### EXPLANATORY TEXT – DEPOSITORY RECEIPTS ISSUED OVER SHARES SCHEDULE

69. In view of the unique structure of this product, CESR has decided to propose a separate building block for depository receipts (DRs), which would include Global Depository Receipts. These are not widely listed across the EU, but there are sufficient numbers of these securities admitted to trading on regulated markets to justify a differentiated approach as they raise their own particular aspects.
70. In establishing what the disclosure requirements regarding the issuer of the DR's should be, CESR considers the issuer for disclosure purposes to be the issuer of the underlying shares to which the DR's relate, although from a legal perspective the issuer of the DR is in fact the depository.
71. On the basis that the investor rarely has a right of recourse against the depository under the terms of the DR, the information concerning the depository itself is probably of less importance. This has led CESR to conclude that the disclosures regarding the depository itself should be minimal. Where there is legal recourse to the depository over and above a breach of its fiduciary or agency duties, CESR would expect this fact to be noted in the "risk factors" section in the prospectus and the circumstances of such recourse to be disclosed in full.
72. On the issue of whether an issuer of DR's would have the choice to produce the prospectus in the form of a complete document or as a tripartite document, CESR's advice is that issuers of DR's should have the option of producing a tripartite agreement but the Registration Document will inevitably be limited to the information on the depository.
73. The detailed disclosure obligations for depository receipts issued over shares are set out in Annex J. CESR proposes a regime that is applicable to DR's aimed both at retail and wholesale investors. CESR could assess in the future the need for a different regime applicable to DR's aimed at wholesale investors, but for the moment has proposed a separate section relating to the historical financial information disclosure requirements for wholesale investors.

#### EXPLANATORY TEXT – BANKS REGISTRATION DOCUMENT

74. CESR proposes a specialist building block for banks on Annex K. It can be used by banks issuing any type of non-equity securities (with the exception of asset backed securities issued by SPVs). **Banks for the purposes of such a building block would include not only "credit institutions" as defined by the Prospectus Directive, but also regulated firms such as investment banks that have substantial experience of issuing securities.**
75. CESR has decided that the banks building block should not be extended to cover equity securities because the rationale for a reduced disclosure regime for banks is the prudential and regulatory supervision providing greater comfort in respect of non-equity issues. This comfort would not deal with all the interests of investors in equity securities who are more concerned with the value and growth of the issuer.



As such banks who issue equity securities will be expected to disclose information based on the equity registration document.

76. CESR has taken the view that non-EU banks which are subject to significantly high standard of prudential and regulatory supervision should benefit from this building block. To do otherwise will result in excluding well regulated non-EU banks that are already issuing large numbers of securities successfully in the EU.

#### LEVEL 2 ADVICE ON MINIMUM INFORMATION

- |     |   |
|-----|---|
| 77. | The minimum disclosure requirements for the equity registration document are set out in Annex “A” to this paper.                            |
| 78. | The Pro-Forma financial information building block is set out in Annex “B” to this paper.   |
| 79. | The minimum disclosure requirements for the equity securities note are set out in Annex “C” to this paper.                                  |
| 80. | The minimum disclosure requirements for the debt registration document are set out in Annex “D” to this paper.                              |
| 81. | The minimum disclosure requirements for the debt securities note are set out in Annex “E” to this paper.                                    |
| 82. | The minimum disclosure requirements for the guarantees building block are set out in Annex “F” to this paper.                               |
| 83. | The minimum disclosure requirements for the asset backed securities registration document are set out in Annex “G” to this paper.           |
| 84. | The minimum disclosure requirements for the asset backed securities, securities note building block are set out in Annex “H” to this paper. |
| 85. | The minimum disclosure requirements for the wholesale debt registration document are set out in Annex “I” to this paper.                    |
| 86. | The minimum disclosure requirements for depository receipts issued over shares set out in Annex “J” to this paper.                          |
| 87. | The minimum disclosure requirements for the banks registration document are set out in Annex “K” to this paper.                             |



## **PART TWO - INCORPORATION BY REFERENCE**

### **Extract from Provisional Request**

88. According to Paragraph 2.2 of the Provisional Request CESR is asked to “*provide technical advice on possible draft rules on at least the following:*
- *the documents that can be incorporated by reference in a prospectus (e.g. memorandum of association, annual and interim accounts, press releases);*
  - *the documents that can be incorporated by reference in order to fulfil annual update requirements linked to the registration document.”*

According to Paragraph 3.4 of the Additional Provisional Mandate, the first request for technical advice remains valid while the second is “*revoked since the obligation of annual update has been removed from the text during the negotiation. Therefore, DG Internal Market only requests CESR to complete its work with respect to the documents that can be incorporated by reference in a prospectus, in accordance with the first provisional mandate”.*

### **Introduction**

89. Article 11 of the Directive states that “*(1) Member States shall allow information to be incorporated in the prospectus by reference to one or more previously or simultaneously published documents that have been approved by the competent authority of the home Member State or filed with it in accordance with this Directive, in particular pursuant to Article 10, or with Titles IV and V of Directive 2001/34/EC. This information shall be the latest available to the issuer. The summary shall not incorporate information by reference. (2) When information is incorporated by reference, a cross-reference list must be provided in order to enable investors to easily identify specific items of information.”*
90. In addition, according to Preamble no. (27) of the Directive, “*The opportunity of allowing issuers to incorporate, by reference, documents containing the information to be disclosed in a prospectus – provided that the documents incorporated by reference have been previously filed with or accepted by the competent authority – should facilitate the procedure of drawing up a prospectus and lower the costs for the issuers without endangering investor protection”.*

## **EXPLANATORY TEXT - DOCUMENTS THAT CAN BE INCORPORATED BY REFERENCE IN A PROSPECTUS**

### **Factors which need to be taken into account in deciding whether and when a document may be incorporated by reference in a prospectus**

91. In order to identify, as required by the Provisional Request, which documents may be incorporated by reference, it is fundamental to recall that, as stated in the Preamble of the Directive, the aim of incorporation by reference is to simplify and reduce the costs of drafting a prospectus. This aim however should not be achieved to the detriment of the other interests the prospectus is meant to protect. In fact according to the Directive (article 5.1) the prospectus shall contain all the

information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor and of the rights attaching to such securities. To this aim, when evaluating whether documents may or may not be incorporated by reference, besides the simplification of procedures and reduction of costs for issuers, the circumstance that the natural location of the information required is the prospectus, and that the information should be presented in an easily analysable and comprehensible form, should be considered.

92. These aspects should therefore be borne in mind by the issuer that, when drafting the prospectus, shall use incorporation by reference only to the extent that it does not endanger investor protection in terms of comprehensibility and accessibility of the information. Therefore, adequately balancing the interests of issuers and those of investors, it should be possible to incorporate as many documents as possible provided that the interest of investors of receiving at no cost an easily analysable prospectus is duly protected.

#### **Characteristics of the documents incorporated by reference**

93. The text of the Directive already provides for the following requirements of the documents containing information incorporated by reference in a prospectus:
- the documents may be more than one;
  - the documents must have been previously or simultaneously published;
  - the documents must have been approved by the competent authority of the home Member State or filed with it;
  - the above mentioned approval or filing must have been in accordance with the Prospectus Directive, in particular pursuant to Article 10, or with Titles IV and V of Directive 2001/34/EC;
  - the information shall be the latest available to the issuer.
94. Article 10 refers to the” *information that the issuer has published or made available to the public over the last 12 months in one or more Member States and in third countries in compliance with their obligations under Community and national laws and rules dealing with the regulation of securities, issuers of securities and securities markets. Issuers shall at least refer to the information required pursuant to Company Law Directives, Directive 2001/34/EC and Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of International Accounting Standards*”.
95. With reference to the above indicated requirements CESR is of the opinion that approval (instead of filing) is required only if national legislation in the context of the transposition of the requirements of the mentioned Directives, so provides.
96. With reference to the requirement that “*the information shall be the latest available to the issuer*”, CESR is of the opinion that implementing rules should make clear that this provision does not mean that the prospectus cannot incorporate by reference historical data. CESR believes that if documents containing information that has undergone material changes are incorporated by reference the prospectus should clearly state such a circumstance including the updated information.
97. Besides the requirements provided for in the Directive, CESR acknowledges the fact that documents incorporated by reference are part of the prospectus and therefore

the regime applicable to them should, as far as possible, be the same as that of the prospectus.

98. For the safeguard of this principle CESR feels the need to underline that only incorporation by reference of those documents that are drawn up in the **same language** as that of the prospectus - or of the documents composing it into which the relevant information is incorporated (registration document, securities note, supplements) – should be allowed. In other words the language regime applicable to the documents incorporated by reference is the same as that of the prospectus.
99. Even though CESR believes that the prospectus should not end up being a one page document containing a list of references to a multitude of publicly available documents. CESR does not consider appropriate to indicate a specific limit to the number of references allowed in a prospectus. CESR considers that the issuer should duly evaluate whether the information is given in an easily analysable and comprehensible form.
100. In certain circumstances, especially when incorporating historical information, it may prove useful to incorporate information making reference only to certain parts of a document. Overburdening investors with a large quantity of information may hamper the comprehension of the prospectus. Therefore CESR is of the opinion that that the issuer may incorporate information in a prospectus by making reference only to certain parts of a document provided that this is not misleading and that it declares that the not incorporated parts are not relevant for the investor or covered elsewhere in the prospectus

#### EXPLANATORY TEXT - ADDITIONAL TECHNICAL ADVICE

101. As previously recalled, the First Provisional Request asks CESR to provide technical advice “*at least*” on the documents that may be incorporated by reference in the prospectus. CESR believes that other considerations on the practice of incorporation by reference should be made.
102. In particular CESR considers fundamental the indication of specific rules concerning the accessibility of the documents incorporated by reference. As said before, when indicating the characteristics of the documents that may be incorporated by reference, this practice should be allowed taking in consideration the identification and accessibility of the information for investors.
103. The Directive provides, in article 14 (5) that “*in case of a prospectus drawn up with several documents and/or with information incorporated by reference, the documents and information composing the prospectus may be published and circulated separately as long as the said documents are made available, free of charge to the public, according to the arrangements established in paragraph 2. Each document shall indicate where the other constituent documents of the full prospectus may be obtained*”. As far as the accessibility of the incorporated documents is concerned CESR agrees that the modalities should be the same as those provided for the prospectus. Therefore the documents should be available, at no cost, in the same places where the prospectus should be made available and a paper copy should also be available free of charge on request. CESR believes it is useful to add that when the prospectus is made available in electronic form the documents incorporated by reference, and solely these documents, may be linked to the prospectus with easy and immediate technical modalities. The documents should be made available to anyone for the same period as the prospectus.

**LEVEL 2 ADVICE ON INCORPORATION BY REFERENCE**

104. The documents containing information that can be incorporated by reference in a prospectus or in the documents composing it (registration document, securities note, supplements) should be drawn up in the same language of the prospectus or of the documents composing it (registration document, securities note, supplements) into which the information is incorporated by reference.
105. If the document contains information which has undergone material changes, the prospectus should clearly state such a circumstance including the updated information.
106. The issuer may incorporate information in a prospectus by making reference only to certain parts of a document, provided that this is not misleading and that it states that the not incorporated parts are not relevant for the investor or covered elsewhere in the prospectus.
107. Provided that the above mentioned characteristics and the requirements set by the Directive are met, the information contained in the documents mentioned in the illustrative list below may be incorporated by reference in a prospectus:
  - annual and interim financial information;
  - documents prepared in occasion of a specific transaction such as a merger or de-merger;
  - audit report and the financial statements ;
  - memorandum and articles of association
  - earlier approved and published prospectuses;
  - regulated information;
  - circulars to security holders.
108. When incorporating information by reference issuers should have due regard to not endanger investor protection in terms of comprehensibility and accessibility of the information.
109. When the prospectus is made available in electronic form the documents incorporated by reference, and solely these documents, may be linked to the prospectus with easy and immediate technical modalities.

## PART THREE - AVAILABILITY OF THE PROSPECTUS

### Extract from Provisional Request and from Additional Provisional Mandate

110. According to paragraph 2.3. of the Provisional Request, CESR is asked to “*provide technical advice on possible draft implementing rules on at least the following:*
- *Availability in an electronic format – principles on ensuring a wide electronic access;*
  - *Availability via the press (periodicity of newspapers: minimum circulation, nature of the newspaper: financial, general).”*
111. In addition, considering that the text of the Directive provides for an option of the home Member State to require the publication of a notice stating how the prospectus has been made available and where it can be obtained (article 14.3), the Additional Provisional Mandate, in its paragraph 3.5., requests CESR to “*provide technical advice on possible draft implementing rules relating to the content of the notice and its method of publication”.*

### Introduction

112. The basic principles and features of the regime of the availability of the prospectus are provided for in articles 14 and 16.1 of the Directive. According to such provisions, the following principles should be kept in mind, as premises of CESR’s technical advice:
113. The means of availability of the prospectus eligible for the purposes of the Directive are:
- *by insertion in one or more **newspapers** circulated throughout, or widely circulated in, the Member States in which the offer is made or the admission to trading is sought, or*
  - *in a **printed form** to be made available, free of charge, to the public at the offices of the market on which the securities are being admitted to trading, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents, or*
  - *in an **electronic form** on the issuer's website and, if applicable, on the web-site of the financial intermediaries placing or selling the securities, including paying agents, or*
  - *in an **electronic form** on the website of the regulated market where the admission to trading is sought, or*
  - *in an **electronic form** on the web-site of the competent authority of the home Member State if the said authority has decided to offer this service,*
  - *A home Member State may require issuers which publish their prospectus in accordance with the first two bullets also to publish their prospectus in an electronic form in accordance with the third bullet.*

114. A home Member State may require publication of a notice stating how the prospectus has been made available and where it can be obtained by the public.
115. The competent authority shall publish on its web-site over a period of twelve months, at its choice, all the prospectuses approved, or at least the list of prospectuses approved, including, if applicable, a hyperlink to the prospectus published on the web-site of the issuer or on the web-site of the regulated market.
116. In the case of a prospectus comprising several documents and/or incorporating information by reference, the documents and information making up the prospectus may be published and circulated separately provided that the said documents are made available, free of charge, to the public, in accordance with the arrangements established in paragraph 110 above. The prospectus shall contain a list of each constituent's documents and the places where they can be obtained.
117. The text and the format of the prospectus, and/or the supplements to the prospectus, published or made available to the public, should at all times be identical to the original version approved by the competent authority.
118. Where the prospectus is made available by publication in electronic form, a paper copy must nevertheless be delivered to the investor, upon his request and free of charge, by the issuer, the offeror, the person asking for admission to trading or the financial intermediaries placing or selling the securities. Documents incorporated by reference will be delivered on paper when specifically requested by the investor.
119. The supplement to the prospectus is published in accordance with at least the same arrangements as were applied when the original prospectus was disseminated.

**EXPLANATORY TEXT - AVAILABILITY IN AN ELECTRONIC FORM**

120. With regard to availability in an electronic form, either on the web-site of the issuer, of the regulated market or of the competent authority of the home Member State, besides the principles stated in the Directive, CESR is of the opinion that, to ensure that availability of the prospectus in an electronic form is an equal alternative to the traditional means of publication, additional safety measures are required.
121. It is, at least, necessary to ensure that i) the prospectus is easily accessed when entering the website in question; ii) the file format is such that the prospectus cannot be modified, either by the issuer or third parties with access to the website and to the file; iii) the prospectus in itself does not contain hyperlinks, in particular links to information that may contain subjective and biased opinions, such as price targets and advertising documents, with the exception of links to the electronic addresses where information incorporated in the prospectus by reference is available; and iv) the prospectus can be easily downloaded and printed.
122. CESR would like to stress that special attention should be given to the use of hyperlinks, even if this use is restricted to documents incorporated by reference. In fact, the principle, provided for in the Directive, that the prospectus must at all times be identical to the original version approved by the competent authority prevents changes to be made to all the documents that are connected with the prospectus by an hyperlink.

123. CESR is also of the opinion that, due to foreign regulations regarding the definition of public offer it should be made clear that the availability of a prospectus for a public offer in the Internet does not constitute, by itself, an offer addressed to residents in all jurisdictions. Therefore, CESR strongly recommends the insertion of a disclaimer that should be made clear that the offer is only directed to certain investors in certain jurisdictions to the exclusion of others to ensure that ineligible investors cannot subscribe the offer.

#### EXPLANATORY TEXT -AVAILABILITY VIA THE PRESS

124. According to the Directive, when an issuer, an offeror, or a person asking for admission to trading chooses to publish the prospectus by its insertion in one or more newspapers, these newspapers should “*circulate throughout*” or be “*widely circulated in*” the Member States. Level 2 measures should indicate the scope, periodicity, and nature of such newspapers. CESR believes that in deciding such features, the following issues should be borne in mind.
125. With regard to the **scope** of the newspaper, CESR is of the opinion that the publication of the prospectus in a national or supra-regional newspaper (in the sense that it widely circulates throughout the territory of the State) should be required for the purposes of compliance with the duty of making a prospectus available to the public.
126. As far as **minimum circulation** is concerned, considering that the circulation (number of copies sold to the public) of newspapers depends upon the geographic area, number of inhabitants and reading habits in each Member State, the setting up of a given threshold is not recommended. Therefore, CESR proposes the adoption of a subjective criterion, leaving the assessment of the circulation requirements to the competent authority.
127. As far as the **nature** of the eligible newspaper is concerned, it is worth noting that there are newspapers of very specific natures (general, financial, culture, sports, advertisements, etc) and not all of them are suitable for the publication of a prospectus. CESR considers that the prospectus should be published in a general newspaper or in a financial/business newspaper as long as its circulation satisfies the minimum circulation requirements.
128. With regard to **periodicity**, CESR believes that when the scope, the minimum circulation and the nature requirements are complied with, the issuer, the offeror or the person asking for admission to trading should not be prevented from publishing the prospectus in non-daily newspapers.
129. Finally, it has to be added that, in any case, the issuer, the offeror or the person asking for admission to trading may, in addition to the publication in a newspaper that comply with the aforementioned requirements, publish the prospectus in newspapers with different scope, circulation and nature.

**EXPLANATORY TEXT - NOTICE STATING HOW THE PROSPECTUS HAS BEEN MADE AVAILABLE AND WHERE IT CAN BE OBTAINED**

130. CESR believes that the notice mentioned in Article 14.3 of the Directive should be **made public** in a straightforward way that facilitates its speedy consultation and in a manner that does not depend on the mean of publication of the prospectus.
131. The two possible approaches would be to require the notice or i) to be made available in an electronic form, or ii) to be inserted in a publication, as currently provided for in the Directives 89/298 (article 10.4) and 2001/34 (article 98.2).
132. Considering the growing use of electronic devices and the relatively few cases where the prospectus is inserted in a newspaper, CESR believes that the aim of the notice will be better accomplished by making it available in a publication. Therefore, CESR recommends the notice to be published in a newspaper that fulfils the requirements for publication of prospectuses.
133. In alternative, in cases of prospectuses for admission to trading on a regulated market of securities of a class already traded in that market, the notice may be published in the gazette of the market, regardless of its form (paper or electronic).
134. With regard to the **content of the notice**, CESR believes that the notice is not supposed to be an abstract of the prospectus since its aim is merely that of informing the public that a prospectus from a given issuer and related to given securities has been published and where it can be obtained.
135. For that reason, CESR is of the opinion that the content of the notice should be kept to the necessary items of information.

**EXPLANATORY TEXT - ADDITIONAL TECHNICAL ADVICE**

136. In addition to the issues particularly asked for in the Provisional Request and in the Additional Provisional Mandate, CESR is of the view that there are two other matters regarding the availability of the prospectus that would require Level 2 implementing measures. One concerns the information on how the prospectus has been made available and where it can be obtained by the public. The second issue is related to the duty to deliver paper copy when the prospectus is published in an electronic form.

**Additional technical advice related to the information on how the prospectus has been made available and where it can be obtained by the public**

137. CESR is of the opinion that the list of approved prospectus to be posted by the competent authority of the home Member State in its web-site, in accordance with article 14(4) of the Directive, should mention how such prospectuses have been made available and where they can be obtained.
138. CESR considers that this measure, which does not imply additional costs to the competent authority, represents a valuable role in centralizing useful information



for the investors, in particular in the cases where the law of the home Member State does not require the publication of the notice referred to above

**Additional technical advice related to the delivery of a paper copy**

139. CESR considers necessary to adopt a general implementing rule which stresses that the timing for the delivery of a paper copy of the prospectus must not hinder the right of the investors to have the prospectus in due time.

**LEVEL 2 ADVICE ON AVAILABILITY OF THE PROSPECTUS**

140. The publication of the prospectus in electronic form, pursuant to Article 14 (2)(c) and (d) of the Directive, or as an additional mean of availability, should be subject to the following requirements:
- a) The prospectus should be easily accessed when entering the web- site;
  - b) The file format should be such that the prospectus cannot be modified (e.g. pdf-file);
  - c) The prospectus cannot contain hyper-links, with exception of links to the electronic addresses where information incorporated in the prospectus by reference is available (in such a case only the documents incorporated by reference should be made available);
  - d) The investors should have the possibility of downloading and printing the prospectus.
141. If a prospectus for offer of securities to the public is made available on the web-sites of issuers and financial intermediaries or regulated markets, these should take measures, such as the insertion of warnings related to the addressees of the offer, to avoid targeting residents in jurisdictions where the public offer does not take place.
142. The newspaper where the prospectus is inserted according to Article 14 (2)(a) of the Directive should comply with the following requirements:
- a) It should have a national or supra-regional scope;
  - b) It should be a general or financial information newspaper.
- Otherwise, it should be a newspaper whose circulation is deemed appropriate for this purpose by the Competent Authority.
143. The notice referred to in Article 14(3) of the Directive should be inserted in a newspaper that fulfils the requirements for publication of prospectuses.
- When the notice relates to a prospectus published for the only purpose of admission to trading of securities on a regulated market and securities of the same class are already admitted to trading on the same regulated market, the notice may, in alternative, be inserted in the gazette of that regulated market, irrespective of whether that gazette is in paper copy or electronic form.
144. The notice should be published no later than the next business day following the date of publication of the prospectus.
145. The notice should contain the following items of information:

- a) The identification of the issuer;
  - b) The type, class and amount – if already known – of the securities to be offered and/or in respect of which admission to trading is sought;
  - c) The intended time schedule of the offer / admission to trading;
  - d) A statement that a prospectus has been published and where it can be obtained.
  - e) If the prospectus has been published in a printed form, the addresses where and the period of time during which such printed forms are available to the public;
  - f) If the prospectus has been published in electronic form, the addresses to which investors should refer to ask for a paper copy;
  - g) The date of the notice.
146. The list of the approved prospectuses posted on the website of the competent authority, in accordance with article 14(4) of the Directive, should mention how such prospectuses have been made available and where they can be obtained.
147. The deliverance, by the entity in charge of this duty, of a paper copy of the prospectus, as set out in Article 14(7) of the Directive, should be made as soon as possible allowing investors to consult the prospectus in due time.