THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

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PRESS RELEASE

CESR publishes joint responses to commonly asked questions on prospectuses

CESR publishes today a guide for market participants which establishes a convergent response from all EU securities supervisors to commonly asked questions on the day-to-day application of the EU legislation regarding the preparation of prospectuses (Ref. CESR/06-296d). The purpose of this guide is to provide market participants with greater certainty and quick answers to their most common queries.

This 'Q and A' guide that CESR members have developed focuses on responses to queries that are likely to have an EU-wide impact on market participants or end users, and therefore on the smooth functioning of the Single Market. Some of the agreements aim at facilitating the correct functioning of cross-border offers (for example, information from the issuers to host competent authorities or passport of the supplements). The rest are responses to questions on the application of the legislation that have been arising frequently in most Member States (for example, how to treat employee share option schemes, free offers or offers of convertible or exchangeable securities).

CESR has been very active in the area of prospectus over the last four years, providing the European Commission with technical advice on the implementing measures of the Prospectus Directive. CESR completed this initial work in 2003 and continued its activity in this area during 2004 to ensure the consistent application of the Prospectus legislation. To this end, the CESR expert group prepared a set of recommendations (Ref. CESR/05-054b) which gave guidance on how to produce a prospectus. In addition, in 2005, CESR delivered its advice to the EC on how to deal with those circumstances where the historical financial information to be included in the prospectus might not sufficiently reflect the issuer's whole business throughout the required period ("complex financial histories"). In a parallel manner, CESR members have been coordinating procedures to assist a seamless operation of the passport and to deliver supervisory convergence. These have contributed to the smooth functioning of the passport since 1 July 2005.

The Prospectus Directive and the Commission's Regulation on prospectuses became effective on 1 July 2005. During the course of the 2005 and 2006, regulators and market participants have responded to practical application and operational issues arising from the implementation of this Community framework into national law. The need for a 'common approach' is compounded by the fact that the Prospectus Directive is a maximum harmonisation Directive and that the scope for interaction between competent authorities has increased because of the passport that it provides for issuers. It is therefore essential for CESR members to achieve convergence in their approaches. To this end, prospectus experts from CESR members have been holding practical and operational meetings to discuss specific implementation and application issues and, to the extent necessary, agreed common solutions. This Expert Group is chaired by Mr Gérard Rameix, Secretary General of the French Autorités des Marchés Financiers and supported by Mr Javier Ruiz of the CESR Secretariat. The European Commission has also participated at the meetings of the group as an observer.

CESR does not intend to issue new standards, guidelines or recommendations on prospectuses. Rather, the purpose of this publication (and the subsequent updates of this that may follow) is intended to provide quick answers to the questions market participants channel to the relevant CESR members and/or to CESR secretariat (placing either in copy). The common approaches reached are not set in stone. The Group

operates in a way that will enable it to react efficiently if any aspects of the published 'common positions' needs to be modified or adapted for greater clarity.

The European Commission Services have provided very useful input on some of the questions discussed in the paper. However, these views do not bind the European Commission as an Institution, who will be entitled to take a different position.

The CESR group will continue to meet regularly to discuss the questions that might be raised by market participants. The pace of the future publications will depend on the amount of new questions identified and how long it takes to analyse the issues and to develop common positions. **Should market participants have further questions of this nature they can directly email the relevant competent authority with whom they are dealing with on a regular basis, placing the CESR secretariat (prospectus@cesr.eu) in copy.**

Finally, as the Prospectus Directive will have been in place for a year, it now seems an appropriate juncture for CESR to undertake an assessment of its practical functioning. To this end, CESR is currently working on an analysis of the impact that the Directive is having on the EU markets and is seeking to identify any practical day-to-day difficulties encountered with the passport and other relevant provisions of the Prospectus Directive. **CESR will seek input from market participants through an open hearing that will take place in Paris before the end of 2006, the date for this will be announced on CESR's website under 'news'.**

CESR

Notes for Editors:

1. The work that CESR is carrying out in this capacity forms part of the four level approach to European legislation for financial services. The four level approach was proposed in the report by the working group chaired by Baron Lamfalussy (available on the CESR website as described in para. 5). The approach can be summarised very briefly as follows: Level one measures set out the high level objectives that the legislation must achieve. Level two measures set out some of the technical requirements necessary to achieve these objectives. Level three measures are intended to ensure common and uniform implementation by the use (amongst others) of common interpretative guidance and standards agreed amongst regulators in CESR. Level four measures relate to the enforcement of the legislation.
   Page 6 of the Lamfalussy report illustrates diagrammatically how these four levels of legislation fit together and the procedure to adopt these measures. The Level 3 'strengthened co-operation between regulators to improve implementation' including the conditions for their adoption are described in more detail on page 37 of the report.

2. The European Commission published the Prospectus Directive (Directive 2003/71/EC) on 31 December 2003. This set out the high level policy objectives that the legislation must achieve and established the areas and scope of what should be included in the implementing measures which later took the form of a Regulation. The Regulation on Prospectus No 809/2004 implementing the Directive (2003/71/EC) was published on 30 April 2004 and this set out the technical implementing measures. The technical measures developed by the European Commission followed a request to CESR for its advice. CESR completed this initial work to provide the European Commission with technical advice for the legislative measures in 2003 and continued its activity in this area during 2004 to ensure the consistent application of the Prospectus legislation. To this end, the CESR expert group prepared a set of recommendations (Ref. CESR/05-054b) which gave guidance on how to produce a prospectus. In addition, in 2005, CESR delivered its advice to the EC on how to deal with those circumstances where the historical financial information to be included in the prospectus might not sufficiently reflect the issuer's whole business throughout the required period ("complex financial histories").

3. CESR is an independent Committee of European Securities Regulators. The role of the Committee is to:
   - Improve co-ordination among securities regulators;
   - Act as an advisory group to assist the EU Commission, in particular in its preparation of draft implementing measures in the field of securities;
   - Work to ensure more consistent and timely day-to-day implementation of community legislation in the Member States;
   - The Committee was established under the terms of the European Commission's decision of 6 June 2001 (2001/1501/EC).

   It is one of the two committees envisaged in the Final Report of the group of Wise Men on the regulation of European securities markets, chaired by Baron Alexandre Lamfalussy. The report itself was endorsed by the European Council and the European Parliament. The relevant documents are available on CESR's website.

   Each Member State of the European Union has one member on the Committee. The members are nominated by the Member States and are the Heads of the national public authorities competent in the field of securities. The European Commission has nominated the Director General of the DG Market, as its representative. Furthermore, the securities authorities of Norway and Iceland are also represented at a senior level. From 1st January 2006, the securities supervisors of Romania and Bulgaria attend CESR meetings as observers.

4. For further information please contact:

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THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Date: 18 July 2006
Ref. CESR/06- 296d

Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members

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 'Q and A' publication (Ref.CESR/06- 296d) 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.

The CESR group will continue to meet 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 a copy to 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.

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 Directive[1]?

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 Directive[2]?

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

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.

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[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. Employee share option schemes

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)).*

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 reflect 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.

4. Free offers

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.

5. Languages of the documents incorporated by reference[3]

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.*

6. Order of the information in the prospectus

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.

[3] 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).

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.*

7. Risk factors section

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.*

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

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.*

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

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 particularly the term "nearly equivalent to EUR 1.000", is applied in practice to cases where the securities are denominated in a currency other that 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.*

10. Item 20.1 of Annex I of the Regulation

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 has 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.*

11. Application of the different schedules of the Regulation

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).*

12. Supplement of a prospectus

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.*

13. Interim financial information included in the prospectus

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.

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

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.

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

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.*

16. Convertible or exchangeable securities

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.*

17. Profit forecasts

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.