

**European Securities Markets Expert Group
(ESME)**

**Report on Directive 2003/71/EC
of the European Parliament and of the Council
on the prospectus to be published when securities
are offered to the public or admitted to trading
- Annex to the Report -**

Brussels, 5 September 2007

The purpose of this table is to stimulate discussion by cataloguing issues identified to date in relation to the practical application of the Prospectus Directive (PD) and grading them according to their practical impact for market participants (Low/Medium/High). With respect to each issue, the table also seeks to identify the type of possible action that might be needed to address the issue. In some cases, no action may be required. In others, it may be desirable to seek to reach an agreed interpretation (either through CESR or otherwise). In others, the issue could only be addressed by amendments to the implementing regulation adopted under the PD (PDR) or to the PD itself, although in some cases there is a risk that it might be difficult to agree amendments to the PD that reverse compromises agreed in the original directive and that doing so may lead to worse outcomes than those sought to be addressed. Any proposal for legislative action would, in any event, need further evaluation, including cost-benefit analysis, and consultation.

PD Article	Issue Description	Grading	Comment	Possible Action
<i>Recitals</i>				
(12) ... Depository receipts and convertible notes ... fall within the definition of non-equity securities set out in this Directive. (21) the summary should be written in non-technical language and normally should not exceed 2 500 words in the language in which the prospectus was originally drawn up.	Inconsistent with the definition of equity securities in Article 2(1)(b) - see below. 2,500-word limit widely ignored in practice	Low Low	Under Article 2(1)(b) securities convertible into the issuer's own shares are equity securities. For complex issues, such as convertible or high yield securities, and for issuance programmes 2,500 words is too few to give an adequate summary.	No action necessary.
<i>Article 1 (Purpose and scope)</i>				
1. The purpose of this Directive is to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when	Issuers are choosing admission to trading on exchange regulated markets (such as AIM, EuroMTF, etc.), rather than regulated markets.	Medium	Exchange regulated markets have provided a necessary "safety valve" to address some of issuers' concerns about the regulated market regime.	Further research

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securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.	<p>It has to checked whether the transparency directive will lead to identical requirements for issuers listed on official and on exchange regulated markets.</p> <p>Overall, the increased attractiveness of exchange regulated markets appears to be a consequence of the FSAP directives collectively, and not only a direct result of the Prospectus Directive.</p> <p>Exchange regulated markets provide certain types of issuers, mostly SMEs, with a market infrastructure and regulatory regime that better suits their particular needs.</p>		There is a need to identify factors that are leading issuers to select exchange regulated markets over regulated markets.	
2. This Directive shall not apply to:				
(a) units issued by collective investment undertakings other than the closed-end type;	<p>No EU-wide private placement exemption available for cross-border sales of units in open-ended collective investment undertakings e.g. ETFs, private equity funds, etc.</p> <p>See article 2(1)(o) in relation to the lack of clarity as to when collective investment undertakings are considered open or closed ended, especially where there are restrictions on redemptions.</p>	Medium	The Commission has identified this issue as needing action in its White Paper on investment funds (November 2006).	PD amendment (or other EU legislation).

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<p>(f) non-equity securities issued in a continuous or repeated manner by credit institutions provided that these securities:</p> <p>(i) are not subordinated, convertible or exchangeable;</p> <p>(ii) do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument;</p> <p>(iii) materialise reception of repayable deposits;</p> <p>(iv) are covered by a deposit guarantee scheme under Directive 94/19/EC of the European Parliament and of the Council on deposit-guarantee schemes;</p>	<p>It is unclear whether the existence of any form of deposit protection is enough to exclude the application of the PD under this article (e.g. for debt issuance programmes by bank issuers). Where this article applies, issuers are not able to elect to draw up prospectus under article 1(3) PD, except in the limited cases falling within article 1(2)(j).</p>	Low	Unclear whether this has caused a practical problem for any class of issuers.	No action necessary.
<p>(h) securities included in an offer where the total consideration of the offer is less than EUR 2 500 000, which limit shall be calculated over a period of 12 months;</p>	<p>It is unclear how issuers should calculate the offer size for these purposes (counting the offer in that Member State, across EU or EEA or worldwide).</p> <p>Some countries (e.g. Germany, Belgium) have chosen to extend the PD's prospectus requirements to offers falling under the EUR 2.5m threshold, without modification. This creates obstacles to third country issuers, especially under employee share</p>	Medium	<p>In practice, it may be simplest to apply these (and other similar) criteria "per Member State", reflecting the fact that offers may be made on different bases in different Member States.</p> <p>CESR's PD FAQ (July 2006) confirm that offers of free shares benefit from this exemption (and article 3(2)(e)) so long as there is no hidden consideration.</p>	Agreed interpretation/PD amendment/Home State issue

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	schemes (as they cannot benefit from a passport) as well as burdens for domestic issuers. See also Art. 2 1 (a).			
(j) non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer is less than EUR 50,000,000, which limit shall be calculated over a period of 12 months, provided that these securities: (i) are not subordinated, convertible or exchangeable (ii) do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument.	Small and medium sized credit institutions issuing plain vanilla debt may find the EUR 50m limit too low or may be impeded by national laws extending the prospectus directive to all offers (although they can choose to prepare a prospectus).	Low	For consideration whether the possibility of domestic exemption should continue (perhaps with higher thresholds) or a more harmonised EU wide approach taken to the treatment of credit institutions.	PD amendment.
Article 2 (Definitions)				
1. For the purposes of this Directive, the following definitions shall apply:				
(a) 'securities' means transferable securities as defined by Article 1(4) of Directive 93/22/EEC ...	Treatment of employee and other options, shares in private companies, limited partnership interests, etc. In particular, this definition has significant practical importance in relation to offers of non-transferable employee share options and in relation to offers to employees of shares in private	High	CESR was unable to agree on the interpretation of this provision in relation to employee share options (CESR FAQ on prospectuses - July 2006). The question of whether these instruments are transferable securities	Agreed interpretations.

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	companies where transferability is restricted in some way.		also has implications for MiFID (e.g. as to whether advice or other activities related to these instruments are regulated or passportable investment services).	
... with the exception of money market instruments as defined by Article 1(5) of Directive 93/22/EEC, having a maturity of less than 12 months. For these instruments national legislation may be applicable;	<p>It can be unclear when short-maturity (less than 12 months) notes issued under programmes are instruments which are "normally dealt in on the money markets".</p> <p>No EU-wide private placement exemption for sales of exempt money market instruments, even when issued in wholesale denominations.</p>	Low	Commercial paper issues are being addressed by STEP project. Unclear that action currently required under PD.	No action required.
(b) "equity securities" means shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer;...	<p>Many preference shares have economic substance which is more similar to debt than equity securities (although may depend on their features under national law). Some competent authorities are continuing to treat preference shares as debt for disclosure purposes, in line with the pre-PD approach and reflecting the economic substance of the issuer's obligations (and the way the securities are traded). However, technically, preference shares fall within the PD definition of equity securities.</p> <p>Definition clearly covers some</p>	Medium	<p>Treatment of preference shares as equity securities has implications for choice of home state and the application of the relevant disclosure annexes under the PDR (to be considered in the context of the PDR)</p> <p>(Also, there is a read across issue with respect to MiFID as it may be inconsistent with economic substance to treat most preference shares in the same way as shares for pre- and post-trade transparency purposes).</p> <p>Issue of harmonizing national</p>	Home state issue: see below.

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	convertible notes, contrary to recital 12.		commercial law.	
(c) 'non-equity securities' means all securities that are not equity securities;	<p>Definition is different from that of "debt securities" in TD. The TD definition is narrower in that it excludes:</p> <p>i) all convertible securities (even when not convertible into shares of the issuer); and</p> <p>ii) warrants and other derivative securities.</p>	Low	<p>Exemptions in PD for debt securities may be unduly narrow.</p> <p>(Specific definition for derivative securities to be discussed in context of PDR).</p>	Read-across issue.
(d) 'offer of securities to the public' means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries;	<p>This definition has raised a number of issues e.g. whether it is possible to make a public announcement of the terms of an offer which is not yet open for action by investors (e.g. announcements of the terms of a takeover offer that will be made at a future time, as may be required to comply with takeover regulations; publication of selected information on a forthcoming issue on the internet).</p> <p>It also is unclear how there can be secondary market trading in securities without continuous triggering of the requirement to publish a prospectus (see below).</p> <p>Could an offer which does not contain sufficient information (eg price omitted)</p>	Medium	<p>CESR's PD FAQs (July 2006) indicate that allocations of securities where the recipient has no element of choice is not an offer to the public.</p> <p>The fact of a public offering should depend on the concrete possibility of an investor either to buy or to subscribe for the securities. The public offering should end as soon as the secondary market (trading) for a security starts.</p>	Agreed interpretations

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	nevertheless still be within the definition if investors are able to make binding conditional acceptances (eg "I will subscribe [x] amount of the securities if the price is [y]")			
(e) 'qualified investors' means: ...				
(ii) national and regional governments, central banks, international and supranational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations;	The corresponding element of definition of professional investor in Annex II MiFID includes public bodies that manage public debt and the corresponding element of the definition of eligible counterparty in article 24(2) MiFID includes exempt persons.	Low		Read across issue.
(iii) other legal entities which do not meet two of the three criteria set out in paragraph (f);	Criteria for "large undertakings" for the purpose of definition of professional investor in Annex II MiFID are different. In addition, firms may grandfather existing professional clients for MiFID purposes.	Medium	Practical problem as prevents firms relying on classification carried out for MiFID purposes (or grandfathering).	Read across issue.
(iv) certain natural persons: subject to mutual recognition ... and (v) certain SMEs: subject to mutual recognition,	Requirement for public registration of individuals and SMEs (under article 1(3)) means that these provisions have been of little practical importance, at least in UK or Germany.	Low	The approach is inconsistent with the MiFID approach which allows firms to categorise certain individuals and smaller entities as "professional clients" without public registration.	Read across issue.
(h) 'issuer' means a legal entity which	It is unclear who is the issuer of depositary receipts (the depositary or the	Medium	The issuer of the underlying shares should be considered to be the person	PD amendment and read

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issues or proposes to issue securities;	issuer of the underlying shares/securities).		liable under article 6 or responsible for the continuing obligations under article 10 and continuing obligations under MAD/TD. The PDR addresses the different disclosure requirements applicable to depositary receipts.	across issue.
(m) 'home Member State' means:				
(i) for all Community issuers of securities which are not mentioned in (ii), the Member State where the issuer has its registered office;	Shackling issuers to the competent authorities in their country of incorporation reduces market discipline on competent authorities to ensure satisfactory levels of service to issuers and stifles competition between regulated markets to attract issuers.	Medium	There are particular problems for issuers which wish to list and offer their securities in a country other than that of their registered office, but still need their home state to approve their prospectus (especially as their home state may only be willing to review the prospectus in the home state's language).	PD amendment (but likely significant obstacles to achieving this).
(ii) for any issues of non-equity securities whose denomination per unit amounts to at least EUR 1000, and for any issues of non-equity securities giving the right to acquire any transferable securities or to receive a cash amount, as a consequence of their being converted or the rights conferred by them being exercised ...	Arbitrary EUR 1000 threshold causes practical issues for issuers (e.g. need to maintain additional debt issuance programmes). The reference to an exercise of rights does no longer describe the reality of derivative securities where indeed the element of exercise is existent from a theoretical point of view (the option elements included in the structure), but where the investors in almost any case	High	In any event, threshold does not apply to most derivative securities.	PD amendment to remove threshold and reference to exercise.

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	do not have any interest in exercising such option element.			
... The same regime shall be applicable to non-equity securities in a currency other than euro, provided that the value of such minimum denominations is nearly equivalent to EUR 1000.	What amounts to "nearly" EUR 1000.	Medium	CESR's PD FAQs (July 2006) suggest that the nearly equivalent test is applied at the time of submission of the prospectus, but gives no further guidance on when an amount is "nearly" EUR 1000.	Agreed interpretation.
(iii) for all issuers of securities incorporated in a third country, which are not mentioned in (ii), ...	<p>See also Article 30 (transitional provisions).</p> <p>There has been confusion regarding interpretation of this provision. Some issuers have missed the election deadline.</p> <p>The paragraph is only relevant for issuers of equity and stock option schemes (and debt issues with a denomination of less than 1000 Euro), but in general not for issuers of debt and derivative securities</p>	Medium	There are also continuing questions for new issuers as to how this provision operates in practice. The inability to obtain binding rulings is a particular issue for non-EU issuers. It should be removed.	Agreed interpretations and PD amendments.
<p>(o) 'collective investment undertaking other than the closed-end type' means unit trusts and investment companies:</p> <p>(i) the object of which is the collective investment of capital provided by the public, and which operate on the</p>	Lack of clarity as to when securities are considered to be units in collective investment undertakings other than the closed type (and thus outside PD), especially where there are restrictions on redemption.	Low		Agreed interpretation.

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principle of risk-spreading; (ii) the units of which are, at the holder's request, repurchased or redeemed, directly or indirectly, out of the assets of these undertakings;				
<i>Article 3 (Obligation to publish a prospectus)</i>				
2. The obligation to publish a prospectus shall not apply to the following types of offer:	Absence of an express exemption for secondary market trading activities. In what circumstances is it possible to combine the exceptions e.g. an offer to qualified investors combined with an offer to retail investors with a minimum investment of EUR50,000?	Medium		Agreed interpretation/PD amendment. Agreed interpretation
(a) an offer of securities addressed solely to qualified investors; and/or	Need to confirm that issuer can still make a public announcement (e.g. to satisfy obligations under article 6(1) MAD) of an offer which is only directed at qualified investors.	Low		Agreed interpretation.
(b) an offer of securities addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors;	Need to confirm that this exemption is available in one Member State even if a public offer is being made via a prospectus in another Member State (i.e. there is no requirement to use the passport to access investors in other states where the offer in that state	Low	The consensus is that each dealer in a syndicate cannot sell to 100 persons but rather that the limit is applicable to the syndicate as a whole?	Agreed interpretation.

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	qualifies for an exemption).			
(d) an offer of securities whose denomination per unit amounts to at least EUR 50,000;	It is unclear how this will be interpreted.	High	<p>A number of deals have been structured with denominations of "EUR 50,000 plus integral multiples of 1,000 in excess thereof" in order to benefit from this exemption. Such formulations have generated lengthy debate about how to deal with printing of definitive notes to ensure that no investors receive definitive bearer notes of less than EUR 50,000. If an issue will only be represented by a global note, for example the German securities law does not allow for different denominations included in one global note. This means that the 50 + 1 solution could only be realized in Germany by printing definitive notes.</p> <p>The increasing reliance on issues of securities with denominations of EUR 50,000 or more to benefit from this exemption is reducing supply of corporate bonds for retail investors and significantly reducing volume of stock exchange trading in corporate bonds, at least in Germany.</p>	Agreed interpretation, later PD amendment. Further research on national securities law.
(e) an offer of securities with a total consideration of less than EUR 100 000,	Treatment of offers of free shares.	Low	CESR's PD FAQ (July 2006) confirm that offers of free shares are benefit	No further action required.

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which limit shall be calculated over a period of 12 months.			from this exemption (and article 3(2)(e)) so long as there is no hidden consideration.	
...[A]ny subsequent resale of securities which were previously the subject of ... [an exempt offer] shall be regarded as a separate offer ... The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions (a) to (e) are met for the final placement.	Significant concerns about "retail cascade", i.e. whether an underwriter or issuer is liable for breaches of the directive where securities are sold to an intermediary which resells them in breach of PD (or where those sales when aggregated with other sales breaches the PD exemption).	High	In practice, this is driving issuers/arrangers to arrange for issues in EUR 50,000 or larger denominations. This has an effect on the retail market for notes.	Agreed interpretation (including parameters of safe harbour).
<i>Article 4 (Exemptions from the obligation to publish a prospectus)</i>				
1. The obligation to publish a prospectus shall not apply to offers of securities to the public of the following types of securities:	<p>Absence of an exemption for rights issues increases expense/delay of secondary capital raising.</p> <p>If an exemption is provided for rights issues, then it would also be appropriate to extend the exemption to other types of issues where all existing shareholders have the opportunity to participate in proportion to their current shareholdings, e.g. open offers.</p> <p>An alternative might be to continue to require a prospectus but create a lighter disclosure regime for rights issues where an issuer already has shares</p>	High	Requires issuers to follow passporting procedure (including translation of summary) or exclude shareholders in other Member States from participating in rights issue. Increases costs and complexity of rights issues where shareholders located in several countries.	PD amendment.

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	admitted to trading on a regulated market.			
(a) shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital;	It is unclear what this is intended to cover.	Low		Agreed interpretation.
(b) securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;	<p>Where target has shareholders in another Member State it may be difficult to obtain approval from the competent authorities in that state. Therefore, the bidder may need to register a prospectus in order to passport it into other countries (but then may encounter issues with withdrawal rights under article 16(5).</p> <p>Need for <i>uniform availability of exemptions</i> in Articles 4(1)(b) and (c), and 4(2)(c) and (d) across the EU, which is of vital importance in order to ensure issuers' equal treatment, not to discourage certain types of operations as foreseen by the Directive and to enhance a level playing field across the EU. In particular with reference to the contents of the equivalent document, it becomes extremely relevant to state at legislative level a clear preference for the definition of specific criteria characterising such document by the</p>	Medium	Also article 4(2)(c).	PD amendment, level 2 amendment and/or agreed interpretation.

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	Competent Authorities, rather than a case-by-case approach.			
(c) securities offered, allotted or to be allotted in connection with a merger,...	As for paragraph (b).	Medium	Also article 4(2)(d).	PD amendment
(d) shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out ...	Share offerings to existing shareholders should not be subject to a full prospectus according to the Directive as the existing shareholders should be sufficiently familiar with the company. The document currently required for bonus shares should also be appropriate in such cases.	High	The directive should not impose companies with burdensome requirements for raising capital as long as such action is only directed to existing shareholders. A prospectus shall only be required if the shares shall be admitted for trading at a stock exchange. Therefore, the proposed amendment should be considered in connection with the exemptions in article 4 (2), especially the 10 per cent clause and the shares allotted free of charge.	PD amendment
(e) securities offered, allotted or to be allotted to existing or former directors or employees by their employer which has securities already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.	Inconsistency with article 4(2)(f) as it refers to "securities" (not shares) already admitted to trading. Absence of a clear exemption for employee share schemes of non-EU listed and EU unlisted companies. The employees or directors should have other possibilities to obtain sufficient information on the company.	High	Restrictive view of scope of article 4(1)(e) and absence of any other exemption means that, in practice, many non-EU companies cannot offer their share schemes to their employees. Trading on an equivalent market should be sufficient for non-EU issuers. The wording of the article should be amended as follows: (e) securities offered, allotted or to be allotted to	PD amendment.

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			existing or former directors or employees by their employer which has securities already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.	
<i>(f) to be inserted</i>	An exemption shall be made for the increase of already publicly offered non-equity securities (“same ISIN code”) which have initially been issued under a stand alone prospectus. While securities issued under a base prospectus can easily be increased and publicly offered by a new set of final terms, the increase of a security based on a stand alone prospectus is unclear. Some authorities require a new prospectus, some a supplement to the existing prospectus. Both habits are not covered by the PD, impose additional requirements and time restrictions or confuse markets by having two documents for the same ISIN code, respectively.	High	The exemption would bring the rules regarding the public offering of base prospectus issues in line with stand alone prospectus issues. There is no reason for a different application. The present rules regarding base prospectuses have been proved efficient. The equivalent exemption has to be inserted under article 4 (2) (i)	PD amendment
2. The obligation to publish a prospectus shall not apply to the admission to trading on a regulated market of the following types of securities:				

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(a) shares representing, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market;	Dual listed non-EU companies apparently need to file a prospectus where a merger/issuance results in an increase of capital even if there is no offering in the EU. Increase of existing issues of debt securities which are admitted to trading requires new prospectus even where there is no public offer of the securities.	Medium	Policy rationale is unclear, even for EU companies.	PD amendment
(h) securities already admitted to trading on another regulated market, on the following conditions: (i) that these securities, or securities of the same class, have been admitted to trading on that other regulated market for more than 18 months;	Restriction on ability of EU regulated markets to compete for trading activity in new issues.	Low	In practice, other EU regulated markets would seek to attract trading on MTFs.	PD amendment.
<i>(i) to be inserted</i>	An exemption shall be made for the admission to listing and trading of increases of already existing non-equity securities ("same ISIN code") which have initially been issued under a stand alone prospectus.	High	The exemption would bring the rules for base prospectus issues in line with stand alone prospectus issues. The equivalent exemption regarding public offering has to be inserted under article 4 (1) (f)	PD amendment
Article 5 (The prospectus)				
4. ... the prospectus can, at the choice of the issuer, offeror or person asking for the admission to trading on a regulated	No possibility to prepare a tripartite base prospectus (registration document, securities note, summary) as it is	High	Market flexibility for frequent issues and emphasis on the importance of a stand alone registration document.as	PD amendment

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market consist of a base prospectus containing all relevant information concerning the issuer and the securities offered to the public or to be admitted to trading on a regulated market ...	possible for stand alone prospectuses. When such separate final terms are produced, are they deemed to become part of the prospectus? What is the meaning of "provided to investors"? Why is this included when the final terms must in any event be published in accordance with Article 14(2)?		initially intended by the PD.	
4.... 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.	Different interpretations by different competent authorities regarding the possible (maximum) content of final terms (Germany, Luxembourg versus United Kingdom). Only a wide interpretation of the final terms allows for market efficiency, as could be seen with derivative securities in Germany. Unclear what information can be included in final terms and when a supplement is required.	High	Consider whether final terms might include any information item regarding the securities (but not the issuer) which is not known at the time of approval of the base prospectus and can only be determined at the time the public offer takes place including, but not limited to, the underlying, pay-out structure and related risk factors (reflecting the need for market efficiency and flexibility - see Recitals 10 and 24 of PD).	Agreed interpretation.
Article 6 (Responsibility attaching to the prospectus)				
1. Member States shall ensure that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to	Differing member state standards for prospectus liability impede cross-border offers of securities. Issuers and other transaction parties are exposed to inconsistent liability regimes in other	High		PD amendment.

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trading on a regulated market or the guarantor, as the case may be....	countries.			
<i>Article 7 (Minimum information)</i>				
3. The implementing measures referred to in paragraph 1 shall be based on the indicative Annexes to this Directive.	The Annex to the Directive is widely ignored by the Regulation and misleading. It should be deleted as the Regulation has been accepted as the only set of disclosure requirements for a prospectus.	Low		Agreed interpretation Ultimately PD amendment
<i>Article 8 (Omission of information)</i>				
1. (a) the criteria, and/or the conditions in accordance with which the above elements will be determined or, in the case of price, the maximum price, are disclosed in the prospectus;	What level of detail satisfies the requirement for disclosure of the criteria, and/or the conditions in accordance with which the above elements will be determined? Failure to satisfy 8(1)(a) triggers two-day put right under 8(1)(b)	Low		PD amendment
1(b) the acceptances of the purchase or subscription of securities may be withdrawn for not less than two working days after the final offer price and amount of securities which will be offered to the public have been filed.	Which member state's laws govern the existence of this put right? Depending upon member states' implementation, may be more than two days in some member states.			
<i>Article 9 (Validity of prospectus, base prospectus and registration document)</i>				

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1. A prospectus shall be valid for 12 months after its publication for offers to the public or admissions to trading on a regulated market, provided that the prospectus is completed by any supplements required pursuant to Article 16.	Some competent authorities, on the other hand, require a new prospectus if the public offering of a security lasts for more than 12 months.	Medium	The basic principle shall be “1 ISIN Code = 1 prospectus”, independent of the fact, how long the public offering will last.	Agreed interpretation.
2. In the case of an offering programme, the base prospectus, previously filed, shall be valid for a period of up to 12 months.	Annual renewal of base prospectuses creates high volumes of work, for little benefit, bearing in mind levels of continuing disclosure and possibility of incorporation by reference. (See above regarding increases of existing issues that are admitted to trading).	Low	Consider extending period of validity e.g. to 18 months to 2 years.	PD amendment
4. A registration document, as referred to in Article 5(3), previously filed, shall be valid for a period of up to 12 months provided that it has been updated in accordance with Article 10(1). The registration document accompanied by the securities note, updated if applicable in accordance with Article 12, and the summary note shall be considered to constitute a valid prospectus.	The method of updating a registration document appears to be via the securities note (see Article 12(2)). What is the purpose of the cross reference to "updated in accordance with Article 10(1)"? Article 10(1) seems to have no relevance here. Why is it not possible to supplement a registration document pursuant to Article 16? To what extent is (will be) an issuer obliged to publish identical or comparable information as a consequence of being subject to the PD	Medium	The principles for a registration document have to be discussed. In general it should be possible to update and exchange the registration document. In addition, an issuer shall not be obliged to publish slightly different information subject to different EU directives.	Agreed interpretation and ultimately PD amendment. Read across

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	<p>and other EU directives, like the transparency directive.</p> <p>Would it be possible in the future to have one single “company information profile” which fits all EU directives?</p>			
<i>Article 10 (Information)</i>				
2. The document shall be filed with the competent authority of the home Member State after the publication of the financial statement.	<p>Does the document according to article 10 provide any significant information to an investor which is not available via other sources?</p> <p>If an issuer has more than one home member state (by virtue of Article 2(1)(m)(ii)), which home member state must it file with? The other home member states shall not be allowed to require additional or different information (“European passport”)</p> <p>What is the significance of "after the publication of the financial statement"?</p>		Article 10 should be considered in the light of company information to be provided subject to other EU directives, especially the transparency directive which intends to be the platform for European company information. Therefore, article 10 could be deleted in the future.	Agreed interpretation and ultimately PD amendment. Read across.
<i>Article 11 (Incorporation by reference)</i>				
1. Member States shall allow information to be incorporated... approved by the competent authority ... or filed with it in accordance with this Directive.. or with titles IV and V of [CARD]...	This provision is quite restrictive and prevents first time issuers from incorporating information by reference, especially financial statements	Medium		PD amendment.

PD Article	Issue Description	Grading	Comment	Possible Action
<i>Article 12 (Prospectuses consisting of separate documents)</i>				
2. the securities note shall provide information that would normally be provided in the registration document if there has been a material change or recent development which could affect investors' assessments since the latest updated registration document or any supplement as provided for in Article 16 was approved.	What is the significance of the phrase "any supplement as provided for in Article 16"? Article 16 does not appear to permit a registration document to be supplemented.	Low		PD amendment to permit registration document to be supplemented.
<i>Article 13 (Approval of the prospectus)</i>				
2. This competent authority shall notify the issuer, the offeror or the person asking for admission to trading on a regulated market, as the case may be, of its decision regarding the approval of the prospectus within 10 working days of the submission of the draft prospectus.	It should be clear that time limits start running when submit the draft prospectus and that approval should not be subject to conditions. Some Member States delay timetable for approval or require additional procedures.	Medium		Agreed interpretation.
4. If the competent authority finds, on reasonable grounds, that the documents submitted to it are incomplete or that supplementary information is needed, the time limits referred to in paragraphs 2 and 3 shall apply only from the date on which such information is provided by the issuer, the offeror or the person asking for admission to trading on a	Some Member States are extending the time period by repeated requests for information.	Medium	Competent authorities should only be able to make one request for additional information.	Agreed interpretation.

PD Article	Issue Description	Grading	Comment	Possible Action
<p>regulated market.</p> <p>In the case referred to in paragraph 2 the competent authority should notify the issuer if the documents are incomplete within 10 working days of the submission of the application.</p>				
<p><i>Article 14 (Publication of the prospectus)</i></p>				
<p>2. The prospectus shall be deemed available to the public when published either: (a)... (b)... (c)... (d)... ;or (e)....</p> <p>2(b), (c) ... when published ... at the offices of the financial intermediaries placing or selling the securities.</p>	<p>The English language version presents five permitted alternative publication methods but other language versions are unclear. It should be made clear that these are each permitted alternative methods.</p> <p>Diversity of publication methods makes it difficult, if not impossible, to undertake a comprehensive search for all of an issuer's published information.</p> <p>Investment banks which are active in the underwriting and selling of securities typically do not have facilities to deal with members of the public requesting information, such as prospectuses nor do they wish to establish such facilities.</p>	<p>Medium</p> <p>Medium</p>	<p>This is particularly significant in the case of issuance programmes where a frequent issuer may publish base prospectus supplements and final terms on a weekly basis if not more often. (Contrast with the ease of searching on the SEC's EDGAR website).</p>	<p>Agreed interpretation.</p> <p>PD amendment (medium term aspiration) to provide for publication on single website).</p> <p>PD amendments</p>

PD Article	Issue Description	Grading	Comment	Possible Action
	Furthermore, from a risk management perspective such banks are generally unwilling to publish their customers' prospectuses on their own websites. These considerations militate against the use of alternatives (b) and (c) for publication.			
3. In addition, 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.	Different requirements by some competent authorities which could lead to discrimination among issuers subject to the choice of the home member state.	Medium	No information contained in such notice; therefore to be abolished	PD amendment. Home member state issue.
<i>Article 15 (Advertisements)</i>				
6. The competent authority of the home Member State shall have the power to exercise control over the compliance of advertising activity, relating to a public offer of securities or an admission to trading on a regulated market, with the principles referred to in paragraphs 2 to 5.	It is unclear the extent to which the host state can impose its own requirements regarding advertising and publicity.	Medium	It should be made clear that only an ex post supervision is allowed, but not an ex ante approval or even control.	Agreed interpretation or PD amendment.
<i>Article 16 (Supplements to the prospectus)</i>				
(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	Lack of clarity about the scope of this obligation (e.g. the requirement to disclose "every significant new factor") and the relationship to ad hoc publicity.	High	Concerns about supplements are linked to the concerns about the "put" in article 16(5). Overlap with the obligations in the	PD amendment, at first at least agreed interpretation.

PD Article	Issue Description	Grading	Comment	Possible Action
mentioned in a supplement to the prospectus.	<p>Lack of clarity about when obligation ceases to apply where the offer may continue after admission to trading.</p> <p>Unclear what information may be included in final terms and when a supplement is required (requiring approval).</p> <p>Unclear how to supplement information which is not significant and how to supplement/correct registration documents and final terms.</p> <p>No timing specified for publication of supplement.</p>		Market Abuse Directive regarding requirements for ad hoc disclosures after submission of application for admission. Regarding the significance of a new factor only such information should be subject to a supplement which also requires an ad hoc disclosure.	
(2) Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within a time limit which shall not be shorter than two working days after the publication of the supplement, to withdraw their acceptances...	<p>If a supplement is required, triggers investor "put". Therefore, issuers will often produce a "drawdown" prospectus instead.</p> <p>Practical problem where there is a takeover by exchange offer with a registered prospectus. Investor "puts" may be inconsistent with irrevocable acceptances.</p> <p>There is potential for inconsistent implementation in different states for the time period of the investor "put".</p> <p>It is unclear which law governs the</p>	High	Unclear whether "put" should affect securities sold in private placement but which are listed or simply because there is a parallel public offer.	PD amendment at first at least agreed interpretation

PD Article	Issue Description	Grading	Comment	Possible Action
	<p>investor “put” in a cross-border situation.</p> <p>Unclear what is position of investors who have not only agreed to purchase or subscribe, but have actually purchased or subscribed before the supplement is published.</p>			
<i>Article 17 (Community scope of approvals of prospectus)</i>				
(1)... the prospectus approved by the home Member State and any supplement thereto shall be valid for the public offer or the admission to trading in any number of host Member State, provided that the competent authority of each host Member State is notified in accordance with Article 18. ...	The requirement to notify supplements results in constant passporting activity for issuers who undertake a number of programme supplements throughout the year.	Medium		PD amendment
Competent authorities of host Member States shall not undertake any approval or administrative procedures relating to prospectuses.	Some member states impose additional requirements where prospectuses are passported from another member state.	Medium	CESR issued “FAQ” guidance in July 2006, encouraging member states to drop additional requirements. However, additional requirements continue.	Agreed interpretation.
<i>Article 18 (Notification)</i>				
1. The competent authority of the home Member State shall, provide the competent authority of the host Member State with a certificate of approval	Procedures among competent authorities are different and often especially outside the scope of the issuer. Some host Member State authorities impose	Medium	A clear procedure shall be agreed among competent authorities to create certainty for issuers. Host member states should not be allowed to	Agreed interpretation

PD Article	Issue Description	Grading	Comment	Possible Action
attesting that the prospectus has been drawn up in accordance with this Directive	additional requirements or fees to issuers using the passport. Such requirements often comprise additional disclosure in the prospectus, for example regarding listing or taxation.		impose additional requirements or fees. See also article 23 (1).	
<i>Article 19 (Use of languages)</i>				
2. ... For the purpose of the scrutiny by the competent authority of the home Member State, the prospectus shall be drawn up either in a language accepted by this authority or in a language customary in the sphere of international finance, at the choice of the issuer, offeror or person asking for admission to trading, as the case may be.	Home member states can insist on reviewing prospectuses in their own language (or a language customary in the sphere of international finance). In practice, the home state language regime is a barrier to issuers offering into other Member States where a domestic language prospectus is required.	Medium	<p>Language regime should be more flexible in order to allow issuers to obtain approval for domestic language prospectuses (in addition to summary) in order to allow for better information of retail investors.</p> <p>Risk that issuer uses a document in the host Member State which is not considered as a prospectus according the home Member State; leads to liability issue.</p> <p>Issues arise in part because issuers are restricted in their choice of home state.</p> <p>Competent authorities should approve bilingual versions of a prospectus (for example a French and an English version of the same prospectus).</p>	PD amendment (or steps by competent authorities to improve language competencies).
Article 20 (Issuers incorporated in third countries)				

PD Article	Issue Description	Grading	Comment	Possible Action
Article 21 (Powers)				
Article 22 (Professional secrecy and cooperation between authorities)				
<i>Article 23 (Precautionary measures)</i>				
1. Where the competent authority of the host Member State finds that irregularities have been committed by the issuer or by the financial institution in charge of the public offer or that breaches have been committed of the obligations attaching to the issuer by reason of the fact that the securities are admitted to trading on a regulated market, it shall refer these findings to the competent authority of the home Member State.	The clause should not be used to justify additional disclosure requirements as described under article 18 (1).	Medium		Agreed interpretation
Article 24 (Committee procedure)				
Article 25 (Sanctions)				
Article 26 (Right of appeal)				
Article 27 (Amendments)				
Article 28 (Repeal)				
Article 29 (Transposition)				
Article 30 (Transitional provisions)	See Article 2(1)(m)(iii). Some issuers		CESR issued guidance in July 2006 in	

PD Article	Issue Description	Grading	Comment	Possible Action
	missed the election deadline.		its FAQs.	
Article 31 (Review)				