



EUROPEAN COMMISSION

Internal Market DG

FINANCIAL MARKETS

Main differences between the Commission draft regulation on draft implementing rules for the prospectus Directive and the CESR advice (ESC / 42/2003-rev2)

The differences that have been highlighted in this document concern the substance of the text. They refer only to the main issues that might have a political impact or are linked to the interpretation of the existing acquis. Further drafting and presentational changes, as well as technical improvements – which are not dealt with in this document – have been incorporated in the draft regulation.

A. Main substantial differences

The Commission draft regulation follows largely the CESR advice. However, several changes have been inserted in the text at both, substantial and technical/presentational level.

On substance, the main differences between the CESR advice and the Commission draft regulation are related to the following issues:

- 1) The question of specialist issuers (acceptance of a general clause along the lines suggested in the CESR advice but restricted to a list of “specialist issuers”).
- 2) The accounting principles used for the preparation of pro forma statements (clarification added to the CESR advice).
- 3) Transitional arrangements related to financial information presented by third country issuers: The draft regulation adds some clarification and completes the CESR approach with respect to a clear cut-off period for the application of the transitional requirements as well as by introducing the obligation for the Commission to put in place a definitive solution before this transitional period comes to its end.
- 4) Dissemination of advertisements: The approach taken by CESR has not been followed by the Commission as it was considered that it did not respond neither to the mandate nor to the habilitation provided in the relevant comitology provision included in Article 15 of Directive 2003/71/EC.

1. Specialist issuers

The Commission agrees with the CESR approach that for some categories of issuers the competent authority should be entitled to require additional information going beyond

the information items included in the schedules and building blocks because of the particular nature of the activities carried out by those issues.

However, we don't agree with CESR in that this should be left at the complete discretion of the competent authority on a case by case basis or simply to level 3; however, level 3 guidance is only indicative and does not have a legally binding effect. We consider that some safeguards should be included in a legal text.

The initial approach followed by CESR consisted in identifying what categories of issuers should be considered as specialist issuers (discussions in the expert groups involved start up companies, SMEs, property companies, mineral companies, investment companies, scientific research based companies and shipping companies) and the precise additional information that should be used in addition to the main schedules for drawing up a prospectus for each of those categories of specialist issuers. Thus, in the first consultation document drawn up by CESR, specific additional building blocks were envisaged for certain types of issuers.

This approach was also shared by the Commission; the first provisional mandate explicitly referred to examples of specialist issuers and that the specificity of those issuers should be taken into consideration when preparing the advice on possible schedules to be used by them.

Extract from the first provisional mandate

2. CESR IS INVITED TO PROVIDE ADVICE ON THE FOLLOWING PRIORITY ISSUES BY 31 MARCH 2003 AT THE LATEST :

2.1. Minimum Information (Article 6 (1) of the proposed Directive)

DG Internal Market requests CESR 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 take account of the different categories of issuers, investors and markets: thus, for example, the schedules, where necessary, should include specific provisions for newly created issuers ("start ups"). In particular, DG Internal Market is seeking CESR's advice on disclosure requirements adapted to issuers who are small or medium-sized companies (SMEs).

However, during the first consultation carried out by CESR for the preparation of the technical advice, the concept of specific schedules for specialist issuers was rejected by a

vast majority of respondents. Following the results of this first round of consultations, CESR adopted a general clause to be triggered on a case by case basis by a competent authority when there is some specificity concerning the financial situation of one issuer.

Following item was included in the CESR advice in the share registration document schedule (Annex 1 Appendix A):

CESR advice

26.	INFORMATION ADAPTED TO CERTAIN TYPES OF ISSUERS
26.1	Where the nature of the issuer’s business activities is such that the information set out in the historical financial information can not give specific explanation or justification of the value of the issuer and its assets, adapted information, including a valuation or other expert’s report providing such specific explanation or justification may need to be provided.

The Commission explored an alternative solution, which, to our knowledge, already exists in some Member States in order to avoid adopting a level 2 measure conflicting with level one.,

Commission draft Regulation

Article 23

Adaptations to the minimum information given in prospectuses and base prospectuses

1. By way of derogation of Articles 3 to 22, where the issuer’s activities fall under one of the categories included in Annex XIX, the competent authority, taking into consideration the specific nature of the activities involved, may ask for adapted information, including a valuation or other expert’s report on the assets of the issuer, in order to comply with the obligation referred to in Article 5(1) of Directive 2003/71/EC.

In order to obtain the inclusion of a new category in Annex XIX a Member State shall notify its request to the Commission. The Commission shall update this list following the Committee procedure provided for in Article 24 of Directive 2003/71/EC.

Annex XIX – List of specialist issuers

- Property company
- Mineral company
- Investment company
- Scientific research based company
- Company with less than 3 years of existence (Start-up company)
- Shipping company

Justification

The Commission does not agree with the inclusion of such a general clause in a level 2 measure for following reasons:

- The scope of this clause is extended to all companies without any distinction and not only to certain issuers (property companies, shipping companies, etc) – where it could be duly justified. There is a reference to the words 'specialist issuers' without definition or list of type of issuers. Our understanding is that all issuers could meet the principles described in this clause because all activities can be characterised as specific enough. This gives the competent authority the possibility to ask for additional information for each of these categories at its own discretion and, thus, hampers the principle of uniform application of the prospectus Directive in all Member States. This is contrary to Article 7 of this Directive which provides for an exhaustive detailed list of information to be disclosed. Competent authorities should not be allowed to adopt their own schedule for certain types of issuers. Competent authorities can only impose additional requirements on a case by case basis; those should be related to specific material information (Article 5).
- This is not consistent with the advice given by CESR for already identified specialist issuers such as banks and collective investment undertakings of the close end type. We do not understand why an ad hoc regime is provided for such specialist issuers and not for the others.

We propose a solution which consists in

- a) a precise list of activities which justify that the competent authority does not make use of the schemes provided for in the Directive; this list will be updated upon request by a Member State;
- b) a general clause enabling the competent authorities to derogate from the strict requirements included in the schedules and building blocks provided for specialist issuers and to ask for “adapted” information;
- c) the list should be easily adapted via comitology procedure

The list of specialist issuers has been largely inspired by the list included in the CESR consultation document. A recital 18 bis has also been included in the text to highlight the restrictive and exceptional character of this derogation to the general principle that a competent authority cannot ask for additional information items but only for additional information within the scope of these items (Art. 7 of Directive 2003/71 EC and Art. 3 and 21 of the draft Regulation).

2. Pro forma financial information

The Commission has modified item 4 in Annex II (pro forma financial information building block)

The formulation in the CESR advice was as follows:

CESR advice

4.	<p>The pro forma information must be prepared with a manner consistent with the accounting policies adopted by the issuer in its financial statements and shall identify</p> <p>a) the basis upon which it is prepared; and</p> <p>b) the source of each item of information and adjustment</p>
-----------	---

In the proposed Commission text, Annex 1 Appendix B has been reformulated in the following way:

Commission draft regulation

4.	<p>The pro forma information must be prepared with a manner consistent with the accounting policies adopted by the issuer in its <i>last or next</i> financial statements and shall identify</p> <p>a) the basis upon which it is prepared; and</p> <p>b) the source of each item of information and adjustment</p>
-----------	--

Justification

We have amended the text for legal clarity and certainty: competent authorities should not be allowed to apply a disclosure requirement, which is supposed to be harmonised, in different manners. On the contrary, it should be up to the issuer and not to the competent authority to decide whether this information should be prepared on the basis of the last financial statements or following the accounting principles to be used in its next accounting principles. The words 'last or next' have been added before the words 'financial statements' in order to make clear that the issuer should be able to choose between the accounting principles used in its last or its next financial statements.

3. Transitional arrangements related to financial information presented by third country issuers

The relevant part of the CESR advice intends to provide a temporary solution for 3rd country issuers when presenting financial statements according to accounting standards which are not equivalent to IAS. The transitional regime proposed by CESR consists in the following elements.

- For US GAAP, this financial information can be used without restatement until 1/1/2007. With respect to other accounting standards, the issuer shall not be subject to restatement obligations but subject to a less stringent requirement which is already included in the acquis (detailed and/or additional information if not true and fair view).
- A different treatment is provided for 3rd country issuers listed prior to the publication of Directive 2003/71/EC – which took place on 31.12.03 - and those who are seeking a first listing after that date.
- Concerning accounting standards different from US GAAP, there is no precise termination of the transitional period. The solution proposed is more a grandfathering clause; its content will have to be modified by the provisions to be adopted in the future

in EU legislation on periodic disclosure (i.e. any subsequent modification to Directive 2001/34/EC).

- The same transitional arrangements should apply for both securities aimed at retail investors (individual denomination per unit of less than 50.000 EURO) and securities aimed at wholesale market (individual denomination per unit of at least 50.000 EURO) (no differentiation is made in the CESR advice, par. 38-39).

CESR advice

(box following par. 38-39 of the advice)

Transitional arrangements

1. Issuers that do not have securities already admitted to trading on a regulated market prior to the publication of Directive 2003/71/EC in the Official Journal of the European Community may include in prospectuses financial statements prepared according to US accounting standards. Notwithstanding, such financial statements will have to be prepared according to Regulation (EC) 1606/2002 on the application of international accounting standards for each financial year starting on or after January 2007.

2. Issuers that have securities already admitted to trading on a regulated market prior to the publication of Directive 2003/71/EC in the Official Journal of the European Community will include in prospectuses financial statements prepared according to the accounting principles permitted by Directive 2001/34 or any new community legislation that could repeal said Directive and establish a new reporting regime for issuers having securities admitted to trading on a regulated market. Any transitional arrangements that legislation referred to in the previous sentence might establish will apply to any prospectus drawn up according to Directive 2003/71/EC irrespective of any options that Member States could have under the former legislation.

Commission draft regulation

Article 35 Historical financial information

4. Until 1 January 2007 the obligation to restate in a prospectus historical financial information according to Regulation (EC) No 1606/2002, set out in Annex I item 20.1, Annex IV item 13.1, Annex VII items 8.2, Annex X items 20.1 and Annex XI item 11.1 shall not apply to issuers from third countries:

- (1) who have their securities admitted to trading on a regulated market at the date of the entry into force of this Regulation;
- (2) who have presented and prepared historical financial information according to the national accounting standards of a third country.

In this case, historical financial information shall be accompanied with more detailed and/or additional information if the financial statements included in the prospectus do not

give a true and fair view of the issuer's assets and liabilities, financial position and profit and loss.

From 1 January 2007 third country issuers shall present the historical financial information referred to in the first subparagraph following the establishment of equivalence pursuant to a mechanism to be set up by the Commission.

5. Third country issuers having prepared historical financial information according to internationally accepted standards as referred to in Article 9 of Regulation (EC) No 1606/2002 may use that information in any prospectus filed before 1 January 2007, without being subject to restatement obligations.

Justification:

The Commission does not disagree with CESR with respect to the global approach, i.e. that a transitional solution has to be provided in the level 2 legislation before equivalence has been effectively established. However, following differences have been included in the draft regulation compared to the CESR approach.

- Concerning the use of internationally accepted accounting standards (ie US GAAP), the draft regulation does not make a difference between those securities issued by third country issuers already listed and those which are candidates for a listing. There is no reason for such a differentiation; besides this would lead to impose additional disclosure requirements to already listed US issuers.

- Concerning the transitional period for already listed third countries issuers not using US Gaap, the draft regulation does not impose yet any restatement obligation to IAS if their accounting standards are not equivalent to IAS; the draft regulation provides for the application of the existing acquis for prospectuses by requesting more detailed and/or additional information if their accounting standards are not 'true and fair'. However, the draft regulation provides for a precise time limit (i.e. 1/1/2007) to these transitional arrangements.

- The draft regulation does not include any reference to future legislation. The concerns reflected in the CESR advice should be taken into consideration when preparing future legislation (eventually in the context of the transparency directive or other pieces of forthcoming EU legislation) but not be addressed in a prospective way in this level 2 measure.

- Wholesale schedules are not covered by the transitional arrangements provided for in Article 35, since no restatement obligation is included in the schedules for securities aimed at wholesale markets (Annex VII, point 8 2bis, Annex IX, Annex X point 20 1bis).

3. Dissemination of advertisement

The approach taken by CESR, i.e. not specifying which means of dissemination should be available to the issuer has not been followed by the Commission; instead, a list of means of dissemination has been included in the draft regulation.

Extract from the additional provisional mandate

3.6. Advertising (Article 15 (7))

DG Internal Market requests CESR to provide by 31 December 2003 at the latest:

- (1) factual information regarding advertisement practices and relevant legislation in the Member States;
- (2) technical advice on possible draft implementing rules concerning the dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading, in particular before the prospectus has been made available to the public or before the opening of the subscription.

CESR advice:

Paragraphs 70 to 73, page 17

70. Advertisements covered by the present advice have the following features:

- Advertisements relate to an offer to the public of securities or to an admission to trading on a regulated market. Accordingly, advertisements that consist of merely general promotion of the issuer, which do not promote a specific public offer or an admission to trading, are outside the scope of this advice.
- The aim of advertisements is to promote the potential subscription or acquisition of securities.
- Advertisements are disseminated to the public by interested parties: issuer, offeror or person asking for admission, the financial intermediaries that participate in the placing and/or underwriting of securities.
- Advertisements are not considered as a prospectus. Formal notices are also outside the scope of this advice, because they give rise to less investor protection concerns as law sets out their contents.

71 No blackout periods (prohibition on the dissemination of any advertisements) should be imposed before or after a prospectus has been made available.

72 All means of dissemination are accepted.

73 Member States must ensure effective compliance of advertising rules concerning public offers and admission to trading on a regulated market. Proper co-ordination between competent authorities should be achieved in cross-border offerings or cross-border admission to trading.

Commission draft regulation

*Article 34
Dissemination of advertisements*

Advertisements related to an offer to the public of securities or to an admission to trading on a regulated market may be disseminated to the public by interested parties, such as issuer, offeror or person asking for admission, the financial intermediaries that participate in the placing and/or underwriting of securities, notably by one of the following means of communication:

- (1) Addressed or unaddressed printed matter;
- (2) Electronic message or advertisement received via a mobile telephone or pager;
- (3) Standard letter;
- (4) Press advertising with or without order form;
- (5) Catalogue;
- (6) Telephone with or without human intervention;
- (7) Seminars and presentations;
- (8) Radio;
- (9) Videophone;
- (10) Videotext;
- (11) Electronic mail;
- (12) Facsimile machine (fax);
- (13) Television;
- (14) Notice;
- (15) Bill;
- (16) Poster;
- (17) Brochure ;
- (18) Web posting including internet banners.

Justification:

We consider that the advice does not respond efficiently to the mandate: on the one hand it goes beyond the scope of the habilitation granted to the Commission on the basis of Article 15 of the Directive, which is restricted to dissemination of advertisements –the Commission is not allowed to establish level 2 provisions going beyond the scope of the habilitation included in the level 1 Directive; on the other hand the advice provided is not really operational for drafting a level 2 measure since the most important part of the advice only provides interpretation to the level 1 Directive.

On the issue of dissemination there is no precise indication in the advice on the modalities of dissemination that could be used. Paragraph 72, which we consider is the only part that is covered by the mandate, only contains a general statement that “all means of dissemination should be accepted”. The Commission has an obligation to adopt efficient level 2 legislation which specifies the content of the level 1

Directive in order to fulfil its 180-days obligation. A general statement like the one proposed by CESR would not be sufficient in that respect

Instead, the Commission proposes the following solution:

- We did not incorporate the third and fourth indent of paragraph 70 and paragraph 71.

- Paragraph 72 of CESR was redrafted by including a broad indicative list of authorised means of dissemination. In order to do so we were inspired by other pieces of EU legislation on advertisement. We were largely inspired by the list of dissemination methods provided for in Annex 1 of Dir. 97/7/EC on the protection of consumers in respect of distance contracts. In addition, the ways of dissemination already included in Art. 101 of Dir. 2001/34/EC and in Art. 14 of Dir. 2003/71/EC have been included in this list. Besides, a number of additional means of dissemination have been included corresponding to current market practices and emerging advertisement methods.

- Paragraph 73 is in recital 30 of the draft Regulation.

B. Other substantial differences between the Commission draft regulation compared to CESR advice

I. Differences to the main text

1. Article 2 of the Commission draft regulation

The following definitions were included in the Commission draft regulation while not part of the CESR advice – or only included as explanatory text or part of the annexes:

Commission draft regulation

- (1) "Schedule" means a list of minimum information requirements adapted to the particular nature of the different types of issuers and/or the different securities involved.
- (2) "Building block" means a list of additional information requirements, not included in one of the main schedules, to be added to one or more schedules, as the case may be, depending on the type of instrument and/or transaction for which a prospectus or base prospectus is drawn up.
- (3) "Risk factors" means a list of risks which are specific to the situation of the issuer and the securities and which are material for taking investment decisions.
- (4) "Special purpose vehicle" means an issuer whose objects and purposes are primarily the issue of securities.
- (5) "Asset backed securities" means securities which:

- represent an interest in assets including any rights intended to assure servicing, or the receipt or timeliness of receipts by holders of assets of amounts payable there under; or

- are secured by assets and the terms of which provide for payments which relate to payments or reasonable projections of payments calculated by reference to identified or identifiable assets;

(6) "Umbrella collective investment undertaking" means a collective investment undertaking invested in one or more collective investment undertakings, the capital of which is composed by separate class(es) or designation(s) of securities;

(7) "Property collective investment undertaking" means a collective investment undertaking whose investment objective is the participation in the holding of property in the long term;

(8) "Public international body" means a legal entity of public nature established by an international treaty between sovereign States and of which one or more Member States are members;

(9) "Advertisement" means announcements:

relating to an specific offer to the public of securities or to an admission to trading on a regulated market; and

aiming to specifically promote the potential subscription or acquisition of securities.

(10) "Profit forecast" means a form of words which expressly states or by implication indicates a figure or a minimum or maximum figure for the likely level of profits or losses for the current financial period and/or financial periods subsequent to that period, or contains data from which a calculation of such a figure for future profits or losses may be made, even if no particular figure is mentioned and the word "profit" is not used.

(11) "Profit estimate" means a profit forecast for a financial period which has expired and for which results have not yet been published.

(12) "Regulated information" means all information which the issuer, or any person who has applied for the admission of securities to trading on a regulated market without the issuer's consent, is required to disclose under Directive 2001/34/EC or under Article 6 of Directive 2003/6/EC.

Justification

Definitions (1) – (5) and (12): We considered these definitions were necessary because they introduce new terminology which is not included in the level one directive and are useful for the understanding of the level 2 implementing measures. Any EU legal text introducing new legal concepts in a specific legal context needs to provide for a definition of those concepts, at least for the purposes of its application.

Definitions (6) – (11): These definitions, subject to drafting modifications, were already part of the explanatory text or were included in the annexes to the CESR advice. For systematic reasons we considered that they should form part of the specific Article we have included on definitions since they explains the content of the concepts covered by them.

Furthermore, the definitions of ‘fund’ and ‘investment manager’ included ANNEX D page 31 of CESR advice related to closed-end funds were removed because they added nothing to the understanding of the scope or the functioning of this schedule. It was not considered appropriate to introduce a definition for such a general term in a legal text having a very specific scope. Besides, we were not certain that there was no conflict with other pieces of EU legislation.

2. Article 3, third paragraph and Article 22, third paragraph of the draft regulation.

The following element is new compared to CESR advice:

Commission draft regulation

In order to ensure conformity with the obligation referred to in Article 5(1) of the Directive 2003/71/EC, the competent authority of the home Member State, when approving a prospectus in accordance with Article 13 of that Directive , may require that the information provided by the issuer be completed, for each of these information items, on a case by case basis".

Justification

This sentence is necessary to align this provision with the general principle included in Art. 5 (1) of the level 1 directive. Articles 3, third paragraph and 22, third paragraph of the implementing regulation should be understood in the following way: the competent authority when scrutinising a prospectus is not allowed to require further information items than those included in each schedule. However, if the competent authority considers that the information related to one or more information items is not complete, it might ask for adaptations to the content of the information covered by those items on a case by case basis – in order to comply with the general principle provided in Article 5 (1) of the Level 1 Directive.

3. Article 4. 2 (2) (b) of the Commission draft regulation

The Commission draft regulation does not use the word 'physical delivery' as included in the CESR advice.

CESR advice:

CESR considers important to make clear that there are derivatives securities for which the non-equity registration documents (retail, wholesale or banks) will not apply. The equity RD will be the one applicable for those derivatives securities that have the following characteristics:

Derivative securities which are:

- (i) at the issuer's or at the investor's discretion or by predetermination*
- (ii) to be converted or exchanged into or give in any other way the possibility to acquire*
- (iii) shares or other transferable securities equivalent to shares.*

Provided that those shares or transferable securities equivalent to shares:

- (i) can be physically delivered; and*

(ii) *are issued by the issuer of the derivative security; and*

(iii) *are not physically admitted to trading on a regulated market or an equivalent market outside the EU at the time of the approval of the prospectus covering the derivative securities.*

Commission draft regulation:

(2) other equity securities which comply with the following conditions:

(a) they can be converted or exchanged into shares or other transferable securities equivalent to shares, at the issuer's or at the investor's discretion, or on the basis of the conditions established at the moment of the issue, or give, in any other way, the possibility to acquire shares or other transferable securities equivalent to shares, and

(b) provided that these shares or other transferable securities equivalent to shares are or will be issued by the issuer of the security and are not yet traded on a regulated market or an equivalent market outside the EU at the time of the approval of the prospectus covering the securities and that the underlying shares or other transferable securities equivalent to shares can be delivered with physical settlement.

Justification

In the Commission draft regulation 'physical settlement' has been explicitly included in the scope of the share registration document schedule. In fact, both the Commission and CESR agree that physical settlement should be included in this schedule, however the formulation in the CESR advice was unclear. The wording used by CESR ("physically admitted to trading") is not a legal wording and needed to be adapted.

The same explanation is also valid for the modification of the scope of the schedule provided for in Article 17.2 (2)

4. Article 14 of the Commission draft regulation

The scope of application of the bank registration document schedule is different (narrower) in the Commission draft regulation compared to the CESR advice.

CESR advice:

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.

Commission draft regulation:

Article 14
Banks registration document schedule

1. For the banks registration document for debt and derivative securities and those equity securities which are not covered by article 4 information shall be given in accordance with the schedule set out in annex XI.
2. The schedule set out in paragraph 1 shall apply to credit institutions as defined in point (a) of Article 1(1) of Directive 2000/12/EC as well as to third country credit institutions which do not fall under that definition but have their registered office in a state which is a member of the OECD and are subject to rules equivalent to those applying in the EU.

These entities may also use alternatively the registration document schedules provided for under in Articles 7 and 12.

Justification:

Though we agree with CESR that non-EU banks developing important business in the EU should be able to benefit from adequate regulatory arrangements, we face a practical and legal problem to accept this solution as proposed by CESR: Assessment of the quality of banking prudential supervision is not part of the tasks of securities regulators. No harmonised solution is proposed for this assessment by CESR either. Moreover, reference to the fact that those banks have substantial experience in underwriting issues has no precise meaning and cannot form part of a legal text. The inclusion of a reference to OECD provides for legal certainty and for a harmonised solution – which, in any event, is necessary for the purposes of maximum harmonisation provided for in Article 7 of the Directive. Moreover, the reference to “credit institutions” instead of “banks” is in line with the existing acquis, for instance with the banking Directive 2000/12/EC and with the level 1 prospectus Directive.

5. Articles 2 and 20 of the Commission draft Regulation

The draft regulation provides for an extended scope of this schedule to cover all legal entities of public nature established by an international treaty between sovereign States. The CESR advice restricts the use of this schedule only to entities with high credit ratings and their securities guaranteed by members or with high credit ratings and their borrowing ceilings limited to their subscribed capital.

CESR advice:

Paragraph 50

A further annex, Annex C has therefore been drafted for public international bodies since it is considered that although they are similar to corporates in their structure, their risk

profiles are more similar to sovereigns. CESR has devised an illustrative list¹ of Public International Bodies to which this annex would apply and they are broadly those that were created by international treaty between sovereign states and are already active in the international capital markets. Further, CESR envisages that such bodies would carry a high credit rating provided by one of the main providers of credit rating and their securities are either irrevocably and unconditionally guaranteed by their members or their borrowing ceilings are set in accordance to the subscribed capital of the members.

Commission draft regulation

Article 2 Definitions

(8) Public international body" means a legal entity of public nature established by an international treaty between sovereign States and of which one or more Member States are members;

Article 20 Registration document schedule for public international bodies

2. The schedule shall apply to all types of securities issued by public international bodies

Justification:

The concept of public international bodies exists in Community legislation for more than 20 years. The proposed definition does not make any difference between public international bodies with an AAA rating or a single B rating. Consequently, the same requirements should apply to all public international bodies independently of their rating.

If the CESR approach were retained, public international bodies would be the only category of issuers where a differentiated disclosure regime would apply based on their credit rating. Such an approach is not retained for closed end funds, banks, commercial or industrial companies or sovereign states.

Secondly, the other additional criteria proposed by CESR (i.e. that the securities issued by those bodies are either, irrevocably and unconditionally guaranteed by their members, or their borrowing ceilings are set in accordance to the subscribed capital of the members) are not workable with important EU public international bodies. For instance, the securities issues by EBRD, EIB or the European Commission are not guaranteed by the members of those bodies. There are no borrowing ceilings or subscribed capital for the European Commission.

6. Article 21 (2) of the Commission draft regulation

¹African Development Bank, Asian Development Bank, Council of Europe Development Bank, Eurofima, European Bank for Reconstruction and Development, European Investment Bank, Inter-American Development Bank, International Bank for Reconstruction and Development, International Finance Corporation, Nordic Investment Bank, World Bank, International Monetary Fund

With respect to the "ranking" of registration document schedules, the text of the Commission adds an additional condition ("more stringent" registration document schedule) compared to CESR advice; it provides also for an additional explanation on the criteria to be used for this ranking.

CESR advice:

Ranking between the various main RD schedules

As a general principle, the most comprehensive RD schedule can always be used to issue securities for which a less comprehensive RD schedule is provided for.

Commission draft regulation:

The most comprehensive and stringent registration document schedule, i.e. the most demanding schedule in term of number of information items and the extent of the information included in them, may always be used to issue securities for which a less comprehensive and stringent registration document schedule is provided for, according to the following ranking of schedules:

- (1) share registration document schedule
- (2) debt and derivative securities registration document schedule with a denomination per unit of less than EUR 50 000
- (3) debt and derivative securities registration document schedule with a denomination per unit at least EUR 50 000

Justification:

This is not a matter of substance but mainly a matter of formulation; we agree with the principle that CESR has proposed, however we consider that the term "comprehensible" of the different registration documents is not sufficient. This term is not precise enough and needed to be complemented. The ranking included in this Article derives from the methodology used by CESR when drafting those schedules: The different schedules are built on the same model; however, depending on the number of information items and the extent of the information required, some of them are more demanding. In this respect, we consider that the additional explanation introduced in the Commission text does not leave any margin for further doubts.

7. Article 22 (2) 22 (5) of the Commission draft regulation

The wording in paragraphs 49 and 70 of CESR September advice has been slightly modified: the term "filed" has been replaced by the term "approved" in the Commission draft regulation.

CESR advice:

49. CESR advises that an abstract generic rule should be used to determine which line items should be classified as final terms and which line items should form part of the base prospectus. This generic rule is:

The base prospectus shall:

a) contain all information required by the applicable schedules and building blocks except for that which can - due to the issue's nature - only be determined at the time of the individual issue and is not known when the base prospectus is filed (so called 'final terms'); and ...

70. In addition to the disclosure requirements as set out in the applicable registration document, or securities note, or other building blocks, and after consultation CESR considers that the following additional disclosure requirements should apply to base prospectuses:

- Information regarding how the final terms will be published, in the event that the issuer is not able to determine the method of publication when the base prospectus is filed, the issuer has to set out how the public will be informed about which method will be used for the publication of the final terms.

.....

Commission draft regulation:

Article 22

(2)

The issuer, the offeror or the person asking for admission to trading on a regulated market may omit information items which are not known when the base prospectus is approved and which can only be determined at the time of the individual issue.(5) In addition to the information items set out in the schedules and building blocks referred to in Articles 4 to 20 the following information shall be included in a base prospectus:

- (1) indication on the information that will be included in the final terms;
- (2) the method of publication of the final terms; if the issuer is not in a position to determine, at the time of the approval of the prospectus, the method of publication of the final terms, an indication of how the public will be informed about which method will be used for the publication of the final terms;

Justification:

We used the words "approved" or "approval" instead of "filed" in order to ensure coherence with the level 1 Directive (Article 13 of the Directive): since the general principles of the Directive also apply to base prospectuses, "approval" (and not simple "filing") must precede the publication of a prospectus.

8. Article 22 (7) of the Commission draft Regulation

The word "file" in CESR's September advice, paragraph 45 has been substituted by the word "publish" in the Commission draft regulation.

CESR advice

CESR considers that Article 16 (Supplement to the prospectus) applies to each separate issue of securities issued under the base prospectus. Therefore, if an event envisaged under Article 16(1) occurs between the time that the base prospectus has been approved and the final closing of the offer of each issue of securities under the prospectus or, as the case may be, the time that trading on a regulated market of those securities begins, the issuer must file a supplement in accordance with Article 16 (1) prior to the final closing of the offer or the admission of those securities to trading. If none of the facts stated in article 16 (1) take place before the final closing of the offer or the admission of those securities to trading, there is no need to publish a supplement.

Commission draft regulation

- (7) Where an event envisaged under Article 16(1) of the Directive 2003/71/EC occurs between the time that the base prospectus has been approved and the final closing of the offer of each issue of securities under the base prospectus or, as the case may be, the time that trading on a regulated market of those securities begins, the issuer, the offeror or the person asking for admission to trading on a regulated market shall publish a supplement prior to the final closing of the offer or the admission of those securities to trading.

Justification:

We used the word "publish" instead of "file" in order to ensure coherence with the level 1 Directive which stipulates that a supplement to a prospectus must be published (and not only filed (Article 16(1) of Directive 2003/71/EC).

9. Article 26 (5) of the Commission draft Regulation

Article 26 (5) of the Commission draft regulation does not reproduce as such point c) of paragraph 63 of CESR's September advice – however the substance has been maintained in the text.

CESR advice:

CESR advises that the final terms can be presented in one of the following ways:

- a) *in the form of a term sheet containing only the final terms; or*
- b) *by inclusion of the final terms into the base prospectus; or*
- c) *in the form of a document which replicates some information of the approved base prospectus which is normally required by the applicable securities note schedule provided that the information is not misleading. If additional information is so replicated a clear and eye-catching disclaimer has to be inserted that the full information on the issuer and on the offer is only available in the base prospectus and where it can be obtained. Furthermore, the final terms have to be emphasized so that they can be easily identified.*

Commission draft regulation:

- (5) The final terms attached to a base prospectus shall be presented in the form of a separate document containing only the final terms or by inclusion of the final terms into the base prospectus.

In case the final terms are included in a separate document containing only the final terms, they may replicate some information which has been included in the approved base prospectus according to the relevant securities note schedule that has been used for drawing up the base prospectus. In this case the final terms have to be presented in way so that can be easily identified as such.

A clear and prominent statement has to be inserted in the final terms that the full information on the issuer and on the offer is only available on the basis of the combination of base prospectus and final terms and where the base prospectus is available.

Justification:

This paragraph has been reformulated in a more systematic way and reworded in legal language. We have kept entirely the substance of CESR advice: however, the division into three indents was not systematically correct: both the Commission and CESR agree that there are two ways for presenting the final terms: this is reflected in both documents, i.e. in points a) and b) in CESR's advice and in the two indents included in the first subparagraph of Art. 26 (5) in the Commission draft regulation. Point c) in the CESR advice is not a separate point but only an explanation to point a). For that reason it has been included in a separate subparagraph which, nevertheless, states clearly that it only concerns the first indent – as it was also CESR's intention. Furthermore, the word 'normally' in the second line of point c) of the CESR advice has been deleted since it is unclear and not appropriate in a legal text – and does not add anything to the substance.

10. Article 26 (8) of the Commission draft Regulation

Concerning the possibility to cover more than one issuer in a base prospectus CESR considered that this issue was not covered by the Commission mandate. The following explanation was included in the CESR advice:

CESR advice

Number of issuers per base prospectus

*Respondents to the 2nd call for evidence raised a question as to whether or not there would be a restriction on the number of issuers and/or guarantors that can issue securities under a base prospectus. On consideration of this issue, CESR concluded that with regard to the disclosure requirements no such restrictions would apply, thus maintaining current market practice, as long as full information on every potential issuer and guarantor is given. However, CESR acknowledges that a complex problem might arise as to which will be the competent authority in case of a multi-issuer programme with issuers from different home Member States and where the kind of securities to be issued will give no right to choose the home competent authority. The same question might arise in cases of multi-products programmes offered by a single issuer. **As these issues are not covered by either of the mandates CESR has decided not give advice on this subject at this stage.** Further guidance can eventually be given.*

Commission draft regulation

8. Issuers, offerors or persons asking for admission to trading on a regulated market may compile in one single document two or more different base prospectuses.

Justification:

The Commission considers that this is mainly a matter of interpretation of the Level 1 Directive. The Directive only refers to one issuer to be covered by a base prospectus (in any case reference to the "issuer" and not to the "issuers" is made all cases, concerning both traditional and base prospectus). However, for the sake of clarity, we have introduced in the draft Regulation a new possibility to compile in one single document, - which, nevertheless, would not be a prospectus itself but another type of comprehensive document, several base prospectuses for several issuers.

11. Article 27 (1) of the Commission draft Regulation

The Commission draft regulation includes an additional element which was not included in the CESR advice (paragraph 143 of the September advice): a clarification in which Member State the document referred to in Article 10 of the Directive 2003/71/EC should be published.

CESR advice:

The document referred to in Article 10 of the Directive of the European Parliament and of the Council on prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC should be made available, at the issuer's choice, through one of the means allowed in Article 14 of that Directive. This choice would have in consideration the objective of the document and that it should permit investors a fast and cost-efficient access to that information.

Commission draft regulation:

The document referred to in Article 10(1) of Directive 2003/71/EC shall be made available to the public, at the choice of the issuer, the offeror or the person asking for admission to trading on a regulated market, through one of the means permitted under Article 14 of that Directive in the home Member State of the issuer.

Justification:

We consider that it is necessary for issuers to specify in which Member State the document referred to in Article 10 of the Directive 2003/71/EC should be published. This is simply a matter of logic – we consider that CESR has not indicated where it should be published in its advice because they considered this was evident. For reasons of completeness we have supplemented this point in the legal text. This approach is in line with paragraph (2) of the same Article.

12. Article 28 (4) of the Commission draft Regulation

The Commission text has not included the condition provided for in paragraph 106 of CESR advice that the incorporation of only certain parts of a document is allowed “provided that this is not misleading”.

CESR advice:

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.

Commission draft regulation:

- (4) The issuer, the offeror or the person asking for admission to trading on a regulated market may incorporate information in a prospectus or base prospectus by making reference only to certain parts of a document, provided that it states that the not incorporated parts are not relevant for the investor or covered elsewhere in the prospectus.
- (5) When incorporating information by reference, issuers, offerors or persons asking for admission to trading on a regulated market shall have due regard to not endanger investor protection in terms of comprehensibility and accessibility of the information.

Justification:

We consider that there is no difference in substance between the Commission proposal and the CESR advice. The idea that incorporation of only certain parts of a document is allowed ' provided that this is not misleading' is included in paragraph 5 of the same Article. Moreover, we consider that the word misleading is vague and thus not adapted for a legal text providing for detailed implementing rules.

13. Article 29 (1) of the Commission draft Regulation

A part from the advice included in the incorporation by reference chapter has been transferred, for reasons of coherence to the chapter of the draft regulation related to availability of prospectuses.

CESR advice:

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.

Commission draft regulation

Article 29

- (1) The publication of the prospectus or base prospectus in electronic form, either pursuant to points (c) (d) and (e) of Article 14(2) of Directive 2003/71/EC, or as an additional means of availability, shall be subject to the following requirements:
 - (1) the prospectus or base prospectus shall be easily accessible when entering the web-site;
 - (2) the file format shall be such that the prospectus or base prospectus cannot be modified;
 - (3) the prospectus or base prospectus shall not contain hyper-links, with exception of links to the electronic addresses where information incorporated by reference is available;

(4) the investors shall have the possibility of downloading and printing the prospectus or base prospectus.

The exception referred to in point (3) of the first subparagraph shall only be valid for documents incorporated by reference; those documents shall be available with easy and immediate technical arrangements.

Justification:

The substance of the CESR advice has been maintained. The only difference is that CESR had included this sentence as part of the advice for the implementing measures concerning Article 11 (incorporation by reference). However, we consider that this refers more to of Article 14 (publication) and thus, for systematic reasons has to form part of Article 11 of the draft Regulation.

II. Differences in the Annexes (schedules and building blocks):

1) Historical financial information

On historical financial information presented according to Regulation (EC) No 1606/2002, set out in Annex I item 20.1, Annex IV item 13.1, Annex VII items 8.2 and 8.2 (a), Annex IX item 11.1, Annex X items 20.1 and 20.1 (a) and Annex XI item 11.1, a sentence has been added in the Commission draft regulation in order to explain that if a set of accounting standards is not equivalent to the standards of the IAS Regulation, those accounting standards should be restated.

CESR advice:

Equity Registration Document (item 20.1 Annex A CESR/03-208)

Historical financial information covering the latest 3 financial years (or such shorter period that the issuer has been in operation), and the audit report in respect of each year. For EU issuers, such financial information must have been prepared according to Regulation (EC) 1606/2002 on the application of international accounting standard, or if not applicable to a Member States national accounting standards. For non-EU issuers, such financial information must have been prepared according to Regulation (EC) 1606/2002 on the application of international accounting standard or to a non Member States national accounting standards equivalent to Regulation (EC) 1606/2002 on the application of international accounting standard .

The last two years historical financial information must be presented and prepared in a form consistent with that which will be adopted in the issuer's next published annual financial statements having regard to accounting standards and policies and legislation applicable to such annual financial statements.

Commission draft regulation

Historical Financial Information

Audited historical financial information covering the latest 3 financial years (or such shorter period that the issuer has been in operation), and the audit report in respect of each year. Such financial information must be prepared according to Regulation (EC) No 1606/2002, or if not applicable to a Member State national accounting standards for

issuers from the Community. For third country issuers, such financial information must be prepared according to Regulation (EC) No 1606/2002 or to a third country's national accounting standards equivalent to Regulation (EC) No 1606/2002. If such financial information is not equivalent to Regulation (EC) No 1606/2002, it must be presented in the form of restated financial statements.

The last two years audited historical financial information must be presented and prepared in a form consistent with that which will be adopted in the issuer's next published annual financial statements having regard to accounting standards and policies and legislation applicable to such annual financial statements.

Justification:

This is more a drafting change; there is no disagreement between the Commission position and the CESR approach. This changes intends to make more explicit the obligation that if the financial statements are not equivalent a presentation according to IAS, they should be restated.

III. Elements of CESR's advice not included in the Commission draft regulation

1. NAMES OF THE SCHEDULES

Instead of following CESR terminology for the registration document schedules "equity" and "non-equity securities" (paragraphs 20, 21 and 22 of the September advice), the Commission draft regulation uses the terms "shares" and "debt and derivatives". A similar approach was retained for the terms 'wholesale' and 'retail' to ensure coherence with the provisions of the Level 1 Directive: the terms used are "individual denomination per unit at least 50 000 Euro"(wholesale) and "individual denomination per unit of less than 50 000 Euro" (retail).

Justification: The change in terminology was introduced for reasons of coherence and better understanding of the text: The same term, for instance "equity", should not have different meanings depending of the type of issue in the same legal text. In the CESR advice, equity has different meanings for the scope of the registration document schedule and for the scope of the securities note schedule. Moreover, in those two cases the meaning is different from the definition of equity in the Directive itself. We did not change the scope of the terms and schedules envisaged in the CESR advice but we felt necessary to use an alternative terminology in different situations to avoid legal confusion. If we keep the CESR option, a convertible bond will be an equity security in level 1, a debt security in recital 12 of the Directive and a derivative security in CESR advice (paragraph 25).

2. Paragraph 147 of the June advice (availability of prospectuses)

CESR advice:

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 draft Directive, should be made as soon as possible allowing investors to consult the prospectus in due time.

Justification:

Paragraph 147 is not taken into account because Article 14(7) of the Directive is not subject to implementing measures in the Directive itself.

3. Paragraph 52 point (a) of the September advice (base prospectus)

The Commission draft regulation only incorporates point b) of paragraph 52 of the September advice.

CESR advice:

On that basis CESR advises that the issuer has a choice between the following methods of creating a base prospectus:

- a) *file one document as a base prospectus excluding final terms, or*
- b) *file a registration document for a particular product group at one point in time and then at a later date file a base prospectus made up of:*
 - *information contained in the previously filed and approved registration document which is incorporated by reference; and*
 - *the information which would otherwise be contained in the securities note less the final terms*

Commission draft regulation:

Article 26

Format of the base prospectus and its related final terms

4. In case the issuer, the offeror or the person asking for admission to trading on a regulated market has previously filed a registration document for a particular type of security and, at a later stage, chooses to draw up base prospectus in conformity with the conditions provided for in points (a) and (b) of Article 5(4) of Directive 2003/71/EC, the base prospectus shall contain:

- (1) the information contained in the previously or simultaneously filed and approved registration document which shall be incorporated by reference, following the conditions provided for in Article 28 of this Regulation;
- (2) the information which would otherwise be contained in the relevant securities note less the final terms where the final terms are not included in the base prospectus.

Justification:

Point a) of the CESR advice is already covered by the level 1 Directive. For reasons of legal correctness repetition in the level 2 Directive cannot be accepted. The rest of the paragraph has been reformulated to focus on the content and presentation of the base prospectus (which is the subject of the habilitation to the Commission provided for in Article 5 of the Level 1 Directive) and not on the methods to create a base prospectus which forms part of the interpretation of the Level 1 Directive.

4. Paragraph 59 of the September CESR advice

CESR advice:

The competent authority has the power to control that the summary is set up in an easily analysable and comprehensible form and in accordance with Art. 5 (2). Further guidelines can be developed at level 3, if necessary.

Justification:

'The power to controlling' the summary of a base prospectus is not relevant in the context of Article 5. The summary is a part of the base prospectus and thus subject to the approval by the home competent authority according to Article 13 of the level 1 Directive. A part from the approval there is no additional control foreseen in the Level 1 Directive.

5. Paragraph 69 of the September CESR advice

This part of the advice has been included in a recital (28) and not in an Article in the main text.

CESR advice:

CESR considers that it is necessary to make it clear that Member States may require that an additional notice in relation to the final terms may also be required to be published.

Commission draft regulation

(28) A home Member State should be able to require publication of a notice stating how the prospectus has been made available and where it can be obtained by the public. Where a home Member State requires publication of notices in its legislation, the content of such a notice should be kept to the necessary items information to avoid duplication with the summary. These home Member States may also require that an additional notice in relation to the final terms of a base prospectus is to be published.

Justification:

This sentence is linked to the interpretation of the level 1 Directive (ie the general principles applicable to prospectus are also applicable to final terms, at the exception of its approval). It should only be included in a recital, to provide additional clarity, or completely omitted.