



European Securities and  
Markets Authority

# Questions and Answers

Prospectuses  
18<sup>th</sup> updated version – December 2012





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## I. Background (UPDATED)

1. The Prospectus Directive 2003/71/EC (PD) and the Commission Regulation on Prospectuses (EC No 809/2004) became effective on 1 July 2005. The Prospectus Directive and accompanying Regulation establish a harmonised format for prospectuses in Europe and allow companies to use the same prospectus prepared for admitting securities to trading on their home market to admit securities to any number of further European markets without having to re-apply for approval from the local regulator. In so doing, the intention is to help companies avoid the inherent delays and cost that any re-application process would involve. The new legislation also sought to ensure investors had access to more consistent and standardised information that would enable them to compare more effectively the various securities offers available from a wide number of European companies.
2. The prospectus regime is made up of the following main pieces of European legislation:
  - a) Directive 2003/71/EC<sup>1</sup>, which was adopted in November 2003. It is a ‘framework’ Level 1 Directive which has been supplemented by the Directive 2010/73/EC (see Level 1 legislation in b. below) and technical implementing measures (see the Level 2 legislation below).
  - b) Directive 2010/73/EU<sup>2</sup>, which was adopted in November 2010. It is a Directive amending Directive 2003/71/EC. The deadline for implementation was 1 July 2012.
  - c) Directive 2010/78/EU<sup>3</sup>, which was adopted in November 2010. It is a Directive amending Directive 2003/71/EC and Directive 2010/73/EU.
  - d) Implementing Regulation 809/2004<sup>4</sup> (Level 2 legislation)
  - e) Implementing Regulation 211/2007<sup>5</sup>. (Level 2 legislation) It is a Regulation amending Regulation 809/2004.
  - f) Implementing Commission Delegated Regulation (EU) No 486/2012<sup>6</sup> (Level 2 legislation). It is a Regulation amending Regulation 809/2004. It entered into force on 1 July 2012.

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<sup>1</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, 31.12.2003, OJ L 345/64.

<sup>2</sup> Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information, 11.12.2010, OJ L 327/1

<sup>3</sup> Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), 15.12.2010, OJ L 331/120

<sup>4</sup> Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, 30.4.2004, OJ L 149/1, as corrected by OJ L 215, 16.6.2004, p. 3. Regulation as amended by Regulation (EC) No 1787/2006 (OJ L 337, 5.12.2006, p. 17).

<sup>5</sup> Commission Regulation (EC) No 211/2007 of 27 February 2007 amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards financial information in prospectuses where the issuer has a complex financial history or has made a significant financial commitment, 28.2.2007, OJ L 61/24

- g) Implementing Commission Delegated Regulation (EU) No 862/2012<sup>7</sup> (Level 2 legislation). It is a Regulation amending Regulation No 809/2004. It entered into force on 22 September 2012.
3. One of ESMA's objectives is to foster supervisory convergence through promoting common supervisory approaches and practices. ESMA's predecessor (CESR) produced a series of questions and answers (Q&A), based on questions received through CESR's PD Q&A mechanism, which reflect common positions agreed by CESR Members. The Q&As were one of the tools used by CESR to elaborate on the provisions of EU legislation and ESMA will continue to play an active role in their development.

## II. Purpose (UPDATED)

4. The purpose of this document is to promote common supervisory approaches and practices in the application of the PD and its implementing measures. It does this by providing responses to questions posed by the general public and competent authorities in relation to the practical application of the PD.
5. The content of this document is aimed at competent authorities under the PD to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA. However, these responses are also meant to provide market participants with an indication of what constitutes proper implementation of the PD rules. The answers are intended to help issuers of securities by providing clarity as to the content of the PD requirements without necessarily imposing an extra layer of requirements.

## III. Status

6. On 1 July 2012 the amended Prospectus Directive and Commission Delegated Regulation No 486/2012 entered into force. Following the entry into force of this legislation and Commission Delegated Regulation (EU) No 862/2012, ESMA conducted a review of the legislative references contained in this document and has updated and revised it accordingly. Certain questions have also been deleted as the issues contained in these questions have been either clarified by the new legislation or superseded by it.
7. The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of ESMA Regulation.<sup>8</sup>
8. Therefore, due to the nature of Q&A's, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may check Q&A responses with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties.

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<sup>6</sup> Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012 amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements, 9.6.2012, OJ L 150/1

<sup>7</sup> Commission Delegated Regulation (EU) No 862/2012 of 4 June 2012 amending Regulation (EC) No 809/2004 as regards information on the consent to use of the prospectus, information on underlying indexes and the requirement for a report prepared by independent accountants or auditors, 22.09.2012, OJ L 265/4

<sup>8</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

9. ESMA will review these questions and answers to identify if, in a certain area, there is a need to convert some of the material into ESMA guidelines and recommendations. In such cases, procedures set in Article 16 of ESMA Regulation will be followed.
10. The views of the Commission Services on some of the issues discussed in this Q&A were sought. However, both the Commission Services and ESMA note that only the European Court of Justice can give a legally binding interpretation of the provisions of EU legislation.<sup>9</sup>
11. At the Commission's request, CESR developed CESR's Recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses No 809/2004 (CESR/05-054b) which has proved useful to market participants in addition to this Q&A which aim to provide greater clarity for issuing companies regarding the provisions to disclose information on a range of areas and to promote greater transparency in the way supervisors apply the Regulation, without imposing further obligations on issuers. CESR consulted market participants during the development of these recommendations. The responses and feedback statement can be accessed on ESMA's website (<http://www.esma.europa.eu/>). CESR's Recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses No 809/2004 (CESR/05-054b) were published on 10 February 2005. On 23 March 2011 ESMA published an update of these recommendations regarding mineral companies (ESMA/2011/81). The responses and feedback statement for this update can also be accessed on ESMA's website. ESMA will continue to monitor the Recommendations and revise them as appropriate.

#### **IV. Questions and answers (UPDATED)**

12. CESR published its first Prospectus Q&As in July 2006 and ESMA last updated these in September 2012. This document includes all the Q&As previously adopted by CESR<sup>10</sup>, as amended and readopted by ESMA. The date each question was last amended is included after each question for ease of reference. Questions which have been subject to material modification due to changes in legislation have been re-dated December 2012. Questions which reflected the view of CESR, and which have now been readopted by ESMA retain their original date. ESMA will continue to edit and update this document as and when new legislation is adopted or new questions are received.
13. Questions on the practical application of any of the PD requirements may be sent to the following email address at ESMA Info.ESMA@esma.europa.eu.

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<sup>9</sup>The views expressed in the paper do not bind the European Commission as an institution, and the Commission would be entitled to take a position different to that set out in this 'Q& A' guide in any future judicial proceedings concerning the relevant provisions.

<sup>10</sup> On the basis of Article 8(4) of the Rules of Procedure of the ESMA Board of Supervisors (ESMA/2011/BS/1), guidelines, recommendations, standards and any other Level 3 material issued by CESR continued in force until such time as they were readopted, replaced or revoked, having the status provided for under the Charter of the Committee of European Securities Regulators.



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## 1. Information from issuers to host competent authorities

Date last updated: February 2009

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**Q) Should the issuer notify/file with the host competent authorities the following information:**

**a) The price and/or amount of the securities omitted in stand alone prospectuses as permitted by Article 8.1 of the Directive<sup>11</sup>?**

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

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

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

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

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

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## 2. Notice

Date last updated: February 2009

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**Q) Can a host Member State require the issuer to publish a notice in its jurisdiction in relation to a prospectus that has been passported into its jurisdiction?**

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

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<sup>11</sup> Article 8.1 of the Directive allows issuers to omit in the prospectus the final offer price and amount of the securities where they cannot be included in the prospectus. The final offer price and amount of securities shall be filed with the home competent authority and published in accordance with the arrangements provided for in Article 14.2.

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

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### 3. Publication of a prospectus in the host Member States (UPDATED)

Date last updated: December 2012

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

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

Article 14 of the Directive sets a list of means of publication of the prospectus all of which are valid for all the investors across the EU (in the home Member State and in the host Member States). At a minimum, and following changes to the Prospectus Directive by Directive 2010/73/EU, all prospectuses must now be available electronically.

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

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

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### 4. Prospectuses published on the Competent Authority's website-disclaimer

Date last updated: February 2007

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**Q) In case that the competent authority decides to publish on its website all the prospectuses approved, is it obliged to take measures to avoid targeting residents in Mem-**

**ber States or third countries where the offer of securities to the public does not take place, for example insertion of a disclaimer<sup>12</sup>?**

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

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## **5. Share option schemes (UPDATED)**

Date last updated: **December 2012**

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

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

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

*Where in the view of national competent authorities transactions are structured as options, but are in reality an offer of shares, such authorities reserve the right to re-qualify the options as an offer of shares in order to overcome any circumvention of the Prospectus Directive.*

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## **6. Free offers (UPDATED)**

Date last updated: **December 2012**

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**Q) Can free offers be considered outside the definition of public offer (for example options granted to employees for no consideration)? If they fall under the definition, could it be considered that they have a total consideration of zero and, therefore, fall outside the scope of the Prospectus Directive? (see Article 1.2 h) offers where the total consideration is less than EUR 5,000,000).**

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

*In the case of allocations of securities (almost invariably free of charge) where there is no element of choice on the part of the recipient, including no right to repudiate the allocation, there is no "offer of securities to the public" within the meaning of Article 2.1 d) PD. This is because the definition refers to a communication containing sufficient information "to enable an investor to decide to" purchase or sub-*

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<sup>12</sup> Please note that according to Article 29.2 of the Regulation 809/2004 the issuers, financial intermediaries and regulated markets must take measures such as the insertion of the above disclaimer in order to avoid targeting residents in Member States or third countries where the offer of securities to the public does not take place, if the prospectus is made available on their websites.

scribe for the securities. Where no decision is made by the recipient of the securities, there is no offer for the purposes of the Directive. Such allocations will therefore fall outside the scope of PD.

Offers of free shares, where the recipient decides whether to accept the offer, are properly regarded as an offer for zero consideration. As such, they would fall within the excluded offers under Article 1.2 h), but are also subject to the exemption for offers of less than EUR 100,000 so no prospectus can be required.

This analysis does not prevent competent authorities from assessing whether an offer presented as an offer of free shares in fact disguises a "hidden" consideration. However, the Commission Services take the view that in most cases where free shares are offered in the context of an employee share scheme, where shares are not offered in lieu of remuneration that the employee would otherwise receive, it would be incorrect to find "hidden" consideration in the employment relationship, for example by claiming that the employees would have a higher salary if an equity participation scheme were not available to them. Such reasoning would be speculative, and the "hidden" consideration difficult to prove, let alone quantify. However, if the shares are expressly offered in the place of quantifiable financial benefits in another form, then it might be appropriate to identify consideration to the value of the benefits that the employee would otherwise have been entitled to receive.

ESMA considers that the 'document' in Articles 4.1.d and 4.1.e of the PD should be made available only in cases where:

- i. the offers fall within the definition of an offer as set out in Article 2.1.d and
- ii. the offers do not fall within the excluded offers under Article 1.2.h or the exemption under Article 3.2.e.

For example in free offers, where no decision is made by the recipient of the securities, there is no such obligation.

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## 7. Incorporation by reference<sup>4</sup>: language requirements

Date last updated: November 2010

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### **Qa) Is it possible to incorporate by reference information in a language different than the language in which the prospectus is drafted?**

**Aa)** Yes, the issuer can incorporate a document drawn up in a different language than that of the prospectus provided that the language of the incorporated document complies with the language rules of the Directive.

For example: the competent authority of Poland approves a prospectus drawn up in English that incorporates by reference the annual financial statements drawn up in Polish. However, if the issuer wishes to passport this prospectus it could do so only to countries where Polish is accepted by the host competent authorities.

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<sup>4</sup> Article 28.2 of Regulation 809/2004: "The documents containing information that may be incorporated by reference in a prospectus or base prospectus or in the documents composing it shall be drawn up following the provisions of Article 19 of Directive 2003/71/EC."

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

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

**Qc) Is it possible to include or incorporate by reference only the translation of the audited financial statements and the audit report without a letter/ statement of consent of the auditor to fulfil the requirement of Annex I, 20.1. Prospectus Regulation (“audited historical financial information”)? If yes, is it necessary to request a written confirmation for the accuracy of the translation and, if so, who has to issue this written confirmation?**

*Ac) Yes, it is possible to include or incorporate by reference the translation of the audited financial statements and the audit report without a letter/ statement of consent of the auditor. No written confirmation for the accuracy of the translation is needed.*

*ESMA draws attention to the fact, that according to national legislation it might be necessary to ask for the auditor’s consent to include or incorporate by reference the audit report in the prospectus. Also in case of third country issuers, national legislation might stipulate to include a letter/ statement of consent of the auditor to guarantee the accuracy of the translation.*

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## **8. Incorporation by reference of information contained in a former base prospectus that is no longer valid**

Date last updated: September 2007

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**Q) Is it possible to incorporate by reference information contained in a former base prospectus that is no longer valid into a new base prospectus?**

**In this context, issuers have explicitly asked how to proceed if a tranche of an issue of securities which has been issued under a base prospectus no longer valid is being increased.**

**This issue may be illustrated by the following example:**

**- A tranche under a base prospectus dated September 2005 is issued in November 2005 and shall be increased in January 2007 (16 months later). There is a new base prospectus as of September 2006 the terms and conditions of which differ slightly from those contained in the base prospectus of September 2005.**

**- At the date where the increase takes place, the base prospectus of September 2005 is no longer valid. Therefore it is not possible to draw up “new” final terms relating to the base prospectus of September 2005, as this base prospectus is no longer valid. Neither is it possible to draw up “new” final terms referring to the base prospectus as of September 2006 as its terms and conditions differ from the terms and conditions contained in the base prospectus as of September 2005.**

*A) ESMA considers that according to Article 28.1.5 of the Prospectus Regulation an issuer could incorporate by reference information from a prior base prospectus that is no longer valid into the new base prospectus as long as the requirements included in this Article 28 are followed. Therefore, in the above ex-*

ample the issuer could incorporate by reference information from the 2005 base prospectus (i.e. terms and conditions of the issue the issuer wishes to increase) into the new 2006 base prospectus.

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## 9. Order of the information in the prospectus

Date last updated: September 2007

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

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

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

**A) The order prescribed by Articles 25 and 26 is mandatory (table of contents, summary, risk factors and the other information items included in the schedules and building blocks). This does not mean that the issuer may not include in addition a brief cover note which has general information about the issuer and the issue before the items prescribed in Articles 25 and 26 are stated in the prospectus. However, the cover note is not a substitute for the summary or the disclosure requirements under the Regulation.**

*Where an issuer is not under an obligation to include a summary in a prospectus, but wishes to produce some overview section in the prospectus, ESMA considers that issuers may include an “overview” section in the place where a summary would usually appear.*

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## 10. Prospectus composed of separate documents: duplication of information

Date last updated: February 2007

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**Q) Can cross-references be made between the different documents which compose a prospectus (registration document and securities note), even if these documents are published separately, when there is duplication of information<sup>5</sup>?**

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

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## 11. Risk factors section

Date last updated: July 2006

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

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

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## 12. Notification which third country issuers are required to make under Article 30.1 Directive **(DELETED)**

Date last updated: July 2006

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## 13. Nearly equivalence of Euro 1,000 (Article 2.1m)(ii) Directive)

Date last updated: July 2006

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**Q) When determining the home CA, the figure EUR 1,000 is a key element. ESMA discussed how the second sentence of Article 2.1m)(ii) of the Directive, in particular the term "nearly equivalent to EUR 1,000", is applied in practice to cases where the securities are denominated in a currency other than euro.**

*A) The decision regarding which CA should approve the prospectus on the basis of the denomination of the non equity securities according to Article 2.1 m)(ii) of the Directive should be made at the time of the submission of the draft prospectus. At that time, "nearly equivalent" doesn't mean exactly EUR 1,000.*

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## 14. Item 20.1 of Annex I of the Regulation

Date last updated: July 2006

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**Q1) The 1st paragraph of item 20.1 requires issuers to disclose audited historical financial information covering the latest 3 financial years and the audit report in respect of each year. If historical information has not been restated and the issuer decides to present the**

**historical financial information for the last 3 years in a columnar format and an accountants report is provided for the purposes of the prospectus, would this meet the requirements of the Regulation?**

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

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

*A) It is necessary to distinguish between:*

- *A restatement made by the issuer according to item 20.1 of the Annex: in this case, ESMA's Recommendations for the consistent implementation of EC Regulation 809/2004 (ESMA/2011/81) apply.*
- *A restatement made by the issuer following an enforcement procedure: in this case, the restated information should be included along with the original accounts, except if the original accounts are officially corrected. The restated information does not necessarily have to be audited as this would depend on the circumstances of the case.*

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

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

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## **15. Interaction between item 20.1 of Annex I Regulation and IAS 8**

Date last updated: March 2011

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**Q) When an issuer changes an accounting policy in its financial statements (e.g. upon initial application of a new Standard or Interpretation issued by IASB or IFRIC or upon a voluntary change in accounting policies) and following IAS 8, it applies the new policy to comparative information for prior periods, should this mean that the issuer has to restate in a prospectus the comparative figures affected by the retrospective application of the new accounting policy?**

*A) The following example illustrates this situation:*

*In 2008, an issuer prepares a prospectus in which it includes 3 years of complete sets of financial statements for 2005, 2006 and 2007, pursuant to item 20.1 of Annex I. For all 3 years, the sets of financial statements were prepared in accordance with IFRS.*

*In 2007, the issuer changed one of its accounting policies e.g. to start applying a new IFRS or upon a voluntary change in accounting policies, according to IAS 8.*

*According to IAS 8, the issuer should present in its 2007 financial statements:*



- 2007 figures according to the new policies
- 2006 comparative figures restated according to the new policies.

The 2006 comparative restated figures presented in 2007 financial statements are not separately re-audited by the statutory auditor whose audit opinion only refers to the set of financial statements for 2007 figures. On the 2006 restated figures, the auditor will normally only verify that the restatement is correct.

The question being analysed is how many years of financial statements presented in the prospectus is the issuer supposed to restate pursuant to IAS 8?

ESMA considers that no additional requirements of IAS 8 should be applicable in a prospectus. Indeed, IAS 8 does not supersede the prospectus regulation. Thus, IAS 8 applies solely to the set of financial statements for the year 2007 (including the comparative information included therein) and no additional requirement of IAS 8 should be applicable to the other sets of financial statements (years 2006 and 2005) included in a prospectus in accordance with Annex I item 20.1.

Therefore, in the prospectus, according to Annex I item 20.1, the issuer should present the following financial statements:

- 2007 audited financial statements (including 2006 comparative figures restated according to the new policies);
- 2006 audited financial statements;
- 2005 audited financial statements.

For 2006 and 2005 audited financial statements, there is no restatement. These financial statements are the financial statements which were approved by the Annual General Meeting and published.

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

Date last updated: February 2007

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

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

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

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

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

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

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

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

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

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

*ESMA considers that when the issuer has already published the historical financial information required by national legislation, this should be normally the only one required to comply with item 20.1, third paragraph, of Annex I of the Prospectus Regulation (interpretation 1 above). ESMA considers that inclusion of the historical financial information required by national legislation together with requirements under item 20.9 of Annex I<sup>6</sup> and the Recommendations published for start-up companies by ESMA (see paragraphs 135 to 139 of ESMA/2011/81) will normally provide investors with the relevant information in the prospectus and enable issuers to comply with Article 5.1 of the Prospectus Directive. This treatment would be the most appropriate to the example described above.*

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

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

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

<sup>6</sup> *Significant change in the issuer's financial or trading position*

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

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

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

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

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

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

*Additionally, when the entire business undertaking at the time of the prospectus is not accurately represented in the historical financial information required under item 20.1, then the issuer will have to assess whether pro-forma information or complex financial histories information is needed.*

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## **17. Item 20.1 of Annex I Prospectus Regulation: interpretation of “such shorter period that the issuer has been in operation”**

Date last updated: May 2008

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**Q) ESMA discussed the interpretation of the expression “such shorter period that the issuer has been in operation” in item 20.1 of Annex I (and related items of other annexes).**

*A) The following example illustrates the question:*

- A company has been incorporated in February 2006 and is in operation since June 2006.*
- Applicable Annex would be Annex I, so the company would need to provide audited historical financial information covering the latest 3 financial years (or such shorter period that the issuer has been in operation).*
- The company presents audited financial information for the short period February-December 2006 and un-audited interim financial information for the first half-year period 2007.*
- The company has submitted a prospectus for approval at the end January 2008.*

*ESMA agreed on the following clarification:*

*As the company has no audited historical financial information for a whole financial year it would need to cover the “shorter period that the issuer has been in operation”. The audited financial information prepared by the issuer for the short period February-December 2006 is considered sufficient.*

*In addition, interim financial information would be provided in accordance with item 20.6 of Annex I (and related items of other annexes).*

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## 18. Application of the different schedules of the Regulation

Date last updated: July 2006

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

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

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

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## 19. Supplement to prospectuses: interim financial information

Date last updated: July 2006

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**Q) Is the publication of interim financial statements considered as a significant new factor that requires the publication of a supplement in accordance with Article 16 of the Directive?**

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

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## 20. Supplement to prospectuses: profit forecast

Date last updated: February 2007

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

**A) Paragraph 44 of ESMA's Recommendations for the consistent implementation of the European Commission Regulation on Prospectuses n° 809/2004 (ESMA/2011/81) states:**

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

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

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## 21. Supplement to prospectuses: right of withdrawal (DELETED)

Date last updated: August 2009

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## 22. Supplement: Period for filing a supplement after a significant new factor has occurred

Date last updated: December 2008

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**Q) Within what timeframe during the offer period, after a significant new factor has occurred or material mistake or inaccuracy is discovered, shall an issuer draw up a supplement within the meaning of Article 16 of the Directive and file it with the competent authority for approval?**

**A) The issuer should draw up and file with the competent authority a supplement as soon as practicable after a significant new factor occurs or a material mistake or inaccuracy is discovered.**

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### 23. Non relevant information in relation to a published prospectus that does not trigger the obligation to publish a supplement (UPDATED)

Date last updated: December 2012

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

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

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

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

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### 24. Interim financial information included in the prospectus

Date last updated: July 2006

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

*A) Two different situations can be envisaged:*

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

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

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## 25. Profit forecasts or estimates (UPDATED)

Date last updated: December 2012

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**Q1) The combination of paragraph 13.1 of Annex I and paragraph 44 of the ESMA's Recommendations for the consistent application of EC Regulation (ESMA/2011/81) means that equity issuers are always required to include any outstanding forecast on the record in a prospectus and report on it or disclaim such forecast in accordance with paragraph 13.4 on Annex I**

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

*A1) Paragraphs 43 and 44 of ESMA's Recommendations (ESMA/2011/81) state that there is a presumption that an outstanding forecast made in another document than in a previous prospectus will be material in the case of share issues.*

*When the rules applicable to the issuer require the publication of profit forecasts, ESMA considers that they will be open to discuss the interpretation of paragraphs 43 and 44 of ESMA's Recommendations on a case by case basis.*

**Q2) The registration document annex for debt and derivative securities with a denomination per unit of at least EUR 100,000 (Annex IX) provides in item 8 for disclosure when an issuer chooses to include a profit forecast or estimate, yet item 8.2 only appears to relate to forecasts. This item states that any profit forecast must be accompanied by a statement confirming the forecast has been properly prepared on the basis stated and that the basis of accounting is consistent with the accounting policies of the issuer. Annexes I, IV, X and XI read the same save for the statement being in the form of a report prepared by independent accountants or auditors, confirming that the forecast or estimate have been properly compiled on the basis stated and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer. Is the lack of a reference to "estimate" in Annex IX item 8.2 a deliberate omission?**

*A2) No, this is not a deliberate omission. ESMA can see no reason why the provisions in Annex IX item 8.2 should not apply to estimates in the same way as other Annexes, and it is our view that Annex IX item 8.2 should be read in the same way as the other Annexes as far as forecasts and estimates are concerned. This view does not affect the present requirements for an accountants or auditors report. Forecasts and estimates are defined in Article 2 of the Directive.*

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**26. Way of calculation of limit of EUR 5,000,000 set in Article 1.2 h)<sup>9</sup> Directive (UPDATED) (Qa DELETED)**

Date last updated: December 2012

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**Qb) Should the limit be calculated per type of security or should all types of securities be taken into account as a whole? For example, if a company makes a debt issue in January of EUR 4 million and an equity issue in March of EUR 2 million, should the issuer draw up a prospectus for the second issue?**

*Ab) Article 1.2 h) exclusion applies separately to offers of different kinds of securities within a 12 month period. ESMA is of the view that equity securities and debt securities should be considered separately for the calculation of the limit.*

*Competent authorities have the power to take enforcement actions if they consider that a transaction has been structured to circumvent the provisions of the Directive.*

**Qc) Should offers during the twelve-month-period where other exemptions are applicable (for example offers to qualified investors) be included for the calculation of the limit?**

*Ac) No. Only offers where the issuer has previously used the exclusion in Article 1.2 h) should be included for the calculation of the limit.*

**Qd) Should offers where a prospectus has been registered be included for the calculation of the limit?**

*Ad) No. Since the information about the previous offers has already been disclosed to the public through the prospectus these offers should not be taken into account for the calculation of the limit.*

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**27. Convertible or exchangeable securities**

Date last updated: July 2006

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

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<sup>9</sup> The Directive shall not apply to securities included in an offer where the total consideration of the offer is less than EUR 5,000,000, which limit shall be calculated over a period of 12 months.



than 10% of the number of shares of the same class already admitted to trading on the same regulated market). Potentially, this means that any issuer could structure a transaction in such a way that a prospectus would never be required for a further issue of shares simply by the interposition of an artificial convertible security. This seems to sit uncomfortably with Article 4.2 a) and in effect potentially could result in this rule being redundant.

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

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

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

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

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## 28. Convertible bond falling in the definition of equity security

Date last updated: December 2008

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**Q) Does it influence the assessment of "convertible bonds" as "equity securities" if the conversion right is solely at the investor's discretion?**

*A) No. For the assessment of whether "convertible bonds" fall within the definition of "equity securities" under the Prospectus Directive it does not matter whether the conversion is solely at the investor's discretion or not.*

*The key element to distinguish "equity" convertible bonds from "non-equity" convertible bonds is to see if the issuer of the convertible bond is the issuer of the underlying shares or an entity belonging to the group of the said issuer ("equity" convertible bond) or not ("non-equity" convertible bond).*

*Although some confusion may arise due to the wording included in recital 12 PD ("(...) convertible notes, e.g. securities convertible at the option of the investor, fall within the definition of non-equity securities set out in this Directive) the definition under Article 2.1b for equity securities clearly includes bonds which give the investor the right to acquire shares as a consequence of their conversion by the investor. Recital 12 should be read as referring to convertible securities which fall outside the scope of the definition, i. e. which are not issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer.*

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## 29. Exemption provided for in Article 4.2 g)

Date last updated: February 2007

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### **Q) Does the exemption provided for in Article 4.2 g) of the Directive<sup>10</sup> include cases where non-transferable securities are converted into shares?**

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

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## 30. Exemptions provided for in Articles 4.1 c) and 4.2 d) Directive in case of mergers (Qa DELETED)

Date last updated: December 2012

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### **Qb) Could a document already assessed by a competent authority as equivalent to the prospectus be used by the issuers in other EU jurisdictions as well?**

*Ab) The Directive passport regime does not apply to the exemptions in Article 4. Therefore, the evaluation of equivalence will have to be undertaken in each Member State where the exemption is to be used. Nevertheless, the competent authorities, if so wish, might use the work previously carried out by another authority when assessing equivalence. Where the assessment is to be undertaken by several competent authorities at the same time, these authorities are encouraged to cooperate in assessing equivalence.*

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## 31. Exemption for admission to trading provided for in Article 4.2 a) Directive

Date last updated: September 2007

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### **Qa) How is the exemption provided for in Article 4.2 a) applied in practice?**

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<sup>10</sup> According to Article 4.2 g) of the PD the obligation to publish a prospectus shall not apply to trading on a regulated market of “shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market.”

**Aa)** Admissions under this exemption must not exceed 10% of the issuer's shares of the same class already admitted to trading on the same regulated market over a 12 month period.

To calculate whether the issuer is exceeding this percentage it should include in the numerator the shares that have benefited from this exemption during the previous 12 months. However, it should not include shares admitted without prospectus due to other types of exemptions.

In the denominator the issuer should include the number of shares of the same class already admitted to trading on the same regulated market at the time it is applying for the new admission (therefore, the CA should not calculate for the denominator the 12 month average of the shares admitted to trading).

For example:

- January 2007: total number of shares admitted to trading is 100. The issuer applies for a further admission of 5 shares (5%). No prospectus is required.
- March 2007: total number of shares admitted to trading is 105. The issuer applies for a further admission of 4 shares resulting from an offer addressed to the employees. No prospectus is required because the employees exemption applies (Article 4.2 f) PD).
- September 2007: total number of shares admitted to trading is 109. The issuer applies for a further admission of 4 shares. No prospectus is required as it amounts to 8% (9/109).
- February 2008: total number of shares admitted to trading is 113. The issuer applies for a further admission of 9 shares. The January 2007 admission of 5 shares is disregarded because since then more than 12 months have elapsed. Also the March 2007 admission is disregarded because it was subject to another exemption. However, the September 2007 admission does count and therefore the issuer has to add 4 shares to the new application of 9 shares and a prospectus is required as it amounts to 12% (13/113).

**Qb) Should the basis for the 10 percent calculation be adjusted for legal measures affecting the number of shares admitted to trading, for example a share split 1 to 2 or a similar reversed split?**

**Ab)** Yes. For example:

- Shares admitted to trading in January are 100.
- In January the issuer applies for the admission of 8 additional shares: the exemption applies as the new admission only represents 8%.
- In June the company splits its capital exchanging the existing 108 shares for 216 new shares (1 x 2).
- In December the issuer applies for the admission of 9 new shares. These new shares plus the previous exempted 8 shares (=17) represent only 8% of the total number of shares (17/216). However, taken into consideration the split that took place in June, the previous 8 shares should be adjusted to 16 (8x2). Therefore to determine whether this further admission in December could benefit from the exemption, the numerator should be 25 adjusted shares (16+9). Consequently 25 shares divided by the number of shares already admitted (216) amount to 12% and therefore the issuer should produce a prospectus in December for the admission of the new 9 shares.

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### 32. Exemptions from the obligation to publish a prospectus in Article 4 Directive as standalone exemptions

Date last updated: December 2007

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**Q) An issuer issues new shares as a result of a merger. The new shares that the issuer wishes to admit to trading in a regulated market represent less than 10% of its total number of shares. Does the issuer need to make available the equivalent document refer to in Article 4.2 d) in order to avoid the obligation to publish a prospectus?**

**A) No because exemption of Article 4.2 a) applies. All the exemptions in Article 4 are standalone and therefore if one of them applies there is no requirement to publish a prospectus.**

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### 33. Quality of translations of passported prospectuses

Date last updated: July 2010

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

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

**Aa) Yes. ESMA considers that the person responsible for the prospectus is also responsible for any translation of the approved prospectus.**

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

**Ab) No.**

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

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

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

**Qd) The translated version of the prospectus referred to in Article 19.3 of the Prospectus Directive should contain the same information as the original version published in the home Member State. What should be the reaction of the issuer and the home competent**

### **authority in case of significant mistakes or omissions of information in such translated version in respect of the information contained in the approved prospectus?**

*Ad)* Without prejudice to the fact that the person responsible for the prospectus is also responsible for any translation of the approved prospectus, if a translated version of a prospectus contains material mistakes or omissions of information which might cause investors to make a misleading assessment of the issuer and/or the securities, both the home competent authority and the issuer should cooperate with the host competent authority in finding the solution which better fits the specific case.

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### **34. Updating of the prospectus (UPDATED)**

Date last updated: **December 2012**

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

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

- Article 9.1: a prospectus drawn up as a single document has to be updated through a supplement if any of the situations described under Article 16 arises or is noted before the final closing of the offer or the time when trading on a regulated market begins, whichever is later.
- Article 9.4: a prospectus consisting of separate documents. The registration document is updated either by way of supplement in accordance with Article 16 or through the securities note published each time the issuer wishes to offer securities in accordance with Article 12(2).

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

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

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

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

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

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### **35. Precautionary measures (Article 23 Directive)**

Date last updated: February 2007

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**Q) Do the irregularities and breaches referred to in Article 23 of the Directive<sup>11</sup> relate to obligations under the Prospectus Directive (as implemented into the national legislation of the host member state) or do they refer to any other legislation or regulation of the host?**

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

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### **36. Offering programmes**

Date last updated: February 2007

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

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

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### **37. Validity of prospectuses under Article 9.3 Directive**

Date last updated: February 2007

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

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

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<sup>11</sup> According to Article 23 of the Directive the host competent authority is to refer to the home CA any findings on "irregularities" or "the issuer has breached its obligations by reason of the fact that securities are admitted to trading on a regulated market".

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### 38. Scope of Article 1.2 j) Directive (UPDATED)

Date last updated: December 2012

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#### **Q) Do redeemable debt securities - cases where the issuer has the right to redeem the security before maturity<sup>12</sup> - fall under the scope of Article 1.2 j) of the Directive?**

*A) ESMA considers that Article 1.2 j) of the Prospectus Directive includes offers of redeemable debt securities (as defined above) whose total consideration is less than EUR 75,000,000 issued by credit institutions and whose characteristics comply with other conditions provided by this Article.*

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

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### 39. Depository Receipts over shares: determination of the home Member State (UPDATED) (Qa DELETED)

Date last updated: December 2012

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

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

- According to recital 12 of the Prospectus Directive, Depository Receipts “fall within the definition of non-equity securities set out in this Directive”.
- The “issuer” is the issuer of the Depository Receipts (in the abovementioned case, the trust) and not the issuer of the underlying shares.<sup>13</sup>

*In the specific case mentioned above, the German competent authority will be the home competent authority if the Depository Receipts have a denomination over EUR 1.000 or give 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, provided the issuer is not the issuer of the underlying securities or an entity belonging to the group of the latter issuer, and if the issuer chooses Germany as home Member State provided that a public offer or and admission to trading on a regulated market takes place in*

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<sup>12</sup> In this type of securities the issuer normally enters into a derivative contract in order to cover its risk.

<sup>13</sup> Although the issuer of the underlying shares is the person responsible for the continuing obligations under the Transparency Directive (Article 2.1 d of the TD).

Germany (according to Article 2.1 m) (ii)). Otherwise, the home competent authority will be the authority of the Member State where the trust has its registered office. If the competent authorities involved consider that the authority of the Member State where the issuer of the underlying shares is incorporated is the best placed to approve the prospectus, they could agree the transfer of the prospectus to this latter authority according to Article 13.5 of the Prospectus Directive.

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#### 40. Total consideration in warrants (UPDATED)

Date last updated: December 2012

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**Q) In cases of offers of warrants (and other derivative securities) how should ‘total consideration’ be calculated in respect to the EUR 100,000 (Article 3.2 c)) and EUR 5,000,000 (Article 1.2 h)) limits? Should only the consideration for the warrants (if any) be counted, or should the strike price for the underlying securities be added?**

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

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#### 41. Inclusion of a summary in the prospectus on a voluntary basis (DELETED)

Date last updated: February 2007

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

Date last updated: February 2007

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

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

*"The group discussed whether it constitutes an offer of securities to the public, within the meaning of the Directive, where a custodian bank informs shareholders in one Member State about pre-emption rights in relation to a public offer of new shares taking place in another Member State (which would almost certainly trigger the obligation to publish a prospectus in this latter Member State). The Commission did*



not take a definite view on this question but indicated that it might issue further guidance after having consulted its Legal Service. However, the Commission recognised that the Directive should not operate as an instrument to limit cross-border share ownership, or effectively to restrict shareholders' ability to exercise pre-emption rights; but noted that where a prospectus is published in connection with an offer of securities in one Member State, it may be used to offer those securities in any other Member State (subject only to a translation of the summary if that is required by the CA of the host Member State)."

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

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

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

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

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#### **43. Subscription of securities by residents of a country where the public offer is not taking place**

Date last updated: September 2007

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**Q) Is it possible for residents in a Member State "A" where a public offer does not take place to subscribe for securities in the Member State "B" where the public offer takes place directly or through their financial intermediaries acting on behalf of these investors<sup>14</sup>?**

**A) Yes.** There is no need for the offeror to publish a prospectus in Member State "A" as no public offer is made in such a country. But this does not prevent investors in that country to subscribe or buy the securities which are subject of a public offer in another Member State. What is relevant in this case is that a prospectus is published in Member State "B" where the public offer takes place.

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<sup>14</sup> There are different situations where investors in country A might find out that a public offer is taking place in country B even when there is no public offer in country A. For example, investors in country A find out about the offer in country B by their own means, without a communication to them in the sense of Article 2.1 (d) of the Directive; the offer in country A is not a public offer because it falls under one of the cases set out in Article 3 of the Directive; investors are informed of the public offer in country B by their financial intermediaries acting under their contractual duty of custodians to inform their clients

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#### 44. **Obligation to publish a prospectus for admission of securities to trading on a regulated market (Article 3.3 Directive)**

Date last updated: September 2007

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##### **Q) Are the exemptions listed in Article 3.2 of the Directive applicable in case of an admission to trading?**

**A)** *The minutes of the 3rd Informal Meeting on the Transposition of the Prospectus Directive (26 January 2005) deal with this issue including the following:*

*“The exemptions listed in Article 3.2 are not applicable in case of an admission to trading (Article 3.3). Accordingly, if an offer of securities is exempt from the requirement to produce a prospectus by virtue of Article 3.2, a prospectus will never the less be required under Article 3.3 if the same securities are admitted to trading (unless an exemption in Article 4.2 applies)”.*

*ESMA agrees with the Commission’s view expressed above.*

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#### 45. **Information on taxes on the income from the securities withheld at source**

Date last updated: June 2012

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##### **Q) ESMA discussed the interpretation of the wording ‘where the offer is being made or admission to trading is being sought’ included certain items of the Regulation (i.e. item 4.11 of Annex III).**

**A)** *Certain items of the Prospectus Regulation (e.g. item 4.11. of Annex III) require information on taxes on the income from the securities withheld at source in respect of the country of the registered office of the issuer and the country(ies) where the offer is being made or admission to trading is being sought.*

*For the sake of clarification, ESMA considers the term ‘where the offer is being made or admission to trading is being sought’ refers to the countries where the prospectus has been approved and to which the prospectus is going to be notified. ESMA believes that it is appropriate to require withholding tax information in respect of such country(ies) as the issuers are legally entitled to apply for a public offer or an admission to trading in those country(ies).*

*As this item is not intended to require a full disclosure of the tax regime in each country where the offer takes place or admission to trading is being sought, a statement in the tax section of the prospectus inviting investors to seek appropriate advice on their specific situation is strongly recommended.*

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#### 46. Definition of Home Member State in case of base prospectuses (Article 2.1 m) Directive) (UPDATED)

Date last updated: December 2012

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##### **Qa) Who is the Home Member State in cases of a base prospectus where non-equity securities with denomination of less than EUR 1.000 are allowed to be issued under that prospectus?**

**Aa)** Pursuant to Article 2.1m)(i) and (iii) of the Directive, the issuer is not allowed to choose its home Member State for issues of non-equity securities with denomination of less than EUR 1,000 (or a sum nearly equivalent to EUR 1,000 in another currency) unless it is an issue 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, provided the issuer is not the issuer of the underlying securities or an entity belonging to the group of the latter issuer (Article 2.1m) (ii) of the Directive). Therefore, if the issuer's intention is to issue non-equity securities with denomination of less than EUR 1,000 under the offering programme and which do not comply with the requirements of Article 2.1m)(ii), it should seek the approval of the base prospectus in the Member State where it has its registered office (or, in case of third country issuers, in the Member State provided in Article 2.1m)(iii)).

**Qb) An issuer, following Article 2.1m)(ii) of the PD, chooses as home Member State for the approval of its base prospectus a Member State different than that where it has its registered office. Is the base prospectus approved by the competent authority of the chosen home Member State valid to make offers and/or admissions to trading exclusively in countries different than the home (i.e. no offer or admission is made in the home)?**

**For example: an issuer that has its registered office in Finland, following Article 2.1m)(ii), chooses Cyprus as Home Member State for the approval of its base prospectus. Is the base prospectus approved by Cyprus valid to make offers and/or admissions to trading exclusively in countries different than Cyprus (i.e. no offer or admission is made in Cyprus)?**

**Ab)** ESMA believes that the issuer must have a reasonable expectation that it will make an issue under the programme which will be admitted to trading or offered to the public in the home Member State that it has chosen (in the example, Cyprus) and it must do so within the time of validity of the prospectus.

Once a base prospectus has been approved, it is valid for all issues made under it regardless whether such issues will be admitted to trading or offered to the public in the home Member State.

However, if the issuer fails to do at least one offer or admission to trading in the chosen home Member State (during the 12 months validity of the prospectus), the competent authorities of the home and host Member States may take appropriate action according to their national legislation (for example, sanctions under Article 25 of the Directive as transposed into their national legislation).

#### **47. Responsibility statement: selling shareholders**

Date last updated: September 2007

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**Q) If a transaction is made as a combination of a sale from a shareholder and an issue of new shares, may also the selling shareholder be required to make a responsibility statement in the prospectus in addition to the issuer's responsibility statement?**

*A) According to the minutes of the 4th Informal meeting on the Transposition of the Prospectus Directive (8 March 2005) "at least one of the persons mentioned in Article 6.1 must be responsible for the whole prospectus, notwithstanding that there might be different persons responsible separately for particular parts of the prospectus".*

*Therefore the Directive only requires that at least one of these persons mentioned in Article 6 is responsible for the whole prospectus. It is up to national legislation to determine whether another person (therefore, more than one person) should be also responsible for the whole or part of the prospectus.*

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#### 48. Guarantor's responsibility for the content of a prospectus

Date last updated: August 2008

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##### **Q) Is the guarantor obliged to assume responsibility for the content of a prospectus or for certain parts if it?**

*A) As already stated in the minutes of the 4th Informal meeting on the Transposition of the Prospectus Directive and in Question 47 of the ESMA Q&A, at least one of the persons mentioned in Article 6.1 of the Prospectus Directive (the issuer, the offeror, the person asking for the admission to trading on a regulated market or the guarantor) must be responsible for the whole prospectus, notwithstanding that there might be different persons responsible separately for particular parts of the prospectus. Therefore the Directive only requires that at least one of these persons mentioned in Article 6 is responsible for the whole prospectus. It is up to national legislation to determine whether another person (therefore, more than one person, for instance also the guarantor) should be also responsible for the whole or part of the prospectus.*

*Therefore, there is no provision in the Prospectus Regulation or the Prospectus Directive that would specifically require the guarantor to assume and declare responsibility for the contents of a prospectus or for certain parts of it. Nevertheless, subject to Article 6.1 of the Prospectus Directive, the guarantor is allowed to accept responsibility for the whole prospectus.*

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#### 49. Use of the term “prospectus” (UPDATED)

Date last updated: December 2012

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##### **Q) May an issuer call a document “Prospectus”, even though this document does not fulfill the requirements set out in the Prospectus Directive? For example, if an issuer is exempted from making a prospectus, but decides to create some document with an explanation of the securities to be offered may he call such a document a prospectus?**

*A) ESMA recommends issuers not to use the term “prospectus” for documents that have not been approved according to the Prospectus Directive or according to any EU legislation where the term “prospectus” is used. Should issuers use this term, they are encouraged to provide a clear statement in the document indicating that it has not been approved in accordance with the Prospectus Directive. Otherwise the use of the term “prospectus” could be misleading.*

*Where no prospectus is required in accordance with Directive 2003/71/EC, any advertisement shall include a warning to that effect unless a prospectus which complies with the Prospectus Directive 2003/71/EC and Prospectus Regulation 809/2004 is produced.*

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## 50. Pro forma financial information: clarification of certain terms used in item 20.2 of Annex I and in Annex II Regulation

Date last updated: September 2007

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### Qa) ESMA discussed the interpretation of certain terms used in item 20.2 of Annex I (those highlighted below in bold letters)

#### **20.2. Pro forma financial information (Annex I)**

In the case of a significant gross change, a description of how the **transaction** might have affected the assets and liabilities and earnings of the issuer, had the transaction been undertaken at the **commencement of the period being reported on or at the date reported**.

This requirement will **normally** be satisfied by the inclusion of pro forma financial information.

This pro forma financial information is to be presented as set out in Annex II and must include the information indicated therein.

Pro forma financial information must be accompanied by a report prepared by independent accountants or auditors.

#### Aa) ESMA agreed on the following clarifications:

**Transaction:** *The reference made to "transaction" under item 20.2 covers both the case of a transaction that has already occurred and the situations, as stated in Article 4a.1 second paragraph of the Regulation<sup>17</sup>, where the transaction has not yet taken place but where the issuer has made a significant firm commitment (i.e. a transaction that the issuer has agreed to undertake).*

**At the commencement of the period being reported on or at the date reported:** *when preparing pro forma information, in order to describe the effect of the transaction, issuers make the assumption the transaction has taken place at a certain date. Item 20.2 refers to two different dates:*

- *The commencement of the period being reported (first day of the period): this is the hypothetical date of the transaction when preparing a pro forma profit and loss account.*
- *The date reported (last day of the period): this is the hypothetical date of the transaction when preparing a pro forma balance sheet. This date is independent from the date of the Prospectus.*

**Normally:** *paragraph 2 of item 20.2 considers that in most cases the best way to describe the effect of a significant gross change is by providing pro forma information, that will be included in the prospectus following the requirements set in Annex II. However, the wording of the Regulation, when stating that "this requirement will **normally** be satisfied by the inclusion of pro forma financial information", acknowledges the fact that there might be certain circumstances where the inclusion of pro forma information in the prospectus is not feasible or might not be a fair way to describe the effect of the transaction. In these cases, issuers would still have to comply with the requirement under 20.2 (i.e. by providing a narrative description) but would not have to follow Annex II. This might be the case when pro forma*

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<sup>17</sup> As inserted by Regulation (EC) N° 211/2007.

information cannot be prepared because the issuer with reasonable effort cannot gain access to the relevant information because, for example, it cannot obtain financial information relating to another entity (this consideration is likely to be relevant, in particular, in the context of a hostile takeover)<sup>18</sup>.

**Qb) ESMA discussed the interpretation of letter (a) of item 3 of Annex II (those highlighted below in bold letters)**

**Item 3 of Annex II**

Pro forma financial information must normally be presented in columnar format, composed of:

- (a) **the historical unadjusted information;**
- (b) the pro forma adjustments; and
- (c) the resulting pro forma financial information in the final column.

The sources of the pro forma financial information have to be stated and, if applicable, the financial statements of the acquired businesses or entities must be included in the prospectus.

**Ab) ESMA agreed on the following clarification:**

**Historical unadjusted information:** when presenting pro forma information in the prospectus, Annex II considers that issuers should normally follow a columnar presentation, being the first column that containing “the historical unadjusted information”. ESMA considers that the expression “historical unadjusted information” normally refers to the statutory historical financial information that has been prepared by the issuer normally to fulfil company law requirements or to statutory interim financial information prepared by the issuer. In most cases, the first column under the pro forma requirements will represent information extracted from that provided by the issuer under items 20.1 and/or 20.6 of Annex I.

**Qc) ESMA discussed the interpretation of letters (a) to (c) of item 5 of Annex II (highlighted below)**

**Item 5 of Annex II**

Pro forma information may only be published in respect of:

- (a) **the current financial period;**
- (b) **the most recently completed financial period; and/or**
- (c) **the most recent interim period for which relevant unadjusted information has been or will be published or is being published in the same document.**

**Ac) ESMA agreed on the following clarifications:**

- (a) **The current financial period:** ESMA considers that this expression refers to a certain period in the current financial year for which interim information different from statutory interim information is prepared (for example, if an issuer who normally publishes half-yearly interim financial information decides to prepare and publish its financial information for the 4 first months of the year).

<sup>18</sup> See recital 13 of Regulation (EC) N° 211/2007.

- (b) **The most recently completed financial period:** ESMA considers that this expression refers to the last full financial year (normally 12 months) and not an interim period.
- (c) **The most recent interim period for which relevant unadjusted information has been or will be published or is being published in the same document:** ESMA considers that the reference made to the relevant unadjusted information in this letter c) refers to the statutory interim financial information that will normally be half-yearly financial information (it could also refer to quarterly financial information as long as it has been prepared with the same level of quality and comfort as the half yearly information). This interim information will normally be the one that has already been published by the issuer (for example to comply with the requirements under the Transparency Directive) or is being published in the prospectus where the pro forma information is being provided.

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## 51. Pro forma financial information: illustrative examples of the application of the requirements on pro forma (special reference to item 5 of Annex II – letters (a) to (c)-)

Date last updated: September 2007

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### Q) ESMA discussed some illustrative examples of the practical of the application pro forma requirements and how item 5 of Annex II could be applied in these cases.

A) ESMA provides below an analysis of 4 typical cases where issuers may be confronted with the need to provide pro forma information in a prospectus and some views on how item 5 of Annex II (letters a to c) could be applied in these cases.

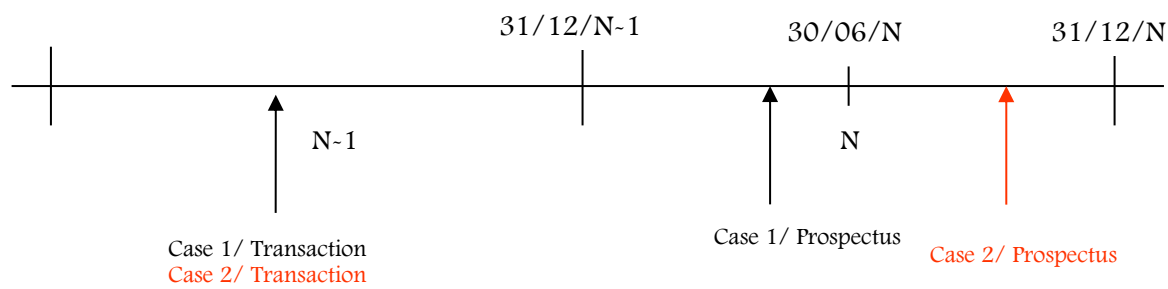
According to item 2 of Annex II “In order to present pro forma financial information, a balance sheet and profit and loss account, and accompanying explanatory notes, depending on the circumstances may be included”. Therefore, in its study ESMA has analysed separately the requirement for pro forma balance sheet and for pro forma profit and loss account (P&L). As for the inclusion of “accompanying explanatory notes”, ESMA considers that the explanatory notes should be included in all cases where any kind of pro forma information (balance sheet and/or profit and loss account) is provided in the prospectus so that investors can understand the pro forma information that is being disclosed.

The following hypotheses are applicable in all cases:

- There is only one transaction;
- The transaction is significant (that is to say that it implies a variation of more than 25% relative to one or more indicators of size);
- Only pro forma information, and not historical financial statements in the prospectus, is being considered.
- The issuer is obliged to publish half-yearly financial information. In case the issuer publishes, in addition, quarterly financial information (as long as it has been prepared with the same level of quality and comfort as the half year information) the conclusions made in the cases below could be applied in a similar way.



### **Diagram for cases 1 and 2**



**Case 1:** as illustrated above, case 1 is a case where:

- A significant transaction happened in N-1
- A prospectus is issued in year N, during first half-year.

#### Balance sheet

The transaction is already integrated in the balance sheet of the most recent completed financial statements (as of 31/12/N-1). Therefore, no pro forma information is required on the balance sheet.

#### Profit and loss account

In this case, as the transaction is not reflected in the P&L for the full N-1 year, most competent authorities require a pro forma profit and loss account for N-1 (12 months) as if the transaction happened on 1 January N-1, according to letter b) of item 5 of Annex II. These competent authorities believe that a P&L should be included in the prospectus if there has been a significant transaction which is not fully (i.e. for the entire twelve months period) reflected in the historical financial information of the most recent financial period. The information according to Annex II compared with the disclosure required under paragraph 70 of IFRS 3 in the case of an acquisition provides additional material information to investors; i.e. notes on pro forma adjustments and an identification of which pro forma adjustments have a continuing impact on the issuer and those which have not.

According to other competent authorities, no pro forma P&L is needed in these circumstances because the real P&L impact of the transaction is already reflected in the financial information provided under Annex I and any information required concerning the theoretical full year P&L contribution of the acquired entity to the group is usually provided elsewhere in the prospectus, for example because the applicable GAAPs already request information on this impact of the transaction (i.e. paragraph 70 of IFRS 3 in the case of an acquisition, or paragraphs 33-36 of IFRS 5 in the case of a carve out).

ESMA considers that letters a) and c) of item 5 of Annex II are not applicable in this case.

**Case 2:** as illustrated above, case 2 is a case where:

- A significant transaction happened in N-1
- A prospectus is issued in N, during second half-year.
- The prospectus contains half-yearly financial statements (as of 30/06/N)

#### Balance sheet

As in case 1, the transaction is already reflected in the balance sheet both of the annual information (as of 31/12/N-1) and of the half-yearly information (as of 30/06/N). Therefore, no pro forma information is required on the balance sheet.

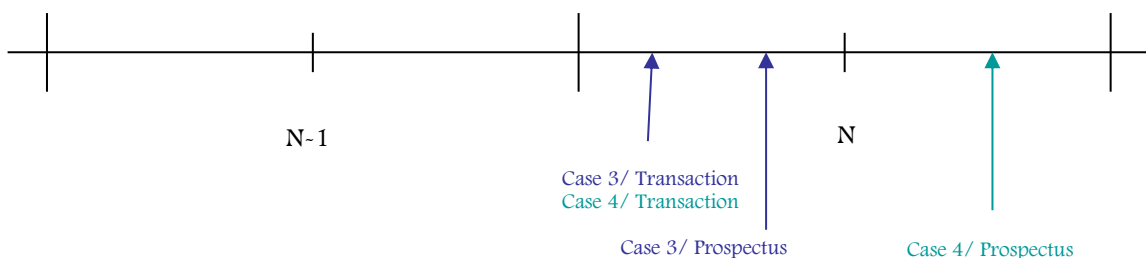
#### Profit and loss account

In this case, as the transaction is not reflected in the P&L for the full N-1 year, most competent authorities require a pro forma profit and loss account for N-1 (12 months) as if the transaction happened on 1 January N-1, according to letter b) of item 5 of Annex II. The reasoning of these competent authorities is the same as the reasoning in Case 1.

According to other members, no pro forma information is necessary here either largely for the same reason as Case 1: the information is usually provided elsewhere in the prospectus; The true P&L effect of the transaction is already reflected in the N-1 accounts and fully reflected in the interim financial statements (here the N half-yearly financial statements) and applicable GAAPs generally request information on the impact of the transaction (i.e. paragraph 70 of IFRS 3).

ESMA considers that letters a) and c) of item 5 of Annex II are not applicable in this case.

#### **Diagram for cases 3 and 4**



**Case 3:** as illustrated above, case 3 is a case where:

- a significant transaction happened in N (first half year)
- a prospectus is issued in N, during first half-year.

#### Balance sheet

In this case, most competent authorities, require a pro forma balance sheet as if the transaction had happened on 31/12/N-1, according to letter b) of item 5 of Annex II.

ESMA considers that letter c) of item 5 of Annex II is not applicable in this case.

#### Profit and loss account

In this case, most competent authorities, require a pro forma profit and loss for N-1 (12 months) as if the transaction happened on 1 January N-1 according to letter b) of item 5 of Annex II.

In addition to the above, some members consider that, according to letter a) of item 5, the competent authority might assess on a case by case basis the need to provide pro forma P&L for the current financial period, conditional upon the available information. The reasoning of these competent authorities is the same as the reasoning in Case 1.

ESMA considers that letter c) of item 5 of Annex II is not applicable in this case.

**Case 4:** Same situation as in case 3 but the prospectus is issued in the second half-year in N.

Balance sheet

The transaction is already reflected in the balance sheet of the half-year information (as of 30/06/N). Therefore, no pro forma information is required on the balance sheet.

Profit and loss account

Regarding the pro forma P&L there are divergent practices among Competent Authorities:

- Some Competent Authorities do not require a pro forma P&L, for reasons analogous to Case 1 or 2 in that the necessary P&L effect of the transaction is already shown in the interim financial information.
- Other Competent Authorities require a pro forma P&L for N-1 (12 months) as if the transaction happened on 1 January N-1 (according to item 5 b)) **OR** a pro forma P&L for N half-yearly financial statements as if the transaction happened on 1 January N (according to item 5 c)).
- Finally, other Competent Authorities require a pro forma P&L for N-1 (12 months) as if the transaction happened on 1 January N-1 (according to item 5 b)) **AND** a pro forma P&L for N half-yearly financial statements as if the transaction happened on 1 January N (according to item 5 c)). The reasoning of these competent authorities is broadly the same reasoning as in Case 1.

In addition to the above, some members consider that, according to letter a) of item 5, the competent authority might assess on a case by case basis the need to provide pro forma P&L for the current financial period, conditional upon the available information.

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## 52. Pro forma financial information in cases where several transactions have taken place

Date last updated: December 2007

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**Qa) What kind of pro forma information should normally be provided in cases where there are several transactions and only one of them is significant (variation of more than 25%)?**

**Aa)** If there are several transactions and only one of them is significant (i.e. implies a variation of more than 25% relative to one or more indicators of size), then generally, the pro forma financial information shall cover only the significant transaction and, therefore, there is no need to aggregate. Nevertheless, the situation should be assessed on a case by case basis to ensure that the information provided is not misleading.

**Qb) What type of pro forma information should be provided in cases where an issuer undergoes several transactions none of which individually qualifies as significant but which when taken together could be considered to qualify as significant?**

**Ab)** If an issuer undergoes several transactions none of which individually qualifies as significant (i.e. implies a variation of more than 25% to one or more indicators of size) but which when taken together could be considered to qualify as significant, in general, ESMA believes no pro forma information should be required. Nevertheless, the situation should be assessed on a case by case basis to ensure that the information provided is not misleading.

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### 53. Pro forma financial information: cases where issuers have already published pro forma financial information in a previous prospectus

Date last updated: December 2007

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**Q) If an issuer has already published pro forma financial statements in a previous prospectus, which financial information must be taken into account in order to evaluate if there is a "significant gross change" (25%) in case of a new transaction?**

**In this case, the issuer has not published any other financial statements (annual or interim) between the two transactions.**

*A) The following example illustrates this situation:*

- *Historical financial information: 100 (basis)*
- *Transaction No1: 40 => as transaction No1 amounts to 40% (40/100), pro forma information No1 (reflecting transaction 1) has to be included in prospectus No1 (pursuant to Annex II of Regulation 809/2004). After transaction No1 the "new group" is 140.*
- *Transaction No2: 30 => should pro forma information be provided in prospectus No2? If yes, what pro forma information?*

*There are 2 options for prospectus No2:*

- *Option 1: No pro forma information has to be included because transaction No2 is not significant compared to the "new group" (30/140=21%).*
- *Option 2: Pro forma information has to be included because transaction No2 is significant compared to the historical financial information (30/100=30%).*

*The inclusion of pro forma information (option 2) seems to be the more sensible option in this case. According to item 3 of Annex II, the starting point for the presentation of pro forma information in a prospectus is the historical unadjusted information (which in this case is the historical financial information -100-). Therefore it would make sense to take this data and not the "new group" as the basis for the calculation of the "significance" of transaction No2 since this historical unadjusted information is the information that according to item 3 a) of Annex II has to be included in the first column for the presentation of the pro forma information.*

*In this case, pro forma information shall reflect transaction No1 and transaction No2. Therefore, the pro forma adjustments to be included in the second column according to item 3 b) of Annex II should be those related to both transactions and not only to transaction No2.*

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### 54. Pro forma financial information included in a prospectus on a voluntary basis (UP-DATED)

Date last updated: December 2012

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**Q) Can pro forma information be included in a prospectus on a voluntary basis?**

**A)** *Yes. The issuer can voluntarily decide to include pro forma information in a prospectus. However, if pro forma information is provided on a voluntary basis, then this information needs to be prepared according to Annex II (including an auditor's opinion). The fact that the issuer voluntarily decides to provide pro forma information in a prospectus cannot imply that it is possible for this information to be provided with less care than when requested on a mandatory basis. As CESR clarified in its advice to the EC (paragraphs 38 to 40 of document CESR/03-208) pro forma information, if not prepared with due care, might confuse or even mislead investors. Therefore, for pro forma information, whether mandatory or voluntary, to be useful for investors it should be prepared and included in the prospectus following the requirements set in Annex II.*

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## **55. Auditor's statement in Pro Forma Financial information (section 7 Annex II Prospectus Regulation)**

Date last updated: August 2008

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### **Q1) Is the auditor's statement on pro forma information required to include the exact wording as set out in section 7 of Annex II?**

**A1)** *ESMA considers that the auditor's statement on pro forma information is required to include the exact wording as set out in section 7 of Annex II. No other wording of the statement is accepted.*

### **Q2) May qualifications and/or paragraphs on emphasis of matter be included in the auditor's statement, without jeopardizing the obligation to render a statement in accordance with section 7 of Annex II?**

**A2)** *ESMA considers that qualifications to the auditor's statement may not be included as they would undermine the statement given by the auditor.*

*In respect of emphasis of matter paragraphs, ESMA would recommend not allowing their inclusion in the auditor's statement because it feels that emphasis of matter paragraphs in this context will only serve to reduce the clarity of the statement in respect of the pro forma information provided by the auditors.*

*ESMA feels that an emphasis of matter paragraph cannot add substantial information from the point of view of investor's protection because such information can neither add to the information already provided in the basis of preparation of the pro forma information nor add more information regarding the consistent application of the accounting policies of the issuer without becoming a qualification. The conclusion of the auditor's report, as required by section 7 of annex II, should not allow the possibility of investors being left in doubt as to the conclusion the auditor has reached on these matters.*

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## **56. Retail cascade offers (DELETED)**

Date last updated: July 2012

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**57. Delineation between the Base Prospectus and the Final Terms (Articles 5.4 and 16.2 Directive) (DELETED)**

Date last updated: December 2007

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**58. Level of disclosure concerning price information (Article 8.1 Directive and item 5.3.1 of Annex III Regulation)**

Date last updated: December 2007

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**Q) ESMA discussed the level of disclosure concerning price information according to Article 8.1 of the Directive and item 5.3.1 of Annex III Regulation. In this context, it discussed *inter alia* the interpretation of certain terms used in these provisions, the place where and the time when this information has to be disclosed.**

**Article 8.1 Directive**

Member States shall ensure that where the final offer price and amount of securities which will be offered to the public cannot be included in the prospectus:

(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;

or

(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.

**Item 5.3.1. Annex III Regulation**

An indication of the price at which the securities will be offered. If the price is not known or if there is no established and/or liquid market for the securities, **indicate the method for determining the offer price**, including a statement as to who has set the criteria or is formally responsible for the determination. Indication of the amount of any expenses and taxes specifically charged to the subscriber or purchaser.

*A) Article 8.1 reflects a market practice commonly known as book-building procedure to most European countries whereby the prospectus as approved by the competent authority does not include the final price. The Prospectus Directive allows this practice but sets some rules to avoid undermining investor protection, since the general rule is that investors must at least know the maximum price they have to pay for the shares at least at the time they subscribe for the offer. With respect to price information the issuer has to comply with the disclosure requirements according to item 5.3.1 of Annex III of the Prospectus Regulation (shares securities note) as well.*

*ESMA discussed different cases about the level of disclosure of price information according to Article 8.1 Directive and item 5.3.1 Annex III. This spectrum of disclosure requirements may be simplified in the following main approaches:*

i) Some competent authorities consider that even if Article 8.1 has a different wording as compared with item 5.3.1 of Annex III of the Prospectus Regulation the content of the respective disclosure requirements is not necessarily of a substantially different nature, as they both focus on information about how the offer price is determined. Therefore these competent authorities consider that a general indication, provided that it is meaningful and not too generic, of the method or combination of methods would be sufficient without the need to give any kind of approximate figures (e.g. the company indicates that the method it will follow is the discounted cash flow method and will provide a general description of such method or just the indication that the price will be determined according to the outcome of the book building process).

ii) Other competent authorities consider that item 5.3.1 focuses on the method of valuation of the company, whereas the Article 8.1 requires information on the procedure the issuer will adopt in setting the final price in order for investors to know how much they will pay for the shares. Therefore, these competent authorities consider that issuers should include in their prospectus:

- according to Article 8.1 a reference to the criteria and/or conditions according to which the price will be determined (i.e. a reference to the book building procedure) and
- according to item 5.3.1 where there is no active market for the shares a (rather detailed) indication of the method(s) of valuation of the issuer, together with an indication of the approximate non-binding value(s) of the share that would result from the application of such method(s). This valuation(s) would be one input among others that the issuer would take into account when deciding the final price (e.g. market conditions at the moment the decision is taken, peer group analysis, the outcome of the book-building procedure, DCF-method, etc).

Case 1: The issuer discloses the final or maximum price.

In this case there is no need to describe the criteria and/or conditions of the price determination according to Article 8.1 a) and the issuer does not have to provide investors with a withdrawal right according to Article 8.1 b).

Further information about the methods of price determination according to item 5.3.1 Annex III, however, might be necessary, depending on the circumstances of the offer. If there is an established market and/or liquid market the Regulation does not require any further information, apart from the disclosure of the final price. It seems that the Regulation considers that the existence of published price quotations in an active market is the best evidence of the fair value of the shares and therefore the potential investors do not need further information about price determination. Such scenario usually occurs when the issuer launches an offer of shares that are already listed on the market. The same conclusion may be drawn, if the maximum price is disclosed instead of the final price. In this case competent authorities agree that there is no need to include additional information either as investors would never be damaged by the determination of the final price that will never be higher the maximum price.

However, in case there is no established and/or liquid market for the shares, the issuer still has to provide the information regarding the method for price determination according to item 5.3.1. Annex III, even if it indicates the price (final or maximum). It seems that the assumption of the Regulation is that where there is no active market for the shares, which is the case for IPOs, the issuer would need to provide further information about the price. As to the extent of this information, competent authorities take different approaches as described above.

Case 2: The issuer discloses neither the final nor the maximum price.

In this scenario the issuer would have to describe the criteria and/or conditions to avoid the investor's withdrawal right according to Article 8.1 b) and it would have to comply with the disclosure requirements according to item 5.3.1 Annex III. As to the extent of this information, competent authorities take different approaches as described above.

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## 59. Disclosure of major holdings by third country issuers: interpretation of item 18.1 of Annex I Prospectus Regulation

Date last updated: December 2007

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### Q How should item 18.1 of Annex I<sup>23</sup> on disclosure of major holdings be interpreted, in particular in relation to third country issuers?

A) ESMA considers that the reference to “the issuer’s national law” in item 18.1 of Annex I, should be interpreted as follows:

a) When the issuer is admitted to trading on an EU regulated market and the provisions of Transparency Directive 2004/109/EC<sup>24</sup> as implemented by the Member State apply, the information that the issuer provides to fulfil the requirements of the Transparency Directive should be included in the prospectus to satisfy item 18.1 of Annex I;

b) When the issuer is not admitted to trading on an EU regulated market and the provisions of the Transparency Directive do not apply, the information to be included under item 18.1 of Annex I is that which is notifiable according to the issuer’s country of incorporation law.

When the issuer’s country of incorporation law does not require any information to be notified, the issuer should include a negative statement in the prospectus to that effect.

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## 60. Items 5.4.1 and 5.4.2 of Annex III Regulation: name of co-ordinator, placers, paying and depositary agents in the various countries where the offer takes place (UPDATED)

Date last updated: December 2012

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Q) According to items 5.4.1<sup>25</sup> and 5.4.2<sup>26</sup> of Annex III Regulation, the prospectus shall contain the name and address of the co-ordinators of the offer, the placers (to the extent known to the issuer), the paying agents and the depositary agents in the various countries where the offer takes place.

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<sup>23</sup> In so far as is known to the issuer, the name of any person other than a member of the administrative, management or supervisory bodies who, directly or indirectly, has an interest in the issuer’s capital or voting rights which is notifiable under the issuer’s national law, together with the amount of each such person’s interest or, if there are no such persons, an appropriate negative statement.

<sup>24</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

<sup>25</sup> “Name and address of the co-ordinator(s) of the global offer and of single parts of the offer and, to the extent known to the issuer or to the offeror, of the placers in the various countries where the offer takes place”

<sup>26</sup> “Name and address of any paying agents and depositary agents in each country”



ESMA has analysed the practical application of these provisions on passported prospectuses and has found out that sometimes some of this information is missing.

The problem described arises due to the issuers' practice of requesting the passport notification for many EU countries even if they are not totally sure at that time that they will actually make a public offer in all those countries. Hence the lack of certain information in the prospectus relevant to all or some of the host markets.

A) ESMA considers that issuers should ensure that all the information requested in items 5.4.1 and 5.4.2 of Annex III Regulation should be included in all prospectuses as it is required by the Prospectus Regulation or provided to host investors through announcements in the host markets if that information is not known at the time the prospectus is approved. Issuers are encouraged to file these announcements with the host competent authorities, where appropriate. This does not prejudice the need for a supplement according to Article 16 Directive if the missing information were considered to be significant according to that article.

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## 61. Clarification of certain terms used in item 3.2 of Annex III Regulation: Capitalisation and indebtedness

Date last updated: December 2007

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Q) ESMA members discussed the interpretation of certain terms used in item 3.2 of Annex III (those highlighted below in bold letters)

### Item 3.2 of Annex III: Capitalisation and indebtedness

A statement of capitalisation and indebtedness (distinguishing between guaranteed and unguaranteed, secured and unsecured indebtedness) as of a date no earlier than 90 days prior to the date of the document. Indebtedness also includes **indirect and contingent indebtedness**.

A) ESMA agreed on the following clarifications:

**Indirect indebtedness:** indirect indebtedness is any obligation that has not been directly incurred by the issuer, which is considered on a consolidated basis, but which may fall on the issuer to meet in certain circumstances: for instance a guarantee to honour a loan advanced by a bank to an entity (that is not in the issuer's group) if this entity defaults on repayments due on the loan.

**Contingent indebtedness:** contingent indebtedness is the maximum total amount payable in relation to any obligation which although incurred by the issuer has yet to have its final amount assessed with certainty, irrespective of the likely actual amount payable under that obligation at any one moment in time: for instance the total VAT liability due on goods in a bonded warehouse where the actual amount payable to the tax authorities in any given financial period will depend not on the actual goods bought by the issuer and deposited in the warehouse but on the level of those goods actually sold on to customers.

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## 62. Updated capitalisation and indebtedness statement (item 3.2 Annex III PR)

Date last updated: December 2008

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**Q) Does item 3.2 of Annex III Prospectus Regulation require updated information in case of a significant change relating to capitalisation and indebtedness within the 90 days limit or is any statement sufficient as long as it is as of a date no earlier than 90 days prior to the date of the prospectus?**

**A) Item 3.2 of Annex III Prospectus Regulation<sup>27</sup> requires a statement of capitalization and indebtedness as of a date no earlier than 90 days prior to the date of the prospectus.**

*ESMA considers that this determines the last possible date of the capitalisation and indebtedness statement in the absence of a significant change.*

*Where an event which could be described as a significant change occurs between the 90-day-period and the date of the prospectus, the issuer must reflect this change in its capitalisation and indebtedness statement, as appropriate, otherwise the statement may be misleading. Generally the capitalisation and indebtedness statement must be consistent with the financial information included in the prospectus and the disclosure on significant changes in the issuer's financial or trading position according to item 20.9 of Annex I Prospectus Regulation.*

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## 63. Rights issue to existing shareholders (DELETED)

Date last updated: May 2008

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## 64. More than one final terms for a specific issue of bonds (UPDATED)

Date last updated: December 2012

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**Q) Can an issuer provide investors and file with the competent authority more than one document with final terms for a specific issue of bonds?**

**A) ESMA has analysed 2 cases where more than one document with final terms for a specific issue of bonds could be filed:**

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<sup>27</sup> ESMA issued some guidance in relation to item 3.2 in paragraph 127 of its Recommendations for the consistent implementation of EC Regulation 809/2004 (ESMA/2011/81).

1. *Amendment of information included in final terms that is not a significant new factor, material mistake or inaccuracy: in this case, ESMA considers that issuers, pursuant to Art.2a, para 2 (2), of Regulation No. 809/2004, shall publish a notice of the change. In addition, issuers should also be allowed to file, on a voluntary basis, a replacement of the final terms with the new information*  
*ESMA notes that the practice in some Member States is to allow the issuer to amend final terms, if it has reserved such right in the applicable terms and conditions. It is the issuer's responsibility to ensure compliance with the applicable terms and conditions and any national laws in order to prevent an infringement of the existing securities holders' rights*

2. *A significant new factor, material mistake or inaccuracy relating to the information included in the final terms which is capable of affecting the assessment of the securities: in this case, it is ESMA's view that a supplement to the related base prospectus with reference to the amended final terms in accordance with Article 16 of the Prospectus Directive would be required. In addition to the required supplement, ESMA recommends to file a second set of final terms replacing the first set of final terms to give a clear picture for investors. This allows the investors to easily have a full and clear view on the relevant issue.*

*In line with other ESMA's statements in this Q&A (cf. answer to Question 20 - Supplement to prospectuses: profit forecast), ESMA considers that it is up to the issuer to assess the significance or materiality of a new factor, mistake or inaccuracy, without prejudice to the powers of the home competent authority.*

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## 65. Significant Change Statements and Half-Yearly Financial Reports

Date last updated: December 2008

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**Q) A company has a year-end of 31 December, and has published a half-yearly financial report as of 30 June. It is preparing a prospectus for a wholesale issue of securities, using Annex 9 for registration document disclosure. For the purposes of significant change in paragraph 11.6, the issuer is required to provide the statement as of the date of "the end of the last financial period" - this could either be the interim financial information or the date of the audited financial information. (Note: for issues of at least EUR 100,000 there is no half-yearly reporting requirement).**

**If it is at the date of the half-yearly report, should the issuer be including the half-yearly report in the prospectus even though Annex 9 does not require this?**

**A)** *As the half-yearly report is the last financial period for which financial information has been published, Annex 9, paragraph 11.6 should be given since 30 June - i.e the date of the last financial period to reflect the full picture of the company's financial situation. Provided issuers are satisfied that for the purposes of Article 5 of the Prospectus Directive the prospectus contains all necessary information, the half-yearly report will not be required in the document. The issuer would however be expected to include the half-yearly financial information in the list of documents on display under paragraph 14 (b) of the Annex since it is referred to in the prospectus.*

*In case of a significant change in the issuer's financial or trading position after the date of the audited financial information the issuer may wish to include interim financial information to satisfy the materiality principle in Article 5 of the Prospectus Directive.*

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## 66. Item 4.6 of Annex III of Regulation No. 809/2004

Date last updated: December 2008

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### **Q) How should the requirement in item 4.6 of Annex III of the Prospectus Regulation on the disclosure of resolutions, authorisations and approvals be interpreted?**

*A) The wording 'by virtue of which the securities have been or will be created and/or issued' in item 4.6 of Annex III of the Prospectus Regulation implies that according to this item only legal acts on the part of the issuer, i. e. general meeting resolutions and board of directors decisions, need to be disclosed.*

*However, disclosure on any legal acts on the part of third parties, e. g. approvals by the central bank or competition authorities, or the fulfillment of any other external preconditions to the creation or the issuance of the securities might be appropriate according to item 5.1.1 of Annex III Prospectus Regulation and Article 5.1 Prospectus Directive.*

*If any internal resolutions, authorisations or decisions on the part of the issuer or any external preconditions on the part of third parties are pending or can be revoked, the issuer is expected to include a clear statement to that effect and an explanation of the consequences in case the required resolution, authorization, approval is not given or a precondition is not fulfilled. This information might also be required according to item 5.1.4. of Annex III Prospectus Regulation. Certain of the abovementioned elements might be considered as risk factors.*

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## 67. Transferable securities

Date last updated: December 2008

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### **Q1) If an offer to purchase shares is directed to investors under the condition that each participating investor must sign an agreement (e.g. a shareholders agreement) which prescribes that the shareholders restrict their right to freely transfer their shares, does this condition of the offer affect the status of the shares as transferable securities?**

*A1) The definition of transferable securities under the Prospectus Directive refers to the definition under Article 4.1.18) of Directive 2004/39/EC on markets in financial instruments.*

*As stated in the document entitled "Your questions on MiFID" published by the European Commission Services (answer to question N° 115): "The essence of the definition of transferable securities in Article 4(18) MiFID is that, as a class, they are negotiable on the capital markets (...)"*

*The transferability of securities may be reduced on a contractual basis, such as selling restrictions applicable in a specific country or by a lock up agreement between the Company and existing shareholders. In these cases, ESMA considers that those securities remain "transferable securities" falling into the scope of the Prospectus Directive.*

*This view is also backed by the fact that Prospectus Regulation requires information in relation to restrictions on the free transferability of the securities (Annex III, 4.8) and information in relation to lock-up agreements of selling securities holders (Annex III, 7.3).*

Nevertheless, ESMA is aware that some restrictions may be so broad that they result in transforming "transferable securities" into non-transferable securities, falling no longer into the scope of the PD.

ESMA will analyse whether the security that is subject to a restriction is transferable or not on a case by case basis.

**Q2) If the shares are considered transferable securities, irrespective of the conditions of the agreement, should information in relation to the agreement be incorporated in the prospectus?**

**A2) Yes.** The Prospectus Regulation requires information in relation to restrictions on the free transferability of the securities (Annex III, 4.8) and information in relation to lock-up agreements of selling securities holders (Annex III, 7.3).

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#### **68. Disclosure for Mineral Companies in the CESR Recommendations (DELETED)**

Date last updated: December 2008

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#### **69. Scope of the wording 'any bankruptcies, receiverships or liquidations' used in item 14.1 of Annexes I and X**

Date last updated: December 2008

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**Q) Third paragraph under (c) of item 14.1 requires that the prospectus includes:**

**"details of any bankruptcies, receiverships or liquidations with which a person described in (a) and (d) of the first subparagraph who was acting in the capacity of any of the positions set out in (a) and (d) of the first subparagraph was associated for at least the previous five years;"**

**Is the required disclosure limited to declared bankruptcies, receiverships or liquidations?**

**A) ESMA considers that the scope of the required disclosure is not restricted to declared bankruptcies, receiverships or liquidations but that also information on bankruptcies, receiverships or liquidations that are pending or in are progress should be provided.**

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#### **70. Disclosure requirements for securities which are "unconditionally and irrevocably guaranteed by one of a Member State's regional or local authorities" (UPDATED)**

Date last updated: December 2012

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## Background

ESMA is aware that given the current market circumstances several Member States are considering the possibility of unconditionally and irrevocably guaranteeing, under various forms, securities issued by credit institutions in their jurisdictions to reactivate the market. ESMA has been approached by some of those credit institutions that are considering the possibility of drawing up a prospectus in accordance with the Prospectus Directive (to benefit from the option of passporting the prospectus) to make a pan-European offer. Some of these credit institutions have applied for derogations from some of the requirements of the annexes to the Prospectus Regulation on the basis that these securities have been guaranteed by Member States and that information on Member States is already in the public domain. Other institutions have argued that they are not readily able to obtain information required on the Member States in the Annexes.

Following these requests, ESMA has discussed the issue and has reached the following agreement.

### **Q1) What are the disclosure requirements for securities "unconditionally and irrevocably guaranteed by one of a Member State's regional or local authorities" if an issuer decides to draw up a Prospectus Directive compliant prospectus (in accordance with Article 1.3 Directive)?**

*A1) According to Article 1.2 d) Prospectus Directive, the Directive shall not apply to securities "unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities".*

*Therefore, it is up to Member States legislation to define how to regulate these offers and admissions to trading. Member States might have set different requirements for these situations, meaning that issuers would have to check each national regime of the Member States where they want to make an offer to the public or an application for admission to trading on a regulated market.*

*Nevertheless, Article 1.3 Prospectus Directive entitles an issuer (or a person asking for admission to trading on a regulated market) to opt-in the Prospectus Directive; i.e. to draw up a prospectus in accordance with the Directive when securities are offered to the public or admitted to trading.*

*ESMA considers that once an issuer decides to use the option provided in Article 1.3 Prospectus Directive to draw up a Prospectus Directive compliant prospectus for securities "unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities", **all the requirements included in the Prospectus Directive and the Prospectus Regulation apply.** In particular, the issuer will be able to benefit from the possibility of "passporting" the prospectus to all EU Member States, once it is approved by the home Member State. On the other hand, the issuer must comply with the disclosure requirements as set in the relevant annexes in the Prospectus Regulation.*

*ESMA has discussed the following example: a bank is preparing an offer of debt securities unconditionally and irrevocably guaranteed by a Member State's regional or local authorities, with a denomination per unit of less than EUR 100,000, and decides to opt-in the Prospectus Directive. In this example, ESMA considers that the following annexes would be applicable:*

- Banks registration document (Annex XI)*
- Securities notes for debt securities with a denomination per unit of less than EUR 100,000 (Annex V)*
- Guarantees building block (Annex VI)*
- Registration document for Member States, third countries and their regional and local authorities (Annex XVI): this information is requested as item 3 of Annex VI (Information to be disclosed about the guarantor) states that "The guarantor must disclose information about itself as if it were the issuer of that same type of security that is the subject of the guarantee". Therefore, Annex XVI should be filed in with the information of the Member State..*

Nevertheless, on a case by case basis, it is possible for the competent authority to authorise the omission from the prospectus of certain information in accordance with Article 8 of the Directive. Besides, in those cases where certain information requirements are not pertinent to the issuer, to the offer or to the securities to which the prospectus relates, that information may be omitted in accordance with Article 23.4 Prospectus Regulation.

**Q2) What are the disclosure requirements for securities guaranteed (but not unconditionally and irrevocably) by regional or local authorities and for securities guaranteed by third countries, their regional or local authorities?**

*A2) The Directive is applicable to these types of securities (i.e. issuers do not need to opt-in to be subject to the Directive) and therefore issuers should provide all the relevant information according to the Prospectus Regulation. In this case, the same reasoning as the one in the example provided in the previous question should be followed and, therefore, Annex XVI would also be applicable.*

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**71. Employee Share Scheme Prospectuses: Short-form disclosure regime for offers to the employees in those cases where a prospectus is required (application of Article 23.4 of the Prospectus Regulation) (UPDATED)**

Date last updated: **December 2012**

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**Background:** The European Commission wrote to CESR on 18 July 2007 to request that regulators should adopt a common 'light-touch' approach to share offers to employees under the Prospectus Directive and Prospectus Regulation.

Following the Commission's request, CESR published a statement in December 2007 (CESR/07-825) stating that it was its intention to analyse the possibility of agreeing a short-form disclosure regime for offers to the employees in those cases where a prospectus is required and requesting market participants views. In particular, CESR stated that it would discuss the application of Article 23.4 of the Prospectus Regulation with the aim of permitting the omission of certain information requirements contained in the Annexes, on the basis that they may not be pertinent to the specific case of an offer to employees.

*Having analysed the input received from market participants, ESMA agrees with the statements by the European Commission (letter from commissioner McCreevy dated 11 September 2007) that the requirement to produce a full equity prospectus for offers made in the context of an employee share scheme is not an effective means of informing employees about the risks and benefits of this particular kind of offer and imposes excessive costs on employers that are not justified in terms of investor protection. The significant amount of detailed information that would otherwise be required in a prospectus for third party investors is not pertinent to employee offers on the basis that employees are privy to information in their companies and have the option to purchase the securities directly from the market if they choose to pursue this option.*

*In trying to find a solution, ESMA has established the following key questions.*

**The European Commission has welcomed the publication of the approach adopted by ESMA.**

**Q1) To which issuers should the short-form disclosure regime apply?**

*A1) ESMA considers that it is appropriate to restrict the application of the short-form disclosure regime to those issuers who have securities admitted to trading on a market as this would normally imply that*

they are subject to some type of on-going information requirements (e. g. yearly publication of financial information).

Therefore, the short-form disclosure regime should be applicable to public offers of securities to existing or former directors or employees by their employer which has securities already admitted to trading on a market or by an affiliated undertaking.

### **Q2) To what type of securities should the short-form disclosure regime apply?**

**A2)** Having observed in practice that almost all the offers to employees where a prospectus is required are offers of shares, ESMA has decided to focus on the information to be produced for shares offerings.

### **Q3) What are the information disclosure requirements under this regime?**

**A3)** The issuer should prepare a prospectus omitting, in accordance with Article 23.4 of the Prospectus Regulation, all the information requested by the items of the relevant annexes which is not pertinent in case of an offer to employees.

ESMA considers that following items are generally not pertinent for offers of shares to employees and can thus be omitted from the prospectus in accordance with Article 23.4 of the Prospectus Regulation:

- Annex I: 5.1.2 to 5.1.5, 5.2, 6, 7, 8, 9, 10, 11, 15, 16, 17.1, 18, 19, 20.1 to 20.5, 20.6, 21, 22, 25;

- Annex III: 3.3, 4.10, 5.1.9, 5.1.10, 5.2, 5.4.1, 5.4.3, 5.4.4, 6.3, 6.4, 6.5, 7, 10.2.

Nevertheless, the competent authority has the right to request the issuer to include the information required in additional items from the annexes, when deemed appropriate in specific cases (in particular if the competent authority is not satisfied that the on-going information requirements of the relevant market ensure a sufficient level of information for investors).

Notwithstanding the omission of information in accordance with Article 23.4. of the Prospectus Regulation, all the rules for prospectuses set in the Prospectus Directive and in the Prospectus Regulation will still apply.

### **Q4) What is the role of the competent authority in relation to the prospectus prepared following the short-form disclosure regime?**

**A4)** The competent authority should scrutinise and approve the prospectus prepared following the short-form disclosure regime. Once approved, this prospectus can be passported to other Member States.

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## **72. Valuations and statements prepared by an expert**

Date last updated: August 2009

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**Q)** The registration document annexes (e.g. in Annex I, Item 24 (b)), requires that the registration document states that it is possible to inspect "all reports, letters and other documents, historical financial information, valuations and statements prepared by an expert at the issuer's request" which are either referred to or included in the registration



**document. Is it the intention that this paragraph should only require documents prepared by an expert to be displayed and the reference to 'prepared by an expert at the issuer's request refer to the whole sentence from "all reports, letters...", or does the reference to being "prepared by an expert" specifically only apply to "valuations and statements"?**

*A) It is ESMA's view that the reference to experts applies to 'valuations and statements' only, rather than to any other report, letter, other document or historical financial information included or referred to in the registration document. The reports, letters and other documents referred to are expected to be put on display whether or not they are prepared by an expert and whether or not they were prepared at the issuer's request, provided they are referred to in the prospectus.*

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### **73. Material contracts (UPDATED)**

Date last updated: **December 2012**

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**Q) Is there a requirement (in Annex I, Item 24 and similar annexes) to display all material contracts?**

*A) There is no specific requirement in the Prospectus Regulation annexes (e.g. in Annex I, item 22) to display material contracts. This requirement which was in the 2001/34 Directive was dispensed in 2005 following the negotiations of the Prospectus Regulation, when some Member States and market participants argued that there might be confidentiality and competition issues. The only requirement (e.g. in Annex I, item 22) is for a summary of each material contract to be included in the prospectus. ESMA would expect the summary to contain all the essential information that an investor would reasonably expect to see. Issuers should be aware of the general duty of disclosure under Article 5.1 of the Directive when summarising the information in material contracts*

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### **74. Definition of public offer**

Date last updated: August 2009

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**Q) Is the simple indication of secondary market prices to be considered an offer to the public?**

**For example: An issuer's securities are admitted to trading on a regulated market X in Member State A. The issuer regularly publishes secondary market prices of its securities on market X on its website. In compliance with the requirements of Art. 4.2 h) (i) to (vii) Directive the issuer applies for the admission of its securities on another regulated market Y in Member State B without publishing a prospectus. After the completion of the issuer's dual listing secondary market prices of the issuer's securities on both markets are in the public domain, e.g. by way of publication on the relevant stock exchanges' websites. Is the issuer allowed to also publish all secondary market prices, i.e. regulated market X and regulated market Y prices, on its website besides information about its business and security identification numbers without publishing a prospectus?**

*A) In general, the simple indication of secondary market prices should not be considered an offer to the public if there are no further circumstances which might altogether amount to an offer to the public. In the case described above, the issuer should be allowed to repeat on its own website secondary market*

prices of its securities trading on regulated markets that are published by the relevant stock exchanges along with securities identification numbers and factual information about its business. Such publication does not necessarily lead to a public offer. Rather, the very specific elements of each situation should be analysed on a case by case basis.

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## 75. Validity of prospectuses under Article 9 PD (UPDATED)

Date last updated: December 2012

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### **Q) How should be calculated the validity period of a prospectus composed of separate documents depending on the date of filing and approval of the registration document?**

**A)** Once approved a registration document is valid for 12 months, provided that it has been updated in accordance with the PD, if applicable. Within this period such a registration document can be used to constitute a valid prospectus when taken together with a summary and a securities note. In doing so the issuer has to keep in mind that a prospectus composed of separate documents must be as complete, comprehensible and consistent as if it were drawn up as a single document.

*The validity period of a prospectus composed of separate documents does not depend on the dates of filling and approval of its registration document, but of the date when all these documents are approved: registration document, securities note and the summary. Concretely, a prospectus composed of separate documents is valid for 12 months after the approval of the securities note and the summary (and registration document if not published yet), provided that the prospectus is completed by any supplements required pursuant to Article 16.*

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## 76. References to credit ratings in prospectuses (UPDATED) (Qd DELETED)

Date last updated: December 2012

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### **Qa Does Article 4 (1) refer to any credit rating mentioned in a prospectus?**

**Aa)** The Prospectus Regulation only requires issuers or offerors to disclose in the prospectus ‘credit ratings assigned to an issuer or its debt securities at the request or with the co-operation of the issuer in the rating process. A brief explanation of the meaning of the ratings if this has previously been published by the rating provider’ (Annex V, item 7.5). However, the requirement imposed by the Regulation on CRAs would also cover other references to ratings included in the prospectus that are not required by the relevant Annex of the Prospectus Regulation.

For example, an issuer might mention in its prospectus:

- a rating assigned by rating agency A to some underlying assets of the security that is the subject of the prospectus;
- a rating assigned by rating agency B to a loan granted to the issuer;
- a rating issued by rating agency C on the securities that are the subject of the prospectus that was not solicited by the issuer and that was determined without participation of the issuer in the rating process;

- that its investment policy is to invest only in securities assigned the highest rating by rating agency D.

None of the credit ratings above need to be disclosed in a prospectus according to the Annexes to the Regulation. It can be assumed that, if the issuer voluntarily includes disclosures about those ratings in the prospectus is because it considers that the ratings are relevant information for prospective investors. ESMA understands that if the disclosure of a credit rating is relevant, information on whether the CRA is registered in the EU is also material. Therefore, in all those cases the issuer should state whether rating agencies A, B, C, and D are registered or not in accordance with the Regulation on CRAs.

***Qb How issuers and offerors find out whether a credit rating agency (CRA) is registered under the Regulation?***

**Ab)** Article 18 (3) of the Regulation on CRAs provides that ESMA shall publish on its website a list of credit rating agencies registered in accordance with this Regulation. That list shall be updated within five working days following the adoption of a decision under Article 16, 17 or 20. The Commission shall publish that updated list in the Official Journal of the European Union within 30 days following such update.

***Qc Do prospectuses relating to non-equity securities referred to in Article 5(4)b of the Prospectus Directive registered before 7 December 2010 need to be supplemented?***

**Ac)** Outstanding prospectuses, relating to non-equity securities referred to in Article 5(4)b of the Prospectus Directive, approved prior to the 7<sup>th</sup> of December 2010 including a reference to a credit rating do not need to be supplemented to comply with Article 4 (1) of the Regulation on CRAs if the issuer or offeror wishes to make a public offer or admission to trading.

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## **77. Global Depositary Receipts (GDRs)**

Date last updated: June 2012

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***Q) How should the PD be applied in the case of admissions to trading of GDRs where, as a result of investors exchanging shares for GDRs (and vice versa) on a continuous basis, the number of GDRs in issue fluctuates?***

**A)** ESMA recognises that the operation of a typical GDR facility, where the number of GDRs in issue fluctuates as a result of the facility for investors to exchange shares for GDRs (and vice versa) at any time and outside the issuer's control, should be accommodated by a pragmatic approach to the application of the PD. ESMA therefore believes that it is acceptable for a person applying for admission of GDRs to trading to produce a prospectus covering the admission of "up to" a specified number of GDRs. The number of GDRs can be no more than the equivalence of 100% of the issued capital of the issuer at the date of the GDR prospectus, because they can only reflect the existing amount of the issuer's shares. That prospectus will be valid for admission(s) for so long as the total number of GDRs in issue does not exceed the limit set out in the prospectus. This would also allow new shareholders (individuals that hold newly issued shares that were issued after the date of the establishment of the GDR "up to" facility) to exchange their shares for GDRs, so long as the number of GDRs in issue does not exceed the amount of the "up to" facility. The use of the "up to" amount is appropriate to facilitate market activity in that it enables shareholders to exchange their shares for GDRs.

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## 78. Issue specific details in case of Category B items

Date last updated: June 2012

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### **Q) What relevant details not known at the time of the approval of the base prospectus may be included in final terms in case of Cat.B items?**

**A)** When according to Article 2a and Annex XX Regulation (EC) 809/2004 as amended by Commission Delegated Regulation (EU) No. 486/2012 of 30 March 2012 (Prospectus Delegated Regulation) an item is categorized as “**CAT. B**”, the base prospectus should contain all the general principles of such item and only placeholders for the relevant details not known at the time of the approval of the base prospectus. ESMA also believes that requiring a defined and limited list of issue specific details ensures legal certainty and harmonization of the final terms.

ESMA therefore believes that such details can only refer to amounts, currencies, dates, time periods, percentages, reference rates, screen pages, names and places.

The final terms may replicate or refer to such principles and fill out the relevant placeholders, pursuant to Recital 26 of the Prospectus Regulation.

Examples of CAT. B Items:

#### **a) Example of final terms replicating the principle:**

THE BASE PROSPECTUS:

“Redemption Amount payable in respect of each certificate as determined by the Calculation Agent shall be:

(i) if the Final Reference Price is equal to or greater than [O] of the Initial Reference Level, then the settlement Amount shall be [O]

(ii) if the Final Reference Price is less than [O] of the Initial Reference Level, then the Settlement Amount shall be [O]”

THE FINAL TERMS:

“Redemption Amount payable in respect of each certificate as determined by the Calculation Agent shall be:

(i) if the Final Reference Price is equal to or greater than 80 per cent of the Initial Reference Level, then the Settlement Amount shall be 200 EUR

(ii) if the Final Reference Price is less than 80 per cent of the Initial Reference Level, then the Settlement Amount shall be 0 EUR”

#### **b) Example of final terms referring to the principle:**

THE BASE PROSPECTUS:

”XY. Redemption at the option of the Issuer (Issuer Call)

If Issuer Call is applicable, the Issuer may:

(a) in not less than 15 nor more than 30 days’ notice to the Noteholders; and

(b) in not less than 4 days before the giving of the notice referred to in a notice to the Trustee redeem all or some only of the Notes then outstanding on any Optional Redemption Date and at the Optional Redemption Amount specified in, or determined in the manner specified in, the applicable Final Terms.”

THE FINAL TERMS:

”Redemption at the option of the Issuer (as referred to under condition XY)

Optional Redemption Date: 09/04/11

Optional Redemption Amount: 1000 EUR”

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**79. Interpretation of the term "index description" included in item 4.2.2 of Annex XII (MOVED)**

Date last updated: September 2012

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**Q)** ESMA has discussed how the term “index description” included in item 4.2.2 of Annex XII should be interpreted.

**A)** ESMA considers that the index description should contain the essential characteristics to enable an investor to fully understand the index and its dynamics and make an informed assessment. For, at least, the following items the essential characteristics should be provided:

- strategy of the index/Investment policy
- description of the individual selection process of the components weighting factors
- method and formulas of calculation
- name of the calculation agent
- adjustment rules
- review frequency
- type of index (price return, excess return, etc.)
- currency

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**80. Format of the summary (Annex XXII)**

Date last updated: July 2012

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**Q) What is the initial guidance on the format of the summary (Annex XXII of the Commission Delegated Regulation (EU) No 486/2012 of 30 March 2012) before the publication of the forthcoming Implementing Technical Standards (‘ITS’) concerning a uniform template?**

**A)** *In order to ensure clarity and comparability ESMA expects the summary to follow the formatting requirements set out below:*

- *The wording of the headings of the Sections A-E of Annex XXII must be included in the summary. As for Section B the reference to guarantor should be deleted if not applicable;*
- *References to the specific annexes are not required;*
- *The Elements-numbering of the relevant annexes shall be included in the summary.*
- *A short description of the Element’s disclosure requirement of each applicable Element for the specific type of securities and Issuer shall be given in the summary as an introductory heading.*

- The following introduction is required in the summary to give more guidance to readers of a summary:

*‘Summaries are made up of disclosure requirements known as ‘Elements’. These elements are numbered in Sections A – E (A.1 – E.7).*

*This summary contains all the Elements required to be included in a summary for this type of securities and Issuer. Because some Elements are not required to be addressed, there may be gaps in the numbering sequence of the Elements.*

*Even though an Element may be required to be inserted in the summary because of the type of securities and Issuer, it is possible that no relevant information can be given regarding the Element. In this case a short description of the Element is included in the summary with the mention of ‘not applicable’.*

- Where information is not included in the body of a prospectus in relation to a particular Element, a reference to ‘not applicable’ should appear followed by a short description of the disclosure requirement. ‘Not applicable’ should not be abbreviated to ‘N/A’.

*Insofar as it is possible, issuers would be expected to provide the information included in the summary in the form below (example below is for a debt prospectus using Annex IV or Annex XI):*

<b>Section B – Issuer [and any guarantor]</b>		
<b>B.1</b>	<b>Legal and Commercial Name</b>	[...]
<b>B.2</b>	<b>Domicile/Legal Form/Legislation/Country of Incorporation</b>	[...]
<b>B.4b</b>	<b>Known trends</b>	<i>Not Applicable; there are no known trends affecting the Issuer and its industries in which it operates.</i>
<b>B.5</b>	<b>Group</b>	<i>Not Applicable; the Issuer is not part of a group.</i>
[...]		

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## **81. The consent given in “retail cascades” (DELETED)**

Date last updated: September 2012

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## 82. Summaries in relation to proportionate disclosure regimes

Date last updated: September 2012

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### Q) How should a summary in relation to proportionate disclosure regimes be prepared?

A) ESMA is aware that Article 24 and Annex XXII of the Prospectus Regulation as amended by the Commission Delegated Regulation (EU) No 486/2012, which determines the disclosure requirements in summaries, contains no explicit reference to the proportionate schedules set out in Annexes XXIII to XXIX.

Article 5 (2) of the Prospectus Directive requires, except for non-equity securities with a denomination of at least EUR 100,000, that a prospectus shall include a summary providing key information and that the summary shall be drawn up in a common format in order to facilitate comparability of the summaries of similar securities and its content should convey the key information of the securities in order to aid investors when considering whether to invest in such securities.

ESMA's view is that there was no intention to exclude the proportionate disclosure regime from the requirements for summaries, and the Commission Services confirm this view. ESMA expects that Annex XXII should also be applicable to issuers, to offerors or the person asking for admission, using the proportionate disclosure regimes and elements in Annex XXII which are not required by the relevant proportionate schedules could be left out in the summary of a prospectus which complies with the proportionate disclosure regime.

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## 83. Type of underlying (NEW)

Date last updated: December 2012

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Q) Prospectus Regulation (PR) Annex V item 4.7, Annex XII item 4.2.2 and Annex XIII item 4.8 require a statement setting out the type of the underlying. According to Annex XX, a statement setting out the type of the underlying is labelled as Category A information and must, therefore, be included in the base prospectus.

**When making the Category A statement setting out the type of the underlying in the base prospectus, how precise should the information be?**

A) All information known at the time of drawing up of the base prospectus must be disclosed in the base prospectus itself. Therefore, if the precise underlying is known by the issuer, then full and complete information must be included in the base prospectus.

If the issuer has not decided on the details of the underlying at the time of the approval of the base prospectus, then a more general statement setting out the type of the underlying should be included. The minimum disclosure in the base prospectus would be whether the underlying is

- an equity security
- a non-equity security
- an interest rate
- an index or

- *a commodity.*

*If the type of underlying does not fall within the categories listed above, the type of underlying should be defined.*

*If the underlying is a basket of underlyings, the type(s) of underlying(s) should be defined in the same manner as described above.*

*The final terms then have to state the details of the underlying(s) pursuant to Category C information requirements and may provide information in accordance to Annex XXI. In case of proprietary indices further disclosure requirements must be complied with in accordance with the Prospectus Regulation.*