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RESPONSE

TO THE

CONSULTATION PAPER OF THE EUROPEAN COMMISSION

“REVIEW OF THE PROSPECTUS DIRECTIVE”

This position paper constitutes the response by the Deutscher Derivate Verband e.V. (DDV) to the European Commission regarding the consultation on the review of the Prospectus Directive (Directive 2003/71/EC).

The DDV represents 20 issuers of derivative securities in Germany: BNP Paribas, Citigroup, Commerzbank, Deutsche Bank, Dresdner Bank, DZ BANK, Goldman Sachs, HSBC Trinkaus, HypoVereinsbank, JP Morgan, LBBW, Royal Bank of Scotland, Sal. Oppenheim, Société Générale, UBS, Vontobel, WestLB, WGZ BANK. BHF-BANK, DWS Finanz-Service. It was founded in Frankfurt am Main on 14 February 2008 and has its offices in Frankfurt and Berlin. The DDV is active in both Berlin and Brussels. It aims to promote the market and the acceptance of certificates, warrants and other structured products in Germany. Furthermore, it works towards improving the general understanding of structured products and product transparency in the derivatives market and further investor protection. Together with its members the DDV advocates the establishment of industry standards and self-regulation. As a political advocacy group the DDV is involved in national and European legislative initiatives by issuing position papers and petitions.

DDV members have established various issuance programmes for retail structured products targeting not only the German market, but also many other EU Member States and for which the prospectuses are not only approved by the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) as the German competent authority for prospectus approval, but also by other competent authorities within the EU. In terms of the number of (base) prospectuses approved, final terms filed and passporting requests, activities of DDV members stand for a significant proportion of the German and potentially also the EU market.

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EXECUTIVE SUMMARY

The German Derivatives Association (*Deutscher Derivate Verband*) appreciates the opportunity to comment on the proposed review of the Prospectus Directive. It strongly supports the overall aim of the European Commission to alleviate obligations for companies that are disproportionate and thus to reduce administrative burdens.

We support most of the European Commission's proposals. Particularly welcome are

- the **alignment of the definition of qualified investors** under the Prospectus Directive with the client categories provided for in the MiFID (Article 2(1)(e) of the Prospectus Directive);

- the **free choice of home Member State** for all issuers of non-equity securities irrespective of their denomination per unit (Article 2(1)(m) of the Prospectus Directive);

- the **removal of the requirement to produce an annual information document** (Article 10 of the Prospectus Directive); and

- the **clarification of the period during which investors can withdraw their acceptances** following the publication of a supplement to the prospectus (Article 16(2) of the Prospectus Directive).

We would propose the following additional amendments:

- **Retail cascade:** We support the proposed deletion of the final sentence of the final paragraph in Article 3(2) of the Prospectus Directive. In addition, we would encourage the European Commission to clarify and state in Article 3(2) that in cases where a prospectus has been published in accordance with the provisions of the Prospectus Directive, subsequent offerings are exempted from the obligation to publish a prospectus.

- **Exemption relating to "total consideration":** We suggest amending the "total consideration" exemption contained in Article 3(2)(c) of the Prospectus Directive to include the concept of a "minimum transferable amount" of EUR 50,000 such that the determination of the total consideration threshold is made at the time of the commencement of the initial offer and such calculation is continuously applied over the term of the securities.

- **Flexibility regarding prospectus format:** We would appreciate the European Commission considering more flexibility with respect to the format of a prospectus consisting of separate documents (i.e. registration document, securities note and summary), in particular whether this format could also be applied to base prospectuses.

- **Delineation between base prospectus and final terms:** We suggest including wording in Article 5(4) of the Prospectus Directive that is close to the interpretations and proposals made by CESR and ESME, in particular taking into account that the distinction between a supplement and final terms, is mainly made on the basis of the wording contained in Article 22(2) of the Prospectus Regulation. As a consequence, we propose to insert wording along the lines of Article 22(2) of the Prospectus Regulation into Article 5(4) of the Prospectus Directive. Furthermore the words "of the offer" are to be

deleted as Article 5(4) should not be interpreted restrictively as referring only to items set forth in item 5 of Annex XII of the Prospectus Regulation. In addition, we would propose clarification that there is some flexibility regarding the contents of final terms by including information on the underlying, pay-out structure and related risk factors as examples for information which can be included in final terms. Furthermore, we believe that it would be helpful to avoid misunderstandings if the last sentence in the last paragraph of Article 5(4) of the Prospectus Directive is deleted.

- **Validity of the prospectus:** We believe that, in line with the proposal made by ESME, the validity period of a prospectus should be extended to 24 months and we suggest amending the wording of Article 9(4) of the Prospectus Directive accordingly. Furthermore, as the relevant provisions give some room for interpretation, we would appreciate clarification of Article 9(1) of the Prospectus Directive that the validity of the prospectus is not affected by the documents incorporated by reference. We believe in relation to base prospectuses for offering programmes governed by Article 9(2) of the Prospectus Directive, it would be appropriate if the validity of the base prospectus only expires if no more of the securities concerned are issued. Lastly, it should be made clear that the validity of a prospectus applies only to a new offering of the relevant securities and not to offerings to the public that have started within the period of validity.

- **Incorporation by reference:** We believe it would be helpful to allow a registration document to be supplemented (without the need to supplement each of the (base) prospectuses) and incorporated in its latest supplemented or updated version into a (base) prospectus.

- **Prospectus consisting of separate documents:** In line with our proposal for Article 16, we would suggest that Article 12(2) of the Prospectus Directive is clarified to confirm that a registration document can be subject to a supplement.

- **Supplements:** We ask the European Commission to include clarification to Article 16 of the Prospectus Directive that a registration document might also be subject to a supplement. Furthermore, we suggest clarifying wording that the requirement to supplement a prospectus ceases at the earlier of (i) the final closing of the offer to the public and (ii) the time when trading on a regulated market (or an MTF) begins. Most importantly, we would also suggest aligning the disclosure obligation of the Prospectus Directive and the Transparency Directive by stating that the obligation to file a supplement shall not apply if the issuer has published the information in accordance with the provisions of the Transparency Directive. In respect of the withdrawal period in Article 16(2) of the Prospectus Directive we would appreciate clarification that (a) such period terminates with settlement and (b) only information that detrimentally affects the assessment of the securities triggers the withdrawal right. Another proposal is that amendments to information contained in the individual final terms might be effected by replacing the final terms applying the same arrangements as were applied when the original final terms were published.

- **Passporting of the registration document:** In order to allow issuers to incorporate a registration document approved by one competent authority into a (base) prospectus to be approved by another competent authority we would

appreciate clarification that the European Passport also applies in respect of the registration document.

- **Notification procedure:** We suggest inserting a legal assumption that an issuer is allowed to commence an offer or admission to trading of securities after the expiry of the three days period contained in Article 18(1) of the Prospectus Directive.

- **Language regime:** We suggest that it should be at the option of the issuer, offeror or person asking for admission to trading that the different language versions produced in the context of applications for passporting could be made available in one document or in separate documents (notwithstanding that each such document should constitute a prospectus for the purposes of this Directive).

I. GENERAL COMMENTS

The German Derivatives Association (*Deutscher Derivate Verband*, the "**DDV**") appreciates the opportunity to comment on the proposed review of the Directive 2003/71/EC (the "**Prospectus Directive**").

Before commenting on the specific articles of the Prospectus Directive, we would like to make the following general remarks:

- **Aim of amending the Prospectus Directive:** We appreciate that the European Commission – as confirmed by a decision of the European Council – has identified the Prospectus Directive as an area containing some obligations for issuers and offerors that are potentially disproportionate. We strongly support the overall aim of the European Commission to alleviate these obligations and thus to reduce administrative burdens.

- **General assessment of the Prospectus Directive:** We agree with the European Commission's view that the prospectus regime has made it easier to offer to the public, and admit to trading on a regulated market, securities within the European Economic Area. There are, however, still a number of areas in which the legislative framework might be improved. The Prospectus Directive and Regulation have not achieved full harmonisation of the disclosure regime and of the rules governing access to capital markets across the Member States. In our opinion, lack of harmonisation predominantly relates to inconsistencies in the implementation of the Prospectus Directive in different Member States and to a lesser degree to the weakness of the overall framework. To address these issues, we would recommend a combination of using "level 3" measures under the Lamfalussy approach to the extent possible and amending the Prospectus Directive in other cases. A calibrated approach has the advantage that the existing regulatory framework can be carefully adapted to market needs and new regulations that might involve additional costs can be avoided. This approach is consistent with the European Commission's goal to reduce costs and administrative burdens in the European Union.

- **Alignment with other Directives:** We appreciate that regarding certain issues the European Commission has examined whether there is an overlap between requirements of the Prospectus Directive and Directive 2004/109/EC (the **"Transparency Directive")** and as a consequence has proposed to delete Article 10 of the Prospectus Directive. We would encourage the European Commission to explore further opportunities to reduce or simplify regulation by identifying overlaps between the different Directives (for example, where there is a requirement to produce interim and ad hoc announcements under both the Prospectus and Transparency Directives) and the potential overlap between Directive 2003/6/EC ("**Market Abuse Directive**") and the Transparency Directive in terms of ongoing investor protection.

- **Aim of maximum harmonisation:** We encourage the European Commission to aim at maximum harmonisation of securities regulation and supervision among Member States. ESME has mentioned various reasons and examples for the current lack of harmonisation[1]. We believe that the review of the Prospectus Directive should be used to overcome this lack of harmonisation to the greatest extent possible.

[1] ESME, Report on Prospectus Directive, September 2007, p. 6 et seqq.

Detailed comments relating to specific articles can be found in the Annex to this position paper.

II. DETAILED COMMENTS

In the following, we would like to address the key issues from our perspective in relation to:

- the consultation document containing the draft proposal of the European Commission for amendments to the Prospectus Directive (the "**Consultation Document**" or "**CD**");
- the background document containing a general assessment of the overall functioning of the Prospectus Directive, an explanation of the proposals included in the Consultation Document and several other proposals not included in the Consultation Document, but on which the European Commission invites comments (the "**Background Document**" or "**BD**"); and
- certain additional issues which we believe would provide greater clarity to the market.

Our comments are sorted by reference to the order of Articles in the Prospectus Directive and indicate the source of the issue (CD, BD, or "new" if it is neither mentioned in CD nor in BD).

References to Articles in the following refer to Articles of the Prospectus Directive.

Article 2(1)(d) – Offer of securities to the public (BD No. 4.6.)

Article 2(1)(d) defines the term "offer of securities to the public" quite broadly and thus gives some room for interpretation for the competent authorities in the different Member States. The resulting legal uncertainty necessitates a careful analysis of the legal situation in each Member State where securities are to be offered.

Whilst we believe that a more precise definition of the term "offer of securities to the public" at the Prospectus Directive level would have advantages, we acknowledge that this is something that may depend on the circumstances in the specific market and jurisdictions and is under constant development. Therefore, a certain degree of flexibility is preferable to take account of these particularities.

We would, therefore, suggest that CESR addresses this issue at level 3 and confirms that the following activities would not constitute an offer of securities to the public:

- Communications concerning trading in securities admitted to trading on a regulated market or MTF: There is some uncertainty under the Prospectus Directive whether any communications concerning the trading of derivatives securities (which, to give an example, are often traded on the German Stock Exchanges' Open Markets (*Freiverkehr*) in Germany which qualify as MTFs) would lead to the commencement of a new offer with the consequence that a new prospectus has to be published if the original prospectus is no longer valid for a new offer. The same applies if securities have been issued via a private placement and following the placement the securities are included into the quotation of the Open Market. In the German law implementing the Prospectus Directive these uncertainties have been clarified by a supplement to the definition of the public offer stating that the pure admission to trading on a regulated market or MTF without additional marketing efforts does not qualify as a public offer. This was in accordance with the interpretation of the competent authority of the respective predecessor provision under the

German Sales Prospectus Act (*Verkaufsprospektgesetz*). The same effect could be achieved by a CESR statement at level 3.

- Information and general marketing material on an upcoming offer of securities, as long as the investor cannot subscribe for or purchase the securities at such point: During the securities placement process, various forms of communications are addressed to investors. In practice, it is often difficult to determine the commencement of the public offer. In order to enable investors to decide to purchase or subscribe for these securities (as Article 2(1)(d) requires for a public offer) it should be clear that forms of communications on the basis of which investors cannot purchase or subscribe for these securities do not trigger a prospectus requirement.

Article 2(1)(e) – Definition of qualified investors (CD Article 1 No. 1.(a), BD No. 3.1.)

As a result of the requirement for investors in some Member States to renew annually their status as qualified investors and as such status may be withdrawn at any time by the relevant competent authority, an issuer is required to check the register of qualified investors before every private placement. Issuers of debt products, especially structured products, who often provide information on their products (without an approved Prospectus Directive compliant prospectus) to a large number of investors via a web portal to which access is provided only to qualified investors, therefore, risk breaching the Prospectus Directive requirements if such investors have not renewed their status as qualified investors or such status has been withdrawn by the competent authority.

Against this background, we agree with the European Commission's proposals to align the qualified investor regime under the Prospectus Directive with the professional client regime under the MiFID as this creates more certainty regarding the status of the investor. Particularly welcome is the fact that the qualified investor definition in the Prospectus Directive is extended to cover not only the professional clients of an investment firm who pursuant to the provisions of Section I of Annex II of the MiFID are considered to be professionals, but also professional clients of an investment firm or credit institution who pursuant to the provisions of Section II of Annex II of the MiFID are treated as professionals on request. The proposed alignment between the Prospectus Directive and MiFID would reduce time and effort for investment firms in respect of private placements with such investors.

Article 2(1)(m) – Choice of competent authority (CD Article 1 No. 1.(b), BD No. 3.6.)

We agree with the view expressed in Recital (6) of the Consultation Document and by ESME[2] that the limitation of the free determination of the home Member State for issues of non-equity securities with a denomination below EUR 1,000 is a burdensome restriction and that as a consequence this restriction should be removed. From a practical point of view, the limitation appears arbitrary. As the features of a non-equity security and the risks to which it gives rise are independent of its denomination, there is no reason for such a differentiation from an investor protection standpoint.

[2] ESME, Report on Prospectus Directive, September 2007, p. 12 et seqq.

Against this background, it does not make sense to keep up the limitation for non-equity securities that have a certain denomination.

Article 3(2) – Exempt offers, retail cascade (CD Article 1 No. 2., BD No. 3.2.)

Currently, the last paragraph of Article 3(2) is interpreted and applied in some Member States in such a way that separate prospectuses are required at every stage of the resale of a security, irrespective of whether a prospectus has already been published or not – the so-called "retail cascade". This means, among other things, that prospectuses which have been approved and which are valid EEA-wide under Article 17 and have been notified accordingly under Article 18 cannot – by reference to Article 3(2) – be used at the subsequent distribution stage and have to be supplemented considerably with regard to the information they contain. In our view, this approach taken by some Member States is not consistent with Article 3(2) and is contradictory to the concept of a European passport. It is also contradictory to the European Commission's declared aim of reducing costs and administrative burdens.

Both CESR[3] and ESME[4] have expressed views on this question which have been cited as the reason for the European Commission's proposal to delete the second sentence of the last paragraph of Article 3(2).

While we fully agree with the statement in Recital (7) of the Consultation Document that the publication of a new prospectus at each of the stages of a placement of securities through financial intermediaries is a burdensome requirement that should be abolished, we are not sure whether this objective is achieved by simply deleting sentence 2 in the last paragraph of Article 3(2). We would rather seek clarity from the European Commission to confirm that where an approved prospectus has been published subsequent offerings are exempted from the obligation to publish a prospectus. For a proposed amendment of the first sentence of Article 3(2) see Annex.

Article 3(2)(c) – Exemption relating to "total consideration" (new)

We would appreciate it if the European Commission could consider amending the "total consideration" exemption contained in Article 3(2)(c) and adapting it to cover the more objective "minimum transferable amount" concept already informally used in the markets in order to provide more certainty to the issuer. In practice securities often do not have a fixed denomination, but are priced by unit. As a consequence, at the time of the commencement of the public offer the minimum transferable amount of the securities determined on the basis of the number of transferable units multiplied by the initial issue price may be equal to or exceed the total consideration threshold of EUR 50,000, but will be volatile over the term of the securities, possibly exceeding or falling below the EUR 50,000 threshold. For technical reasons, it is difficult for settlement systems to verify on an ongoing basis that the total consideration threshold is met every time the securities are transferred. Consequently, up to now there has been little scope for the application of the exemption under Article 3(2)(c) in its current wording.

To find a practicable solution, we suggest determining EUR 50,000 (total consideration threshold) at the time of commencement of the offer and continuously

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3 CESR/09-103, FAQs regarding Prospectuses: Common positions agreed by CESR Members, February 2009, Question 56.

4 ESME, Report on Prospectus Directive, September 2007, p. 13 et seqq.

applying such threshold as a minimum transferable amount over the term of the securities. This would ensure that prospectuses for securities with such a minimum transferable amount can benefit from the same “lighter-touch” regime as those for securities with a minimum denomination of more than EUR 50,000.

For proposed wording see Annex.

Article 5 – Disclosure obligations for retail investment products, the prospectus and its summary (BD No. 4.1. and 4.2.)

In the Background Document the European Commission mentions that it is considering the need to adopt a format of the prospectus that is more conducive to a clear understanding of the core characteristics of the products. Reference is made in this respect to the White Paper on Retail Investment Products to be published in spring 2009.

We appreciate that the European Commission is looking into the adequacy of the regulatory framework for investment products. Appropriate rules and regulations are a key requirement for maintaining general confidence in such products. However, for retail structured products we believe that no new or harmonised rules are required for several reasons. We have set out these reasons in detail in our response to the call for evidence by the European Commission on a “Coherent Approach to Product Transparency and Distribution Requirements for Substitute Retail Investment Products”.

One of the issues that is the focus of the European Commission is the effectiveness of the summary in reaching a fully understandable and useful representation of the product's main features, in particular from the perspective of retail investors. Members of DDV take the requirements of Article 5(2) very seriously and we doubt whether a specific standard in addition to the present disclosure obligation would be useful, as the nature of securities and the relevant information relating to the issuer may differ in individual cases.

In particular, we have considerable concerns relating to the transferability and suitability of the “Key Investor Information approach” as proposed in the context of the amendment of the UCITS referred to in the Background Document. We believe the following considerations make such approach unsuitable and not transferable to summaries contained in the prospectuses of derivative securities:

- A differentiated approach regarding certain types of products (with the consequence that for some of these types of products an exemption from the obligation to provide a summary and an obligation to provide a Key Investor Information Document would apply) seems impracticable as this would require a clear classification of the types of products, which in practice will be difficult.

- The differences in the characteristics of the various types of securities makes it difficult to define a common structure of such a Key Investor Information document.

- In respect of derivatives the restriction of the length of such document to one duplex page might prevent a clear description of the product's structure which is understandable to the investor. In this respect derivatives differ from mutual funds where the Key Investor Information document mainly serves to briefly

describe the portfolio strategy. In contrast, in the case of derivatives the structure of the product and the risks related to it as well as the issuer and risks relating to the issuer have to be described in order to give investors a basis for their investment decision.

- Article 5(2) already provides that the summary must contain information on the relevant derivative product presented in a brief manner and in non-technical language.

- In addition, such a summary or Key Investor Information document is only one of several sources of information on the securities for the investor. Other sources of information relating to securities, especially structured securities, are marketing brochures, term sheets and general explanations contained in publications such as the basic guidelines for investments in financial products (*Basisinformationen*) elaborated by the German banking association, the latter most likely serving the need for detailed information much better than a summary or Key Investor Information document contained in the prospectus.

- Furthermore, structured products differ markedly from other securities and other investment products in the way in which costs and margins are calculated. These particularities will need to be taken into account.

- Where problems occurred in practice and investors felt that they had not been provided with sufficient information the reason for this in most cases was insufficient advice by the intermediary who had direct contact to the investor.

Article 5(3) – Prospectus divided into separate documents, applicability to base prospectuses (new)

We understand that the basic idea behind the concept of a prospectus divided into separate documents is to give issuers a certain flexibility to structure their programme documentation in order to realise synergies from existing documents for multiple issues. Against this background, we would welcome the flexibility to apply this concept to base prospectuses under Article 5(4). This would also lead to consequent amendments to Article 26 of the Commission Regulation (EC) No 809/2004 (the "**Prospectus Regulation**") in which a paragraph similar to Article 25(2) Prospectus Regulation would need to be inserted (for an amended wording of Article 5(3) see Annex).

Article 5(4) – Base Prospectus and Final Terms (new)

The concept of a base prospectus is a core element in the issuance of debt and derivative instruments. A special feature of base prospectuses in accordance with Article 5(4) is that the final terms of a concrete offering of non-equity securities need not be included in the prospectus itself but can be contained in a separate document. The final terms are then provided and published immediately in advance of the start of a public offer. This gives the issuer the flexibility to react to market conditions and reduces administrative burdens for repeat issuances that follow a certain common structure. At the same time, investor protection is ensured due to the fact that the base prospectus is approved by the competent authority and the final terms only add information relevant for the specific offer. As a consequence, it is of utmost importance that the final terms can be handled effectively.

There is no uniform approach in the individual Member States as to what information on an issue may form part of the final terms and what information must be provided in the base prospectus itself and, in particular, through the production of a supplement under Article 16. Article 22(2) of the Prospectus Regulation states that information items which are not known when the base prospectus is approved and which can only be determined at the time of an individual issue may be omitted from the base prospectus. While this distinction is a good starting point, we would suggest clarification that certain information items such as the underlying, pay-out profile or related risk factors in order to achieve a uniform, EU-wide understanding of the contents and function of the final terms.

Both CESR[5] and ESME[6] have expressed views in this respect. We strongly believe that a certain degree of flexibility with respect to the contents of final terms is advantageous for investors, as the issuer can tailor the final terms to the individual offer by adding product-specific explanations and risk factors. In our experience, final terms are more comprehensive and easy to analyse and base prospectuses become more readable if the focus of final terms is on such product specific information, within the framework of the base prospectus approved by the competent authority, and we see no disadvantage of a flexible concept in terms of investor protection.

The argument is often made that including additional information in final terms might conflict with the obligation of the issuer to supplement the base prospectus under Article 16. However, there are fundamental differences between the two provisions: The obligation to file a supplement applies only if a significant new factor or material mistake or inaccuracy relating to the information included in the prospectus has occurred. If the new factor or mistake/inaccuracy had been known at the time of the approval, the issuer would have been required to include the new factor in the base prospectus at the time of the approval or to amend the mistake or inaccuracy accordingly. In contrast to this, information forming part of final terms was not known at the time of the approval of the base prospectus and was intentionally left open in the base prospectus. Therefore, the two regimes under Article 5(4) and Article 16 can be distinguished as long as the scope of the final terms is clearly defined in the base prospectus.

In order to reflect the above considerations, we suggest including wording in Article 5(4) that is close to the interpretations and proposals made by CESR and ESME, in particular taking into account that

- the distinction between a supplement and final terms is mainly made on the basis of the wording contained in Article 22(2) of the Prospectus Regulation and thus should be inserted in the Prospectus Directive itself;
- Article 5(4) should not be interpreted restrictively as referring only to items set forth in item 5 of the Annex XII of the Prospectus Regulation; thus the words “of the offer” are to be deleted; and
- by mentioning information on the underlying, pay-out structure and related risk factors as examples of information which can be included in final terms, clarifying that there is some flexibility regarding the contents of final terms.

Furthermore, we believe that it would be helpful to avoid misunderstanding if the last sentence in the last paragraph of Article 5(4) is deleted. The reference to Article 8

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5 CESR/09-103, FAQs regarding Prospectuses: Common positions agreed by CESR Members, February 2009, Question 57.

6 ESME, Report on Prospectus Directive, September 2007, p. 18 et seqq.

leads to confusion as in practice it is difficult to determine which information can be the subject of final terms and which subject to the omission of information as governed by Article 8. While we acknowledge the importance of Article 8 for equity securities we see only limited scope for application to non-equity securities.

Another proposal would be to include a reference in Article 5(4) to the new Article 16(3) (see below) clarifying that final terms can be subject to a replacement.

For suggested wording of Article 5(4) see Annex.

Article 6 – Harmonisation of civil liability for prospectuses (BD No. 4.7.)

Article 6 deals with the liability of the persons responsible for a prospectus for the information given in the prospectus. Whether the prospectus is regarded as giving a complete and true picture of the issuer and the securities offered depends not only on provision of the information specified as mandatory under the Prospectus Directive and the Prospectus Regulation but also on the relevant provisions of national civil law in a Member State. Depending on how the liability benchmark is set, the provision of further information (i.e. over and above that specified as mandatory under the Prospectus Directive and the Prospectus Regulation) might be required. Differences between the information required in the Member States lead to considerable liability risks for prospectus issuers, seriously obstruct cross-border offers and the admission of securities to trading on a regulated market and thus greatly devalue the European passport for prospectuses.

Against this background, we advocate harmonisation in respect of (civil) liability for prospectuses that take into account and clarify the group of persons liable for the information contained in the prospectus and the precise information they are liable for as well as the law governing the liability for the prospectus; in the case of cross-border offerings, this will probably be the law of the home Member State.

While we agree with the European Commission that this is outside the scope of this review of the Prospectus Directive, we believe that this issue should be actively pursued with the aim of full harmonisation in the long-term.

Article 9(1) – Validity of the prospectus, extension of validity period and documents incorporated by reference (new)

Given the time needed for the redrafting of a prospectus by the issuer and the approval of a prospectus by the competent authorities, preparation for the update of a prospectus has to start nine months after the publication of the previous prospectus. Except for the update of the issuer information, which could be done via supplements, in most cases the changes and amendments are only minor. Therefore, in line with the proposal made by ESME[7] the validity period of a prospectus should be extended to 24 months. As long as the prospectus is updated by any supplements required by Article 16 we see no disadvantage for investor protection (see also our comments under Article 9(2) below).

Furthermore, in practice some uncertainties exist in respect of the validity of the (base) prospectus where documents have been incorporated by reference. Issuers often take advantage of the provision allowing for such incorporation by reference of

[7] ESME, Report on Prospectus Directive, September 2007, p. 20.

information into prospectuses in the case of a registration document. We believe it would be helpful to include a statement into the Prospectus Directive that the validity of the prospectus is not affected by the validity of the documents incorporated by reference. For proposed wording see the Annex.

Article 9(2) – Validity of the prospectus, validity of base prospectuses (new)

In practice, derivative securities are often issued in a continuous and repeated manner under offering programmes in accordance with Article 2(1)(k) and the prospectus takes the form of a base prospectus under Article 5(4)(a). In the same way as for non-equity securities issued under Article 5(4)(b), we believe that there are good arguments to provide that the validity of the base prospectus for offering programmes should only expire if no more of the securities concerned are issued.

In practice, in both cases offers of non-equity securities often last longer than the standard 12-month period or exceed the validity period of the prospectus. CESR[8] has acknowledged this by confirming that the prospectus will be valid until the securities concerned are no longer issued in a continuous or repeated manner (see also proposal for a new Article 9(6) below). In such situations the updating requirements under the Prospectus Directive apply. As a consequence, issuers who have continuously offered securities to the public for several years may have to supplement numerous different base prospectuses having various initial expiry dates (based on the applicable 12-month validity period). This is not only a cumbersome and costly procedure for issuers but also results in a confusing situation for potential investors when the latter have to determine which base prospectus is applicable to the securities they wish to purchase.

In order to address these issues, we would welcome it if the validity period of 12 months for base prospectuses could be deleted. In return and in order to maintain proper investor protection levels, we would recommend that base prospectuses remain valid unless no more of the securities concerned are issued in a continuous or repeated manner provided these prospectuses are continuously updated by supplements pursuant to Article 16 (see Annex).

Article 9(4) – Validity of the prospectus, registration document (new)

We suggest amending the wording in order to harmonise the provision with item 20.5.1 of Annex I of the Prospectus Regulation. If it is possible to include audited interim financial statements in the registration document that are no older than 18 months from the date of the registration document then a previously approved registration document should also remain valid until such date. As the distinction between the validity of the registration document and the general validity period of 24 months would be arbitrary, we would suggest to extend the validity of the registration document to 24 months in such circumstances (see Annex).

[8] CESR/09-103, FAQs regarding Prospectuses: Common positions agreed by CESR Members, February 2009, Question 37.

Article 9(5) – Validity of the prospectus, continuous public offers (new)

In line with CESR's interpretation of Article 9(3)[9] and the proposal made by ESME[10] we suggest an amendment to clarify that the validity, if any, of a prospectus applies only to a new offering of the relevant securities, but not to offerings of the securities to the public that have commenced within the period of validity. This could be achieved by adding a new paragraph into Article 9. The proposed wording for the new Article 9(5) can be found in the Annex.

Article 10 – Annual document (CD Article 1 No. 4., BD No. 3.4.)

The requirement to provide an annual document under Article 10 imposes a bureaucratic burden that is not justified by the need for comprehensive information to protect investors, since the information contained in such a document would not always be up-to-date. Furthermore, the information compiled in the document is also already publicly available because of publication requirements as referred to in Article 10, in particular under the Transparency Directive. We therefore strongly support the deletion of Article 10.

Article 11(1) – Incorporation by reference (new)

In situations where a registration document is incorporated into several (base) prospectuses under Article 11(1), it would be helpful to allow a registration document to be supplemented (without the need to supplement each of the (base) prospectuses) and incorporated in its latest supplemented or updated version (see also the proposal for amending Article 16(1)). This “dynamic” incorporation by reference should be restricted to such documents updated and published in the same manner as the prospectus and filed with the competent authority under the Prospectus Directive.

Such procedure would be relevant primarily for the incorporation by reference of the registration document. We believe it is an unnecessary formal requirement that supplements to the base prospectuses have to be filed if the registration document has been supplemented or updated. In such case the registration document is published and documentation relating to ongoing public offers could refer to the latest supplemented or updated version of the registration document (for amended wording of Article 11(1) see Annex).

Just for reason of completeness we would like to draw the attention of the European Commission to the fact that as a consequence of the entering into force of the Transparency Directive the references in Article 11(1) to EC Directives have to be updated.

Article 12(2) – Prospectus consisting of separate documents, supplement to registration document (new)

If an issuer publishes a prospectus comprising a registration document, securities note and summary note, Article 12(2) states that in the event of a further issue the issuer can only update the already approved registration document by including the

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9 CESR/09-103, FAQs regarding Prospectuses: Common positions agreed by CESR Members, February 2009, Question 37.

10 ESME, Report on Prospectus Directive, September 2007, p. 20.

relevant information in the securities note. Updating or supplementing the registration document is not permitted by some competent authorities under Article 12(2). We believe that in practice, a registration document is often incorporated into different base prospectuses and documentation would be more comprehensible to investors if the registration document could be subject to the supplement or could be updated separately. For proposed amended wording of Article 12(2) see Annex (see also proposal for amendment to Article 16(1)).

Article 16(1) – Supplement to the prospectus, scope of obligation (BD No. 3.5.)

In the Background Document the European Commission raises the question whether uncertainties relating to the interpretation of certain terms contained in Article 16 should be addressed at level 3 only or whether certain amendments would be desirable. We would propose that both approaches are adopted as follows.

Level 3 interpretation guidance

We believe one of the issues that could be handled at level 3 is the differentiation between supplements and final terms in the case of base prospectuses. As described above, the final terms focus on information that was not available at the time of approval of the base prospectus, in contrast, supplements relate to a significant new factor or material mistake or inaccuracy relating to the information included in the base prospectus. As a consequence, it is our understanding that information that completes the framework of the base prospectus as approved by the competent authority can form part of final terms whereas in situations where the information is beyond the framework of the base prospectus a supplement is required. The latter case could become relevant if a new product or underlying not mentioned in the base prospectus is newly inserted (see also our comments on Article 16(3)).

Amendments at the level of the Prospectus Directive

Besides this, we see the following areas where we would recommend a clarification at the level of the Prospectus Directive:

- Some competent authorities are of the opinion that the only method by which new factors relating to the information on the issuer included in the registration document can be added is to include such new information in the securities note under Article 12(2). We believe that such an interpretation is not necessarily convincing. Article 12(2) is, in our view, primarily an exemption from the clear structure of the prospectus consisting of separate documents which might be advantageous in certain cases. In respect of base prospectuses, however, a clear and easily analysable structure of the prospectus may be maintained by a supplement to the registration document. Concentrating information on the issuer in one registration document which is updated if required under Article 16(1) would help investors to keep the overview on the relevant documents. Therefore, we ask the European Commission to include clarification to Article 16 that a registration document might also be subject to a supplement.

- The scope of Article 16(1) is ambiguous in so far as the period during which the requirement to supplement a prospectus ceases to apply is the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins. It is not clear whether the earlier or later of these two times determines when the requirement to supplement a prospectus

ends. We believe it would be helpful to clarify that the earlier of the two times should be decisive.

- The relationship between the ad hoc disclosure requirements under Article 6 of the Market Abuse Directive and the related further disclosure requirements under the Transparency Directive on the one hand and significant new factors that make a supplement necessary on the other hand also needs to be clarified. The issuer will as a rule have to make an ad hoc disclosure in order to inform the market immediately or to publish interim financial information under the procedure foreseen in the Transparency Directive; the requirement to go through the approval procedure under Article 16 is at odds with this. For this reason, the provisions for disclosure under the Transparency Directive and the obligation to file a supplement should be aligned by stating that the obligation to file a supplement shall not apply if the issuer has published the information in accordance with the provisions of the Transparency Directive potentially including a reference to the withdrawal right under Article 16(2).

By reducing the scope of required supplements, the European Commission would also contribute to reducing costs and administrative burdens.

For proposed amended wording of Article 16(1) see the Annex.

Article 16(2) – Supplement to the prospectus, withdrawal period (CD Article 1 No. 5., BD No. 3.5.)

The European Commission proposes to harmonise the period during which investors can withdraw their acceptances if a supplement is published. We strongly support the two working days that are now proposed as being the European standard.

In addition, based on the experience of the implementation of the Prospectus Directive into German law, we would recommend inserting a sentence clarifying that the withdrawal period ends with the settlement, i.e. transfer of cash and securities. Any investor who has already acquired securities under a prospectus which is supplemented has the right to withdraw his acceptance within a period of two days following publication of the supplement. This withdrawal can be handled without any problem in cases where the customer's order can be simply cancelled because the IPO period and the corresponding offering phase are still ongoing. The situation is more complicated, however, where settlement has already taken place through delivery of the securities. In such cases, the transaction has to be reversed, i.e. securities and money have to be retransferred. As the settlement period in Europe is usually two or three days and is thus either the same as or longer than the period allowed for investors to withdraw their acceptance, the withdrawal option would not be restricted in most cases. Only transactions shortly before publication of the supplement would be affected. The right of withdrawal where a prospectus is supplemented should therefore be limited to the time in which settlement has not yet taken place, i.e. the securities have not yet been delivered, in order to avoid complicated reverse transactions.

Furthermore, the obligation to provide a supplement currently applies in general, regardless of whether any significant new factor it contains may affect the assessment of a security positively or negatively. It does not, however, appear appropriate that if this significant new factor is not detrimental to the investor the issuer is required to not only go through the supplement procedure, including approval of the supplement by the competent authority – which usually means

interrupting the offering – but also has to contend with investors possibly withdrawing their acceptances. ESME[11] has illustrated this with the example of an investor who having bought a speculative call warrant and after a few months suffering losses from falling markets made use of the right to withdraw his acceptance following a supplement to the relevant prospectus. It is certainly not appropriate if the investor would be entitled to get back his initial investment as this would result in a "free put option" of the investor. For this reason, the withdrawal right should be restricted to situations in which the information contained in the supplement detrimentally affects the assessment of the securities (and supplemented by the restriction of the period during which a settlement has not yet taken place as described above).

For proposed amended wording of Article 16(2) see the Annex.

Article 16(3) – Supplement to the prospectus, amendments of final terms (new)

As described above, we see a basic distinction between final terms and supplements. As a consequence of the different contents and filing procedure, we believe that an amendment of the final terms should be possible without the requirement to file a supplement under Article 16(1). However, if the information or basic structure contained in the base prospectus is subject to an amendment then the only way to perform this amendment should be via a supplement. This approach should be applied regardless of the fact whether the new factor, material mistake or inaccuracy is significant. As long as the same procedure for filing and publication followed for the original document is applied we see no disadvantage for investors, in particular if the issuer has reserved the right to amend the final terms in the applicable terms and conditions.

Against this background, we would appreciate it if clarification is made on the level of the Prospectus Directive and CESR could reconsider its position taken at level 3.[12]

For proposed wording see Annex.

Article 17(1) – Community scope of approvals of prospectuses, passporting of registration documents (new)

An issuer may have its (base) prospectus approved by several competent authorities, and, in addition, the registration document which may be approved by one competent authority is also intended to be used for incorporation into the (base) prospectuses approved by other competent authorities. Currently, this is prevented by the fact that certain competent authorities do not accept the exclusive passporting of a registration document. This goes against the idea of making as much use as possible of the European passport. For proposed wording clarifying the scope of the passport see Annex.

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11 ESME, Report on Prospectus Directive, September 2007, p. 21.

12 CESR/09-103, FAQs regarding Prospectuses: Common positions agreed by CESR Members, February 2009, Question 64.

Article 18(1) – Notification; assumption of notification without written confirmation (new)

Article 18 sets out the formal procedure that is required so that a prospectus which has already been approved in accordance with Article 17 is valid on an EU-wide basis. The procedure provides for the prospectus, along with a certificate of approval, to be sent by the competent authority of the home Member State to the competent authority of the host Member State. The validity of the prospectus in the host Member State concerned depends on due notification by the competent host Member State authority. Furthermore, notification triggers some important duties for the prospectus issuer which are linked to civil-liability regimes. Against this background it would be helpful to obtain clarification that the issuer is permitted to issue the securities after the expiry of the period of three working days - without the need for any further action by the authorities - without having to face sanctions, for example, (liability for damages or administrative fines) for issuing securities without a prospectus. This is vital in providing the issuer with certainty that, from the perspective of the competent host Member State authority, the notification procedure has been completed as well. Against this background, we have made a proposal for an amendment of Article 18(1) clarifying that an issuer is not prevented from commencing an offer or admission to trading after the expiry of the three day period contained in Article 18(1) of the Prospectus Directive (see Annex).

Article 19(5) – Language regime, multilingual prospectuses (new)

As cross-border issuance platforms for derivative securities are becoming more important we would welcome a more flexible language regime than the current regime which prevents the integration of multilingual prospectuses into one document. This only relates to the question of whether different language regimes can be integrated into one prospectus, but is also relevant if different language versions of the same prospectus are contained in separate documents.

For instance, some issuers offer securities aimed primarily at retail investors, possibly in several different Member States simultaneously. If such issuer considers that the translation of the summary alone is insufficient to provide investors with full disclosure in the issuer and the securities being offered and wishes to provide additional legal information (e.g. the terms and conditions, the risk factors or the final terms) in the language(s) of the host Member State(s) a more flexible regime is required.

Some competent authorities are not willing to approve prospectuses prepared in two languages. Thus, an issuer attempting to provide a prospectus to investors in several languages then has an approved prospectus in one language accompanied by a non-binding translated version in a different language, a “second language version” that is in essence an unapproved prospectus. This may give rise to liability problems under Article 6.

In such cases it should be at the option of the issuer, offeror or person asking for admission to trading that the different language versions are made available in one document or in separate documents (notwithstanding that each such document should constitute a prospectus for the purposes of this Directive). We believe that efforts by issuers to provide more information and information that is more readily accessible to retail investors in different Member States should be encouraged rather than restrained (for proposed wording please see Annex).

III. ADDITIONAL COMMENTS

Passporting – additional national requirements

Various states impose local law requirements which extend beyond the Prospectus Directive's passporting arrangements. Examples include the Belgian requirement for the Issuer's constitutive documents to be translated and filed in Belgium and French requirements for notices regarding publication of the prospectus to be published. These can unduly delay the making of retail offers and, where such offers are made simultaneously in several states, can result in the entire offer proceeding at the pace of the state with the longest procedures. Again, this is not consistent with a maximum harmonisation measure and it frustrates the fundamental objective of the Directive – the promotion of a pan-EEA retail securities market.

This is complicated by the fact that passport information is not always easy for investors to find from an 'official' source in good time. Publication on a centralised website (perhaps managed by CESR) of the passport documentation (in particular certificates of approval and translated summaries) would be helpful in this respect.

It would be helpful if the European Commission could initiate action to remove these barriers and foster the establishment of a central website for passport information.

Information relating to an underlying index

Annex XII paragraph 4.2.2 of the Prospectus Regulation requires the inclusion in the prospectus of a description of an underlying index, if it is composed by the issuer. If it is composed by a third party, the issuer only has to indicate where information about the index can be found. This creates an unequal disclosure regime, with the sponsor of the index having to make more disclosure than others who may use the index. In one instance the effect of having to include additional disclosure because the issuer was the sponsor of the index led to an additional 60 pages of disclosure in the prospectus.

It would be helpful if the European Commission could remove this anomaly by allowing both the index owner and others to indicate where information on the index may be found.

ANNEX: OVERVIEW OF PROPOSED AMENDMENTS TO THE PROSPECTUS DIRECTIVE AND RELATED COMMENTS OF DDV

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
Article 2(1)(d)	/	*No amendment, but advice by CESR at level 3.*	Clarification of the term "offer of securities to the public" in Article 2(1)(d) at level 3 so that a public offer is not deemed to exist in the case of communications purely concerning trading in securities on a regulated market or a multilateral trading facility (MTF) or in the case of information on an imminent offer of securities, as long as the investor has no actual means of subscribing for or purchasing the securities.
Article 2(1)(e)	*Paragraphs (i) and (ii) are replaced by the following:* (i) persons that meet the criteria set out in paragraphs (1) to (4) of Section I Annex II of Directive 2004/39/EC; (ii) in relation to a placement of securities by an intermediary that is an investment firm as defined in Article 4.1.1 of Directive 2004/39/EC or a credit institution as defined in Article 4(1) of Directive 2006/48/EC, other persons that the intermediary categorises as professional clients as defined in Annex II of Directive 2004/39/EC or eligible counterparties as defined in Article 24 of Directive 2004/39/EC, in relation to the	*Agreed.*	Expansion of the qualified investor regime in order to ensure alignment between Prospectus Directive and MiFID taking into account the differentiation between professional clients of an investment firm who pursuant to the provisions of Section I of Annex II of the MiFID are considered to be professionals and those professional clients of an investment firm or a credit institution who pursuant to the provisions of Section II of Annex II of the MiFID are treated as professionals on request.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
	services it provides to those persons with respect to that placement;		
Article 2(1)(m)	*Paragraph (m)(ii) is amended as follows:* (ii) for any issues of non-equity securities, the Member State where the issuer has its registered office, or where the securities were or are to be admitted to trading on a regulated market or where the securities are offered to the public, at the choice of the issuer, the offeror or the person asking for admission, as the case may be;	*Agreed.*	Free choice of the home Member State for all non-equity securities by deleting the requirement of a minimum denomination per unit of EUR 1,000.
Article 3(2)	*Last paragraph is replaced by the following:* However, any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in this paragraph shall be regarded as a separate offer and the definition set out in Article 2(1)(d) shall apply for the purpose of deciding whether that resale is an offer of securities to the public.	*Agreed.* *In addition, amendment to the first paragraph of Article 3(2) as follows:* The obligation to publish a prospectus shall not apply **if a prospectus has already been published in accordance with the provisions of this Directive and** to the following types of offer:	Clarification with regard to the obligation to publish a prospectus in the event of any subsequent resale of securities (so-called "retail cascade") and any admission of securities to trading on a regulated market so that a prospectus is not required for public offers at all stages of the retail cascade and/or for the admission of securities to trading on a regulated market if there is an approved prospectus or valid base prospectus in the EU host Member State available where notification has taken place.
Article (3)(2)(c)	/	*Article 3(2)(c) first paragraph is amended as follows (including the other changes to Article 3(2) proposed above):* The obligation to publish a prospectus shall not apply **if a prospectus has already been published in accordance with the provisions of this Directive and** to the following types of offer:	Adaptation of the exemption for certain types of offer to the “minimum transferable amount” concept.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
		(a) an offer of securities addressed solely to qualified investors; and/or (b) an offer of securities addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors; and/or (c) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 50,000 **calculated at the time of the commencement of the initial offer**, for each separate offer; and/or (d) an offer of securities whose denomination per unit amounts to at least EUR 50,000; and/or (e) an offer of securities with a total consideration of less than EUR 100,000, which limit shall be calculated over a period of 12 months. However, any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in this paragraph shall be regarded as a separate offer and the definition set out in Article 2(1)(d) shall apply for the purpose of deciding whether that resale is an offer of securities to the public.	
Article 4(1)	*The last paragraph of the Article is replaced by the following:* (e) securities offered, allotted or to be allotted	No comments.	No comments.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
	to existing or former directors or employees by their employer or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.		
Article 5(3)	/	*Article 5(3) is replaced by the following:* The issuer, offeror or person asking for the admission to trading on a regulated market may draw up the prospectus as a single document or separate documents. A prospectus composed of separate documents shall divide the required information into a registration document, a securities note and a summary note. The registration document shall contain the information relating to the issuer. The securities note shall contain the information concerning the securities offered to the public or to be admitted to trading on a regulated market.	Clarification by deleting the wording "Subject to paragraph 4" at the beginning of the paragraph that also a base prospectus subject to paragraph 4 can be presented as a prospectus consisting of separate documents. Follow-up amendment of Article 26 Prospectus Regulation required.
Article 5(4)	/	*Article 5(4) last paragraph is replaced by the following:* If the final terms are not included in either the base prospectus or a supplement, the final terms shall be provided to investors and filed with the competent authority when each public offer is made as soon as practicable and if possible in advance of the beginning of the offer. **Final terms may contain all information items not known when the base prospectus is approved and which can only be determined at the time of the**	Integration of the proposals of CESR and ESME into the Prospectus Directive in order to clarify the delineation between the base prospectus and the final terms. In addition, clarification of the non-applicability of Article 8.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
		individual issue. This may include, but is not limited to, information on the underlying, pay-out structure and related risk factors.	
Article 9(1)	/	*Article 9(1) is replaced by the following:* **Subject to paragraphs (2) to (5),** a prospectus shall be valid for **24** months after its publication for offers to the public or admissions to trading on a regulated market, provided that the prospectus is completed by any supplements required pursuant to Article 16. **The validity of a prospectus under Article 9 shall not be affected by the validity of any documents incorporated by reference.**	Extension of the validity period of prospectuses to 24 months and clarification that the validity of a prospectus is irrespective of the validity of the documents incorporated by reference.
Article 9(2)	/	*Article 9(2) is amended as follows:* In the case of **non-equity securities, including warrants in any form, issued under** an offering programme, the base prospectus, previously filed, shall be valid **until no more of the securities concerned are issued in a continuous or repeated manner, provided that the prospectus is completed by any supplements required pursuant to Article 16.**	Adaptation of the validity period for base prospectuses under Article 5(4)(a) to the requirement for base prospectuses under Article 5(4)(b).
Article 9(4)	/	*Article 9(4) is amended as follows:* A registration document, as referred to in Article 5(3), previously filed, shall be valid for a period of up to **24** months provided that it has been **completed by any supplements required pursuant to Article 16**. The registration document accompanied by the	Harmonisation with item 20.5.1 of Annex I of the Prospectus Regulation and adaptation to the general 24 months-period and taking into account of the amendment in Article 16 pursuant to which a registration document can be subject to a supplement.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
		securities note, updated if applicable in accordance with Article 12, and the summary note shall be considered to constitute a valid prospectus.	
Article 9(5) (new)	/	*Article 9(5) is newly inserted:* Where an offer to the public has commenced on the basis of and prior to the expiration of the period of validity of a prospectus provided for under Article 9, such prospectus shall remain valid for the period of such offer notwithstanding that such period of validity may end prior to the end of such offer period.	In line with CESR's interpretation of Article 9(3) it should be made clear from the wording of the provision that the validity of a prospectus applies only to a new offering of the relevant securities, but not to public offerings that have started within the period of validity.
Article 10	*Deleted*	*Agreed.*	Removal of obligation to publish an annual document.
Article 11(1)	/	*Article 11(1) is replaced by the following:* 1. Member States shall allow information to be incorporated in the prospectus by reference to one or more previously or simultaneously published documents **in its latest supplemented or updated version** that have been approved by the competent authority of the home Member State or **with other documents** filed with it in accordance with this Directive, in particular pursuant to Article 10, or with Titles IV and V of Directive 2001/34/EC. This information shall be the latest available to the issuer. The summary shall not incorporate information by reference.	Permission of "dynamic" incorporation by reference for documents approved by the competent authority under the Prospectus Directive, primarily relevant for the incorporation of a registration document.
Article 12(2)	/	*Article 12(2) is replaced by the following:* In the case **of a prospectus consisting of separate documents**, the securities note shall provide information that would normally	Clarification that a registration document can be separately supplemented.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
		be provided in the registration document if there has been a material change or recent development which could affect investors' assessments since the latest updated registration document or any supplement as provided for in Article 16 was approved. **Irrespective of the format of the prospectus, a registration document can be subject to a separate supplement as provided for in Article 16 or updated separately.** The securities and summary notes shall be subject to a separate approval.	
Article 16(1)	/	*Article 16(1) is replaced by the following:* Every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus **in the form of a single document or separate documents including the registration document and forming part of a prospectus in accordance with Article 5(3)** 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 **earlier of the** final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins shall be mentioned in a supplement to the prospectus. Such a supplement shall be approved in the same way in a maximum of seven working days and published in accordance with at least the same arrangements as were applied when	Clarification that also a prospectus in the sense of Article 5(3), including the registration document, can be subject to a supplement and that the requirement to supplement a prospectus should cease to apply at the earlier of the two times referred to in Article 16(1), i.e. either the "final closing of the offer to the public" or when "trading on a regulated market begins". Furthermore, an alignment of the disclosure provisions under the Transparency Directive with the obligation under Article 16 is proposed.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
		the original prospectus was published. The summary, and any translations thereof, shall also be supplemented, if necessary to take into account the new information included in the supplement. **The obligation to file a supplement shall not apply if the issuer has published information under Directive 2004/109/EC that comprehensively describes the new factor that is relevant for the offer; in such case the issuer shall publish the information in accordance with at least the same arrangements as were applied when the original prospectus was published including a reference to the withdrawal right under Article 16(2).**	
Article 16(2)	*Paragraph 2 is replaced by the following:* 2. Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within at least two working days after the publication of the supplement, to withdraw their acceptances.	*Paragraph 2 is replaced by the following:* 2. Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within two working days after the publication of the supplement, to withdraw their acceptances **if the information contained in the supplement is detrimental to the investor in assessing the issuer and the securities which are the subject of the offer or the admission to trading on a regulated market or multilateral trading facility as defined by Council Directive 2004/39/EC and provided that settlement has not yet taken place. In the case of the publication of information under Article 16(1) last sentence the**	Harmonisation of the withdrawal period across Member States in accordance with the proposal of the European Commission (deletion of "at least") and restriction of the right of withdrawal by settlement of the trades, i.e. the transfer of cash and securities, and restriction of the withdrawal right to situations in which the information is detrimental to the investor in assessing the issuer and the securities.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
		withdrawal right shall apply accordingly.	
Article 16(3) (new)	/	*Article 16(3) is newly inserted:* Information contained in final terms may be amended without filing a supplement to the base prospectus. Such an amendment of final terms shall be filed in the same way and published in accordance with at least the same arrangements as were applied when the original final terms were published.	Amendments to final terms should be allowed in the same way as the filing and publishing of the original final terms.
Article 17(1)	/	*Article 17(1) is supplemented as follows:* Without prejudice to Article 23, where an offer to the public or admission to trading on a regulated market is provided for in one or more Member States, or in a Member State other than the home Member State, the prospectus, **in the form of a single document or separate documents including the registration document and forming part of a prospectus in accordance with Article 5(3),** approved by the home Member State and any supplements thereto shall be valid for the public offer or the admission to trading in any number of host Member States, provided that the competent authority of each host Member State is notified in accordance with Article 18. Competent authorities of host Member States shall not undertake any approval or administrative procedures relating to prospectuses **in the form of a single document or relating to separate documents including the registration**	Clarification that single documents forming part of a prospectus can also be passported.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
		document and forming part of a prospectus in accordance with Article 5(3).	
Article 18(1)	/	*Article 18(1) is replaced as follows:* The competent authority of the home Member State shall, at the request of the issuer or the person responsible for drawing up the prospectus and within three working days following that request or, if the request is submitted together with the draft prospectus, within one working day after the approval of the prospectus provide the competent authority of the host Member State with a certificate of approval attesting that the prospectus has been drawn up in accordance with this Directive and with a copy of the said prospectus. If applicable, this notification shall be accompanied by a translation of the summary produced under the responsibility of the issuer or person responsible for drawing up the prospectus. The same procedure shall be followed for any supplement to the prospectus. **After the expiry of such period, the issuer or offeror shall not be prevented from commencing such offer or admission to trading on a regulated market.**	Clarification that no communication between the competent authority of the host Member State and the issuer or offeror is required.
Article 19(5) (new)	/	*Article 19(5) is newly inserted:* Where a prospectus for an offer to the public or admission to trading on a regulated market is drawn up in more than one language in accordance with paragraphs (2) to (4) above,	More flexibility for multilingual prospectuses and prospectuses in different language versions.

Amendments to Directive 2003/71/EC	***Consultation Document***	***Proposal by DDV***	***Explanatory Remarks***
		such prospectus may, at the option of the issuer, offeror or person asking for admission to trading, be made available in one document or in separate documents (notwithstanding that each such document shall constitute a prospectus for the purposes of this Directive).	