

**CONSIDERATIONS ON THE REPORT PREPARED BY THE EUROPEAN
COMMITTEE OF EUROPEAN SECURITIES REGULATORS ON THE
EVENTUAL IMPLEMENTATION MEASURES FOR THE PROPOSED
PROSPECTUS DIRECTIVE**

1. PREAMBLE

This report aims to establish certain law-related considerations on the document (Ref. CESR/02-185b) made public by the Committee of European Securities Regulators (hereinafter, the “CESR”) concerning the eventual implementation of measures for the Proposed Directive referred to the prospectus to be published in cases of public sale offerings or admission to listing on regulated markets (hereinafter, the “Report”).

Our firm has been invited by the Spanish Securities and Exchange Commission (“*Comisión Nacional del Mercado de Valores*”) to collaborate in the analysis and review of the measures proposed in the Report. In this regard, our firm is very pleased to have been taken into consideration to take part in this consultation period.

For these purposes we have prepared this report with the sole aim of providing material for thought from a strictly law perspective, and in those matters we have considered of special relevance in accordance with our professional expertise on the Spanish securities market. We hope our considerations will be useful and of certain interest to the CESR when drafting and preparing the final version of the report to be submitted to the European Commission before 31 March 2003.

2. CONSIDERATIONS IN RELATION TO THE REGISTRATION DOCUMENT

We set forth hereunder those factors we have deemed of special interest in relation to the draft of the registration document to be issued (attached to the Report as Annex A) and to the information to be publicly disclosed when a company intends either to offer shares, bonds and/or any other kind of securities, or to apply for the listing of such securities.

2.1 Issue of share capital

2.1.1 Content of the Registration Document (question no. 44)

It is our understanding that the draft of registration document attached as Annex A to the Report would be wide enough to provide complete and reasonable information on the issuer companies. Therefore, potential subscribers and/or purchasers may construe therefrom a fair image of the issuer companies and a well-sounded judgement on the investment they are proposed.

According to the proposed draft, the issuer companies are obliged to disclose complete and sound information on their corporate structure, shareholding and economic activity, all of this with a view of achieving the principle of transparency and in such a way that future investors may become familiar with the features of the issue and where they are investing their funds. Nevertheless, there are certain references in the Report that are not duly specified in detail and that, in some cases, may result in some uncertainty. As non-exhaustive examples and in our view, the following considerations would require special attention:

- Pursuant to Section III.A.5, the issuer company must describe in detail any material facts (“*hechos relevantes*”) having taken place in the course of its

economic activity. Our understanding is that such reference may be too vague and may generate uncertainty as to which facts must be described in the registration document and which may not. This may result in discrepancy in the sense that certain companies may offer very-detailed information while other companies would only include a concise overview of the company's history.

- According to Section III.B, issuers must provide details of their main investments during the last three financial years. However, no parameters or limits are established to understand what the term “investment” stands for. Therefore, doubts may arise among the issuers in relation to whether or not the obligation to transparency affects portfolio investments made in other companies and reputedly “significant shareholdings” according to the regulation in force on the duty of communicating significant shareholdings in other companies, or would even extend to portfolio investments not reaching the standard to be qualified as such.

2.1.2 Risk factors (question no. 47)

Issuer companies have to be transparent in the information supplied to future investors, particularly when it comes to risk factors. It must be highlighted that reference made to “risk factors” might be too vague and may generate uncertainty in respect of factors that must/may not be included in the registration document.

In this regard, it might be convenient to establish objective limits to the term “risk factors” and exclusively reserve it to those data affecting –or capable of affecting– the issuer's obtaining of future revenues or losses. It should not be forgotten that “risk factors” have to be taken into account by potential investors before making an investment decision. In any case, the proposal to establish a “guide” as to which “risk

factors” are expected to be included in the registration document seems reasonable to us.

2.1.3 “Pro forma” financial information (questions no. 51, 52, 53, 55, 64 and 65)

Issuer companies may disclose, under certain circumstances, financial information that may not have been obtained in accordance with Generally Accepted Accountancy Principles (the “GAAP”). Such information may be extremely useful to investors, and it may even be advisable to establish the obligation to provide the same in cases where the size of an issuer company has undergone a material change.

We consider that the 25 percent threshold proposed by the CESR as “material change” in a company’s size, to be applicable under different parameters like assets or income or turnover or consideration for the transaction, would be adequate for establishing these minimal duties of information and/or issuer transparency.

On the other hand, establishing such limits would help to avoid an excessive transparency cost in cases where a company’s structural change does not take place, that is, when the threshold above referred to is not exceeded. However, there might be a practical problem in implementing these proposals if there is a lack of common standards applicable to all issuer companies in guarantee of a contrastable/comparable information.

In principle, we do not deem convenient that the regulatory authority of the issuer’s country of origin is empowered to discretionally decide whether or not a certain measure affects potential investors and, in particular, whether or not certain pro forma financial information regarding the issuer should be disclosed. Nevertheless, it would be recommendable that, if discretion is conceded to local regulatory authorities, the

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margin of discretion of the aforesaid authority be as narrow as is feasible and that the transparency obligations be objectively fixed through general mandatory regulations.

It is our understanding that the financial information “*pro forma*” should always give a real and accurate image of the financial position of the issuer. In fact, it is advisable that the auditor of the issuer company verifies this “*pro forma*” information. To these effects, it would be crucial that the auditors know on the basis of which criterion the financial “*pro forma*” information has been elaborated, given that such information may not have been elaborated according to Generally Accepted Accountancy Principles (“GAAP”).

On the other hand, it is recommended that this relevant information for the market, and most of all for the investors, be published periodically and not only when certain securities are issued.

2.1.4 Profits forecasts (questions no. 73, 85, 86 and 87)

The proposed measures on the publicity of future profits and the expected projections on the development of the company seem appropriate and fully eligible for sharing. They cannot be neglected since they are data of unquestionable opportunity for the investors to decide their investment. What is more, the reliability of the projection of the business will be guaranteed, as the mentioned projections will be verified by the Directors and Auditor’s Committees.

However, it is essential to determine some type of restrictions when incorporating these projections in the registration document. It would be suitable that an imperative law establishes these limits and they are not left to the choice of the governing authorities.

2.1.5 Directors and senior management privacy (question no. 89)

It is a difficult task to reconcile the need for wide publicity of the data of the directors of the listed companies and the right of the investors to the maximum transparency of these companies and their managers with the protection of the privacy and the personal data of such directors. In any case, data which are or may be relevant for the market (and cases mentioned in the Section V.A.1, 4º paragraph of the Annex A must be unquestionably included) should be published and made available for the market.

In order to achieve a high standard of government of the companies, it seems logical that the requisites of trustworthiness and honourableness also concur in the managers of every listed company. The doubt is whether these requisites should be required by imperative law or just by “codes” of behaviour compliance with which is not compulsory. Auto-regulation, however, has not been so efficient.

Under no circumstances may these details, as referred to in the mentioned Annex, entail a break-off with the regulation of the protection of the privacy and personal data. This notwithstanding, Spanish Constitutional Act 15/1999 on Protection of Personal Data excludes cases that have been authorised by law. In this sense, the Market Securities Act considers that relevant data for the market that affect the honourableness of the managers of a investment services company must be published as a consequence of the existence of a legally recognised general aim superior to privacy.

2.1.6 Controlling shareholders (question no. 91)

It is not an easy task to reconcile the need for wide publicity and the right of the investors to a maximum transparency of the company with the need to maintaining concealed those internal measures adopted by the companies to restrict the excessive

control of the controller shareholder. It is our understanding that the publicity of these measures may generate uncertainty in the management of the listed companies, and subsequently regarding the listed price of their shares. In any case, the interests of the company should prevail over the interests of the group to which the controller shareholder belongs.

2.1.7 Documents on display (question no. 93)

It is fairly complicated to establish which documents of the issuer companies must be available to the market so that the possible subscribers or acquirers may achieve an accurate image of the issuer and a well formed judgement of the proposed investment. In any case, it is important to consider that the disclosure of information, if not strictly necessary, may damage the interests of the company from a competitive point of view.

It must be considered that data regarding the shareholders or investors of a company are communicated to the company for the “*investors relations*”. However, if data of the investors are available to these effects, data of the companies that achieve investments should also be available, and, unquestionably, data regarding the managers of the companies are included.

2.2 Debt Securities

2.2.1 Introduction (question no. 129)

It is our understanding that the difference established in the report between the interest of a person in investing in equity or debt securities does exist. The former will be interested in the future of the company, whereas the latter will be mostly interested in the risks involved in retrieving the invested capital. This notwithstanding, it is rather doubtful that different treatments regarding the quantity or quality of the information

which should be made available to the securities market should be established. In this sense, we consider that relevant differences between both cases should not exist.

2.2.2 Disclosure about the advisers of the issuer (questions no. 134 and 135)

It seems obvious that indications on the publicity of the directors and especially on the company's principal bankers is relevant when issuing securities. However, it is essential to be extremely careful when manipulating these data in terms of the subsequently liability treatment.

The liability treatment applicable to the issuer for the false data that it may include, which may be located under the scope of the contractual or pre-contractual liability, is different to the liability of the advisor or of the banker of the company advising on the investment. On the basis of the diverse treatment applicable in each case it seems advisable to establish some differences.

2.2.3 History of the company's investments (questions no. 137, 138 and 139)

It is unquestionable that investments made in the past are relevant for the investors, either the investment has been carried out in own resources of the company ("*equity*") or in obligations ("*debt*"). However, if the investment has been already liquidated, it is just general information on the precedent management of company that should be included but with no deep specification.

It is a fact that data on precedent, real or future investments are not comparable in an investment on capital or on the debt. This notwithstanding, it is advisable to publish this type of data, as the risk on the issuer company having difficulties in assuming its obligations shall depend on the solvency and liquidity of its investments.

2.2.4 Age of the latest accounts (questions no. 145 and 146)

It may be practical that the financial statements of interim periods do not need to be complete and may be abbreviate. In any case and as long as it is established, it would be opportune to prepare these financial statements according to standard and common rules to all operators. Only in such a case the comparison among different documents shall be possible. For these purposes it would be desirable that the law established not only the obligation to submit such documentation but also the form in which this should be done.

In any case it is reasonable that the requirement is established for both investments in debt and investments in capital.

2.2.5 Documents on display (questions no. 148, 149 and 150)

The fact of making available for the market all the information of the company set forth in the documents mentioned in Section VIII.E of the A Annex, seems be necessary independently of whether the investment is targeted at equity or debt. In this regard, it should be taken into account that on the basis of the analysis of such information, the future investor may make a judgement over the solvency and liquidity of the issuer, which shall be crucial on valuating the risks involved in retrieving the invested capital.

In any case, all the referred documentation on Section VIII.E of the A Annex should be translated into the language of the country in which the offer or the application for the listing is made, given that the justified objective of displaying such information is to provide the possible investor with the sufficient data in order to achieve a well-founded judgement over the proposed investment. In such a case, if the investor does

not understand the language of the aforementioned documents, the objective of offering adequate information to the unsophisticated investor would not be fulfilled.

In order to reduce the due cost of the translations for the issuer, if the documents were long, it would be convenient that the issuer makes a descriptive summary of the same in the language of the country in which the offer or the application for the listing is made. This summary should be aimed at those more important issues which may have special interest according to the nature of the issuance.

2.3 Derivative Securities

It is not easy admitting the need of registering a different document or prospectus for the derivative securities and for other securities (in capital or debt). The reasons justifying the clearness of the securities and of the investments occur in both cases. The distinction between both types of securities is probably linked to juridical customs and most of all, to the fact that derivative securities are a new type of securities over which there are certain doubts about being named as “securities bond” (*negotiable instrument, titoli di credito, Wertpapier*). This is a unknown and indifferent issue to the securities regulation, which is the vision that must be taken into account on the regulation of the issuance prospectus.

It may seem that beyond the aim of establishing a separate legal regimen for derivative securities and other securities, is removing the former from the general regime applicable to all the listed securities (and most of all, to its issuers) of control and supervision by entities specifically dedicated to this control. (question no. 160)

Alternatively, it is debatable that a legal definition of derivative securities is offered given that this legal definition may not be capable of embracing new figures created by the practice. Consequently, objections may be made to every approach contained

on the Report, particularly the inclusion of a list, due to the fact that new cases may evade this regulation. The second option, which includes several definition notes, seems in any case better, although eventually the same objection of the first option might arise.

The crucial issue is the fact that when the law enumerates on a list all the derivative securities or the main features characterising all derivative securities, it may happen that issuers may try to create new types of derivative securities escaping from the control of the supervision authority, and generally, from the entire regimen of “*full disclosure*” governing the law of the securities market, that means, the “*securities regulation*” appeared in the United States during the thirties. (questions no. 170-173)

Likewise, we consider inappropriate to establish new sub-categories of financial derivatives or specific prospectus for every new sub-category. It may be best a general regime with indications applicable to all types of securities, without prejudice that in particular cases, for example by means of annexes, specific provisions depending on the features of certain securities, may be established. (questions no. 179-180)

2.4 Other considerations regarding the information prospectus

After the analysis of the measures proposed by the CESR in Section B, First Part of the Report, regarding the securities (“security notes”), the following general considerations should be made:

- The information that the issuer discloses to the market is not only contained in the corresponding prospectus but in its respective annexes and/or those documents which may be required by the regulatory and supervising authority.

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Given that the information is contained in several documents, all of them constitute an unity and, therefore, it seems reasonable that the responsibility lies on the person who drafts such document, independently of other responsibilities in which other persons may incur for the creation of information and data based on which these documents were finally drafted. (question 254)

- The *worst case scenario* warning results of great relevance for the investors. For this reason, it seems reasonable to include it in the prospectus, given that it can be decisive when deciding to invest or not. (question 257)
- The necessity to indicate whichever personal interest of the financial experts or advisers of the issuance is absolutely basic. Therefore, the prospectus should detail whether there is any interest or not for the experts advising in the issuance. In any case, it seems reasonable that this requirement is similar for investments in debt securities and for share capital investments. (question 258)
- We understand that the rating of the securities to be issued or negotiated should be included in the prospectus. It seems that, between the two alternatives proposed, the first one would offer a greater warranty for its impartiality. However, the said exigency could be excessive and the purposes justifying the rating publicity could be satisfied on the occasion of a classification granted on the issuer's request. Without prejudice to the foregoing, in the event that a rating does not exist, this fact should be included in the prospectus. (question 259)

3. AVAILABILITY OF THE PROSPECTUS

We expose hereto those issues that we have considered of special relevance when analysing the different measures proposed by the CESR regarding the ways in which the prospectus will be made available.

3.1 Availability of an electronic prospectus (question 307)

In principle, we consider that the measures proposed by the CESR in section 305 of the Report would warranty an easy access to the electronic prospectus. However, it is very difficult to determine other measures which can be considered of easy access for the purpose of having available an electronic prospectus.

In any case, it seems necessary that the determination of those ways which can be considered of easy access are established by legal imperative. Only this would permit the operators' equality, the security in complying with the rules and the data contrast and comparison by the investors.

3.2 Availability of the prospectus in national and supra-national press (question 314)

Given the short segmentation of the diary press market of our country (the newspapers with a real great diffusion in the whole country are no more than 5 and, moreover, some of them have a really short diffusion in certain geographic areas in which, on the other hand, the newspapers which are usually read are different) and the short circulation between the readers of certain newspapers and the others, it does not seem very reasonable the usage of the press to diffuse the content of the prospectus.

Probably the same could not be said with reference to the economic-financial press. However, its problem is the risk that its independence is questioned (even more), something that is extremely important for the correct and transparent operation of the stock markets.

3.3 Other proposed measures regarding the public availability of the prospectus

3.3.1 Notice stating where the prospectus is available (questions 325, 326 and 327)

It would be reasonable that advertisement where it is included the place where the prospectus is made available would be published with enough anticipation, advising on the date in which it will be published. We consider that this advertisement should not made after the prospectus date of publication, as it is proposed, all for warranting the maximum diffusion of the same.

We understand, in any case, that the minimum data which have to be published in this advertisement should be established by legal way. Each company can consider convenient the publication of more data. But, in any case, the minimum data to be published has to be legally predetermined to give security to the issuers and enough and contrastable information to investors.

Much more important than the determination of the data which have to be included in the prospectus (over which in the detail there is always the possibility to discuss on the necessity or opportunity of any concrete data) is that the data which legally have to be published and have been published are accessible for the group of investors. From this point view, it would be very convenient that the web page of the competent authority or any other place where the existence of the prospectus is advertised indicates where this document can be obtained or at least, known.

In any case, it seems reasonable that the convenience of publishing the advertisement in the competent authority's web page is not used to exclude any other kind of advertisements.

3.3.2 Delivery of a paper copy of the prospectus (questions 334 and 335)

It seems reasonable that the issuer is not able to rebound payment of the delivery costs of a paper copy of the prospectus to the potential investor who is requiring it, and this because the usage of the new information technologies favours exclusively the issuer; if the purpose of the full disclosure policy which characterises the stock market laws is to protect this securities through the investors protection, it is no sense that the new technologies, used to shorten the issuers' costs, have as consequence the reduction in the transparency levels previously achieved.

On the other hand, probably the printing of the prospectus does not represent a relevant cost for the issuers which, if the new technologies are used to make available the prospectus is not only a costs problem, but also because the great majority of the investors will access the relevant information through the new media. In this sense it will not be necessary to make an excessive printing of the prospectus or, if the case may be, the publication of a high number of prospectus.