This guide is a joint product of leading independent law firms in France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom:

**France:**

**Bredin Prat**

www.bredinprat.com

Olivier Saba, Partner
130, rue du Faubourg Saint-Honoré
75008 Paris
Tel: +33 1 44 35 35 35
E-mail: oliviersaba@bredinprat.com

Jean-Damien Boulanger, Associate
130, rue du Faubourg Saint-Honoré
75008 Paris
Tel: +33 1 44 35 35 35
E-mail: jean-damienboulanger@bredinprat.com

Florent Mazeron, Associate
130, rue du Faubourg Saint-Honoré
75008 Paris
Tel: +33 1 44 35 35 35
E-mail: florentmazeron@bredinprat.com

**Germany:**

**Hengeler Mueller**

www.hengeler.com

Torsten Busch, Partner
Bockenheimer Landstraße 24
60323 Frankfurt am Main
Tel: +49 69 170 95-347
Fax: +49 69 170 95-7346
E-mail: torsten.busch@hengeler.com

Ralph Defren, Partner
Bockenheimer Landstraße 24
60323 Frankfurt am Main
Tel: +49 69 170 95-254
Fax: +49 69 170 95-7383
E-mail: ralph.defren@hengeler.com
Italy:  
Bonelli Erede Pappalardo  
www.beplex.com

Gianfranco Veneziano, Partner  
Via Barozzi, 1  
20122 Milan  
Tel: +39 02 771 131  
Fax: +39 02 771 132 60/61  
E-mail: gianfranco.veneziano@beplex.com

Federica Munno, Associate  
Via Barozzi, 1  
20122 Milan  
Tel: +39 02 771 131  
Fax: +39 02 771 132 60/61  
E-mail: federica.munno@beplex.com

The Netherlands:  
De Brauw Blackstone Westbroek N.V.  
www.debrauw.com

Niek Biegman, Partner  
Claude De Bussylaan 80  
1082 MD Amsterdam  
P.O. Box 75084  
1070 AB Amsterdam  
The Netherlands  
Tel: +31 20 577 1497  
Fax: +31 20 577 1775  
Mob: +31 6 5325 8019  
E-mail: niek.biegman@debrauw.com

Jan Willem Hoevers, Partner  
Claude De Bussylaan 80  
1082 MD Amsterdam  
P.O. Box 75084  
1070 AB Amsterdam  
The Netherlands  
Tel: +31 20 577 1596  
Fax: +31 20 577 1775  
Mob: +31 6 5149 7273  
E-mail: janwillem.hoevers@debrauw.com
Joost Schutte, Partner
Claude De Bussylaan 80
1082 MD Amsterdam
P.O. Box 75084
1070 AB Amsterdam
The Netherlands
Tel:  +31 20 577 1688
Fax:  +31 20 577 1775
Mob:  +31 6 5325 6783
E-mail: joost.schutte@debrauw.com

Portugal:

Uriá Menéndez – Proença de Carvalho
www.uria.com

Carlos Costa Andrade, Partner
Rua Duque de Palmela, 23
1250-097 Lisbon
Tel:  +351 21 351 5639
Fax:  +351 21 351 53 77
Mob:  +351 91 618 86 76
E-mail: carlos.andrade@uria.com

Ana Sá Couto, Of Counsel
Rua Duque de Palmela, 23
1250-097 Lisbon
Tel:  +351 21 358 30 05
Fax:  +351 21 351 53 77
Mob:  +351 91 618 88 49
E-mail: ana.sacouto@uria.com

Catarina Gonçalves de Oliveira, Senior Associate
Rua Duque de Palmela, 23
1250-097 Lisbon
Tel:  +351 21 351 53 74
Fax:  +351 21 351 53 77
Mob:  +351 91 221 98 80
E-mail: catarina.goncalves@uria.com
Spain:

**Uriá Menéndez**

[www.uria.com](http://www.uria.com)

Gabriel Núñez, Partner  
Príncipe de Vergara, 187  
Plaza de Rodrigo Uría  
28002 Madrid  
Tel: +34 91 586 03 54  
Fax: +34 91 586 45 80  
Mob: +34 639 35 04 54  
E-mail: gabriel.nunez@uria.com

Javier Redonet, Partner  
Príncipe de Vergara, 187  
Plaza de Rodrigo Uría  
28002 Madrid  
Tel: +34 91 586 01 54  
Fax: +34 91 586 45 80  
Mob: +34 639 22 36 99  
E-mail: javier.redonet@uria.com

Alfonso Ventoso, Partner  
Príncipe de Vergara, 187  
Plaza de Rodrigo Uría  
28002 Madrid  
Tel: +34 91 586 01 80  
Fax: +34 91 586 45 80  
Mob: +34 629 85 55 12  
E-mail: alfonso.ventoso@uria.com

UK:

**Slaughter and May**

[www.slaughterandmay.com](http://www.slaughterandmay.com)

Nilufer von Bismarck, Partner  
One Bunhill Row  
London EC1Y 8YY  
Tel: +44 20 7090 3186  
Fax: +44 20 7090 5000  
Mob: +44 77 6882 7406  
E-mail: nilufer.vonbismarck@slaughterandmay.com
Richard Smith, Partner
One Bunhill Row
London EC1Y 8YY
Tel: +44 20 7090 3386
Fax: +44 20 7090 5000
Mob: +44 75 8106 6449
E-mail: richard.smith@slaughterandmay.com

Marc Hutchinson, Partner
One Bunhill Row
London EC1Y 8YY
Tel: +44 20 7090 3063
Fax: +44 20 7090 5000
Mob: +44 77 6882 7405
E-mail: marc.hutchinson@slaughterandmay.com
IMPORTANT NOTE

This guide is intended to provide a summary overview of certain important aspects relating to the implementation of the Prospectus Directive in the seven jurisdictions it covers. The information contained in this guide is not intended to be used and must not be used as legal or taxation advice, either on general questions relating to the implementation of the Prospectus Directive or on questions relating to any specific transaction.

The firms listed at the front of this guide would be pleased to provide advice upon request for general queries relating to the implementation of the Prospectus Directive, as well as advice on specific transactions.

The information contained in this guide is given as at 25 July 2013. Updates to the information contained in this guide may be requested from the relevant firms; however, the firms are under no obligation, and have no responsibility, to provide updates of any such information in the absence of a specific and agreed request.
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Each section is divided into country-specific sections for:

- France
- Germany
- Italy
- The Netherlands
- Portugal
- Spain
- United Kingdom

Section 3 is not divided into country-specific sections as the same approach is taken by all

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DEFINITIONS

GENERAL

“Amending Directive” means Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending, amongst other things, the Prospectus Directive, which was required to be implemented into national law by Member States by 1 July 2012.

“Commission” means the European Commission.

“EEA” means the European Economic Area.


“ESMA Recommendations” means ESMA’s update of the CESR recommendations for the consistent implementation of the Prospectus Regulation, published on 20 March 2013 (Ref: ESMA/2013/319).

“EU” means the European Union.


“Member State” means a member state of the EU (or of the EEA where applicable).


FRANCE

“AMF” means the French Financial Markets Authority (*Autorité des marchés financiers*)

“FMFC” means the French Monetary and Financial Code (*Code monétaire et financier*)

“FCC” means the French Commercial Code (*Code de commerce*)

“GR AMF” means the General Regulation (Règlement général) of the AMF

“Loi Toubon” means Law n° 94 – 665 of August 4, 1994

“Ordinance” means the Ordinance n° 2009-80 of January 22, 2009 which came into effect on April 1, 2009

GERMANY

“BaFin” means the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*)

“WpHG” means the German Securities Trading Act (*Wertpapierhandelsgesetz*)

“WpPG” means the German Securities Prospectus Act (*Wertpapierprospektgesetz*)

ITALY

“CFA” means Legislative Decree n.58 of 24 February 1998 (as amended), also known as the Consolidated Financial Act

“Consob” means Commissione Nazionale per le Società e la Borsa

“Issuer Regulation” means Consob Regulation approved with resolution No. 11971/91 of 14 May 1999, as amended

“Italian Stock Exchange” means Borsa Italiana S.p.A.

THE NETHERLANDS

“AFM” means the Netherlands Authority for the Financial Markets (*Stichting Autoriteit Financiële Markten*)

“AFM Conduct of Business Rules” means the FMSA Implementing Regulation on the Supervision of Conduct of Business Financial Firms (*Nadere Regeling gedragstoezicht financiële ondernemingen Wft*)

“DCC” means the Dutch Civil Code (*Burgerlijk Wetboek*)
“FMSA” means the Dutch Financial Markets Supervision Act (*Wet op het financieel toezicht*).

“FMSA Decree on Market Abuse” means the Dutch FMSA Decree on Market Abuse (*Besluit Marktmisbruik Wft*).

“FMSA Exemption Regulation” means the Dutch FMSA Exemption Regulation (*Vrijstellingsregeling Wft*).

“FMSA Regulation on Accepted Market Practices” means the Regulation of the Dutch Minister of Finance dated 4 May 2011 with no. FM/2011/8728M as published in the Official Gazette (*Staatscourant*) 2011, no. 8349 (*Regeling gebruikelijke marktpraktijken Wft*).

**PORTUGAL**

“CMVM” means the Portuguese Securities Exchange Commission (*Comissão do Mercado de Valores Mobiliários*).

“CVM” means the *Central de Valores Mobiliários*, the Portuguese centralised securities system managed by *Interbolsa – Sociedade Gestora de Sistemas de Liquidação e de Sistemas Centralizados de Valores Mobiliários, S.A.*

“Euronext Lisbon” means *Euronext Lisbon – Sociedade Gestora de Mercados Regulamentados, S.A.*

“PCC” means the Portuguese Companies Code (*Código das Sociedades Comerciais*) approved by Decree-law no. 262/86 of 2 September 1986, as amended.


**SPAIN**

“CNMV” means the Spanish Securities Exchange Commission (*Comisión Nacional del Mercado de Valores*).

“Iberclear” means the Spanish Central Securities Depositary (*Sociedad de Gestión de los Sistemas de Registro, Compensación y Liquidación de Valores, S.A., Sociedad Unipersonal*).

“LMV” means Act 24/1988, dated 28 July 1988 on the securities market, as amended (*Ley del Mercado de Valores*).

“LSC” means the consolidated text of the Corporate Enterprises Act, approved by Royal Legislative Decree 1/2010 dated 2 July 2010, as amended.


“RD 1362/2007” means Royal Decree 1362/2007 dated 19 October 2007, which partially develops the 1988 Act regarding the transparency requirements relating to information on issuers whose securities are admitted to trading on an official secondary market or on another EU regulated market, as amended

UNITED KINGDOM

“Admission and Disclosure Standards” means the admission and disclosure standards published by the LSE from time to time

“AIM” means the Alternative Investment Market operated by the LSE

“CA06” means the Companies Act 2006, as amended

“CJA” means the Criminal Justice Act 1993, as amended

“Disclosure and Transparency Rules” means the disclosure rules, transparency rules and corporate governance rules made by the UK Listing Authority under Part 6 of FSMA, as amended

“FCA” means the Financial Conduct Authority (the successor to the FSA)


“FSA” means the Financial Services Authority (the predecessor of the FCA)

“FSMA” means the Financial Services and Markets Act 2000, as amended

“Listing Rules” means the listing rules made by the UK Listing Authority under Part 6 of FSMA, as amended

“LSE” means the London Stock Exchange Plc

“Prospectus Rules” means the prospectus rules made by the UK Listing Authority under Part 6 of FSMA, as amended

“Professional Securities Market” or “PSM” means the Professional Securities Market operated by the LSE

“UK” means the United Kingdom

“UK Listing Authority” or “UKLA” means the FCA when exercising its functions under Part 6 of FSMA
INTRODUCTION: THE PROSPECTUS DIRECTIVE

The Prospectus Directive was introduced with the aim of harmonising prospectus requirements on a public offer or on a listing of securities in the EEA and to permit the mutual recognition of prospectuses. The Prospectus Directive affects those entities making a public offer of securities and/or seeking admission of their shares to listing on a regulated market in the EEA. The Amending Directive made a number of changes to the Prospectus Directive, and was required to be implemented by Member States by 1 July 2012. Both the Prospectus Directive and the Amending Directive are maximum harmonisation directives, allowing Member States little flexibility with respect to their implementation.

1. Obligation to Publish a Prospectus

The Prospectus Directive provides that, subject to certain exceptions, a prospectus must be published when:

(A) securities are offered to the public in the EEA; or

(B) securities are admitted to trading on a regulated market in the EEA.

The scope of this obligation is determined by the definitions of the terms “offer to the public”, “securities” and “regulated market” as well as various exemptions from this obligation set out in the Prospectus Directive.

2. Definition of “offer of securities to the public”

The Prospectus Directive defines “offer of securities to the public” as “a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities.”

3. Definition of “securities”

The Prospectus Directive defines securities as transferable securities as defined in MiFID other than money market instruments having a maturity of less than 12 months. “Transferable securities” are defined by MiFID as those classes of securities which are negotiable on the capital markets, with the exception of instruments of payment, such as:

(A) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;

(B) bonds or other forms of securitised debt, including depositary receipts in respect of such securities; and

(C) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.
4. **Definition of “regulated market”**

MiFID states that a regulated market is a market appearing on a list of regulated markets drawn up by Member States and annually published by the Commission. For the jurisdictions covered by this guide, the following are regulated markets:

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<td>Euronext Paris Matif</td>
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<td>Frankfurter Wertpapierboerse (Regulierter Markt)</td>
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<td>Euronext IRF – Interest Rate Future and Options</td>
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<td>Mercado Regulamentado de Derivados do MIBEL</td>
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<td>The London International Financial Futures And Options Exchanges (LIFFE)</td>
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<td>The London Metal Exchange</td>
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SECTION 1: OFFERS TO THE PUBLIC

This section considers how the Prospectus Directive has been implemented within the Member States and how the implementation by each Member State deals with:

- pre-emptive offers;
- share dividends;
- shares offered to employees; and
- whether the following are offers to the public:
  
  (a) a court sanctioned scheme of arrangement under CA06;

  (b) a takeover by means of a stock offer; and

  (c) a demerger whereby a parent company distributes securities that it holds in a subsidiary to its shareholders, in proportion to the shares held by each shareholder in the parent company.
FRANCE

1. How has the Prospectus Directive been implemented in France?

The Prospectus Directive has been implemented by:

- Law no 2005-842 of July 26, 2005;
- the Ordinance; and
- the GR AMF as amended by several orders, the latest dated June 14, 2012, which came into force on July 1, 2012 (pursuant to and implementing the Amending Directive).

The Ordinance modifies the FMFC and the FCC by abandoning the concept of “appel public à l’épargne” to substitute the European definition.¹

The GR AMF states that “for the purposes of the Prospectus Regulation, the AMF shall take into account the ESMA Recommendations”.

A private placement is not considered as an offer to the public and therefore no prospectus is required. Private placement encompasses offers made exclusively to:

- Providers of portfolio management services on a discretionary basis (“personnes fournissant le service d’investissement de gestion de portefeuille pour compte de tiers”).
- Qualified investors (“investisseurs qualifiés”) acting for their own account. A qualified investor is a person or a legal entity with the expertise and the facilities required to understand the risks inherent in transactions relating to securities.
- A restricted circle of investors (“cercle restreint d’investisseurs”) acting for their own account. The number of investors to whom the offer is made was originally to be lower than 100 persons. The Amending Directive has increased this threshold from 100 to 150 persons. The FMFC (article D.411-4) has been amended accordingly by a decree dated 8 November 2012.

¹ The key concept that applied under French law until the Ordinance was known as “appel public à l’épargne”. This concept was considered by the French regulator to be broader than the concept of “offer of securities to the public” and thus per se conforms to the requirements under the Prospectus Directive.

Prior to the entry into force of the Ordinance, an offer to the public (“appel public à l’épargne”) was made when (i) securities were admitted to trading on a regulated market or (ii) securities were issued or sold (a) to the public and (b) through advertising, cold calling (“démarchage”) or the use of credit institutions or investment service providers (this second criteria was sometimes called the “means test”).
2. **(a) Do pre-emptive offers to shareholders (such as a rights issue or open offer) require a prospectus either because it is a public offer or because there is a listing of the new shares (and, if applicable, the nil-paid rights)?**

A pre-emptive offer to shareholders requires a prospectus and qualifies as an offer to the public:

(A) if the offer itself is an offer to the public (which will be the case for listed companies); and/or

(B) if the offer is a private placement and the issuer seeks to admit the newly issued shares to trading on a regulated market (without any exemptions).

Under the Euronext rules, an issuer whose shares are listed on Euronext Paris must seek admission of newly issued shares having the same nature as those already admitted to trading as soon as such shares are issued in case of a placement made to all or part of the public and no later than ninety days after their issue in other cases. It follows that an issuer whose shares are admitted to trading on Euronext Paris will, in the event of an issue of new shares of the same class in a private placement, have to seek admission of those new shares (which may require the issuer to publish a prospectus).

However, pursuant to the GR AMF, the obligation to publish a prospectus does not apply when shares representing, over a period of 12 months, less than 10 per cent. of the number of shares of the same class already admitted to trading on a regulated market, are admitted to trading on the same regulated market.

**(b) Can you exclude overseas shareholders from the offer? If so, are they compensated in any way for being excluded?**

French companies usually exclude overseas shareholders from an offer if such shareholders reside in a Member State where the prospectus has not been ‘passported’. However, issuers may allow overseas shareholders residing in a Member State to subscribe to the offers if they are aware of the offer without any solicitation.

Generally, issuers specifically exclude overseas shareholders residing in non-Member States (such as the US, Canada and Japan) and will not accept their subscriptions, even if they are aware of the offer without any solicitation. There is no specific legal compensation for the excluded overseas shareholders of a French company but it is common for financial intermediaries to sell the pre-emptive rights belonging to such shareholders and pass the cash proceeds of the sale to them.

**(c) Can you issue the shares at a discount to their market price and if so what shareholder approval is required for a discounted issue?**

**(i) Share issues with a preferential subscription right**

Although the issue price cannot be less than the nominal value of the shares, the issue price (and discount thereon) is usually determined by the board of directors following a shareholder vote to delegate such determination at the annual general meeting of the company. The board of directors is typically given full discretion for determining the discount. It is common for shares to be issued at a 30 to 40 per cent. discount to the market price.
(ii) **Share issues without a preferential subscription right**

(a) **Companies whose shares are listed on a regulated market** must offer their shares to the public at a price no less than the volume-weighted average of the market price of the last three days preceding the date of determination of the price less a discount of up to 5 per cent. Subject to a limit of 10 per cent. of the share capital per annum, the extraordinary general meeting may authorise the board of directors to set the issue price on the basis of a set of terms determined by the shareholders. These terms (volume and price formula) are proposed by the board of directors in the resolution submitted to vote at the extraordinary general meeting. For example, the resolution can state that the price will be fixed according to a book-building process, except that it must at least be equal to a floor price.

The extraordinary general meeting may delegate to the board of directors the authority to increase capital without pre-emption rights through either a private placement reserved to unidentified qualified investors or to an unidentified restricted circle of investors limited to 20 per cent. of the share capital per annum (subject to the minimum price limit set out above).

(b) **Companies whose shares are not listed** must offer their shares at an issue price determined by the extraordinary general meeting (or at conditions determined by the extraordinary general meeting) after review of a report of the board of directors and a special report of the auditors.

(d) **What pre-emption rights do shareholders have and how can they be excluded?**

Shareholders have a preferential right to subscribe for all share capital increases in proportion to the value of their holding. This right may only be excluded by a vote at the extraordinary general meeting after a review of reports from the board of directors and the auditors.

The extraordinary general meeting may also decide to exclude preferential subscription rights in favour of one or more categories of persons, thus reserving the share capital increase to these persons. In these circumstances, the issue price is determined by the extraordinary general meeting (either directly or by setting rules). The AMF takes a restrictive view of such exclusions, so that qualified investors do not qualify as a definable category.

The Ordinance allows the extraordinary general meeting to delegate to the board of directors the authority to decide capital increases without pre-emptive rights and through private placement reserved to unidentified qualified investors or to an unidentified restricted circle of investors limited to 20 per cent. of the share capital per annum (subject to the pricing rules applicable to share issues without preferential right – see our answer to Question 2 (c) above).

It has become common for listed companies to grant shareholders a subscription priority ("droit de priorité") period in the context of convertible bond offerings without pre-emption rights. Such priority period must last at least 3 days.
Shareholders typically receive guidance from:

- the board of directors, which must issue a report at the shareholders’ meeting regarding the exclusion of pre-emptive rights, if any (please note that under French law blank proxy forms are deemed to vote in favour of the resolutions submitted or approved by the board of directors and against adopting any other resolutions); and

- proxy firms, which may issue their own guidance to shareholders on how to exercise their voting rights on these matters (such publication is a common practice for major listed companies).

(e) What is the timetable and process for a pre-emptive offer to shareholders?

The normal process for a pre-emptive offer to shareholders is around six weeks from the kick-off meeting to the opening of the subscription period and is as follows.

<table>
<thead>
<tr>
<th>Day (in trading days)</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>D – 20</td>
<td>Prepare an update of the registration document (“document de référence”) which describes the characteristics of the issuer and is often registered or filed with the AMF on a yearly basis and updated via a separate document named the “actualisation du document de référence” at the time of the offer, and a draft securities note (“note d’opération”) which describes the characteristics of the offer</td>
</tr>
<tr>
<td>D-10</td>
<td>File the draft prospectus on a confidential basis with the AMF</td>
</tr>
<tr>
<td>D</td>
<td>Agree with one or several investment service providers to irrevocably guarantee the offer (if applicable); and obtain approval (“visa”) by the AMF of the prospectus (the approved prospectus must be made public as soon as practicable and, in any case, at a reasonable time in advance of and, at the latest, at the beginning of the public offer or the admission to trading on the regulated market)</td>
</tr>
<tr>
<td>D+1</td>
<td>Press release of the issuer announcing the offer and subscription period (before the market opens); publication of the prospectus on the issuer’s and the AMF’s website; and publication of the prospectus in a national newspaper (optional)</td>
</tr>
<tr>
<td>D+2</td>
<td>The subscription period commences</td>
</tr>
<tr>
<td>D+11</td>
<td>The subscription period closes (the subscription period typically lasts 10 trading days)</td>
</tr>
<tr>
<td>D+18</td>
<td>Statement announcing the results, and publication by Euronext of a statement (“avis”) indicating that the shares will be admitted to trading and the final amount of the offer</td>
</tr>
<tr>
<td>D+20</td>
<td>Certificate of the depositary; issuance of the new shares; settlement – delivery; and listing of the new shares</td>
</tr>
</tbody>
</table>

The AMF has set up a fast track procedure under which the review process for the prospectus is limited to five trading days. The normal review process typically requires about two or three weeks. The fast track procedure is available to issuers in “good standing”, that is, the registration document (“document de référence”) must be filed and updated during the three previous fiscal years and contain all the information required by the Prospectus Directive (periodic and permanent disclosure shall also be up to date).
For public offerings of securities and if the issuer is of “good standing” the securities note (“note relative aux instruments financiers”) is filed no later than five trading days before the proposed date for obtaining approval for the transaction. The AMF has two trading days from the date of this filing to decide whether or not to grant the fast track procedure.

If additional information is required by the AMF, the five trading days limit commences when the AMF receives that information.

3. (a) Do you need a prospectus to offer shares instead of cash dividends to shareholders?

No. Under the GR AMF, the obligation to publish a prospectus does not apply to share dividends if the shares are of the same class as those in respect of which such dividends are paid, provided that a document containing information on the number and nature of the securities and the reasons for and details of the transaction is made available by the issuer to the shareholders.

In the event the shares received are not of the same class as the shares in respect of which such dividends are paid, a prospectus would normally be required (see however our answer to Question 1 with respect to private placement).

(b) Does the answer differ if shareholders are offered a choice between cash or shares for their dividend?

No, but under the FCC, shareholders cannot be forced to accept shares in lieu of cash dividends. Shareholders must be offered the option to receive cash. Moreover, for the option to be implemented, the articles of association of the company must allow shareholders to be offered such a choice.

(c) Does the answer differ if the shares of the company concerned are listed in another jurisdiction and not in your jurisdiction?

No, but the issuer may have to publish certain information pursuant to regulations applicable in the jurisdiction where its shares are listed.

In France, no public solicitation in connection with transactions of securities on a foreign market other than an EEA regulated market may take place, unless such market is a recognized foreign market, as determined by decree and subject to reciprocity. We are not aware of any case law or AMF’s position on this matter, but we believe that offers made solely to qualified investors should not constitute a “public solicitation”.

If the shares to be given as a dividend are to be listed in France and there are no other shares of a similar class listed in France or the shares received as dividends are not of the same class in respect of which such dividend is paid, a prospectus may be needed. However, the obligation to publish a prospectus does not apply when the financial instruments to be admitted to trading on the French regulated market are already admitted to trading on another regulated market, if:

(i) this class of financial instruments have been admitted to trading on that other regulated market for more than 18 months;
(ii) the admission to trading on that regulated market was pursuant to a prospectus made available to the public in accordance with the Prospectus Directive, Directive 80/390/EEC or Directive 2001/34/EC;  

(iii) the issuer has fulfilled all its periodic and ongoing disclosure obligations on that regulated market; and  

(iv) the person applying for admission prepares a French summary to be published and circulated in accordance with the GR AMF, although such a summary is not required if the admission concerns that part of the regulated market reserved to qualified investors. The summary must state the location where the most recent prospectus can be obtained and where the financial information published by the issuer pursuant to (iii) is available.

4. If an overseas company wants to offer shares to employees in your jurisdiction as part of an employee share scheme what exemptions are available to the need to file a prospectus? Are there any other regulatory requirements in relation to the distribution of information regarding the share scheme?

Under the GR AMF, the obligation to publish a prospectus does not apply to the disposal or issuance of securities offered, allotted or to be allotted to existing or former employees by their employer or by an affiliate, provided that a document containing information on the number and nature of the instruments as well as the reasons for and details of the transaction is made available by the issuer and provided that:

(A) the issuer has its head office or registered office in a Member State of the European Union, or that;  

(B) the issuer has its head office or registered office in a State outside the European Union and has its securities admitted to trading on a regulated market; or  

(C) has its shares admitted to trading on another country market, provided that, adequate information, including the aforementioned document, is made available at least in a language customary in the sphere of international finance and that the Commission has adopted an equivalence decision regarding the third-country market concerned.

Note however our remark in Question 3.(c) above regarding “public solicitation”; where employees located in France are so numerous that they could be considered as being the public.

The Loi Toubon provides that the above mentioned document (as well as any circular, notice and other documents (other than a prospectus compliant with the Prospectus Directive) concerning the offer of financial services or financial goods) must be in French. Breach is an offence which may give rise to a fine of up to €750 for individuals and up to €3,750 for companies, per offence.

As of today, we are not aware of an issuer having been sanctioned on the basis of the Loi Toubon.

2 For financial instruments not mentioned in (ii) and first admitted to trading after June 30, 1983 and before the transposition of the Prospectus Directive a prospectus must have been approved in accordance with directive 80/390/EEC or directive 2001/34/EC.
5. Is a scheme of arrangement an offer to the public?

The concept of scheme of arrangement has no equivalent under French law.

However, it is likely that the AMF, since entry into force of the Ordinance, will follow the views of other European regulatory authorities and accept that a scheme of arrangement is not an offer to the public.

6. Is a takeover by means of a stock offer an offer to the public?

A prospectus is not required if the issuer produces a document ("note d’information") containing information equivalent to that required in a prospectus. This exemption applies by virtue of the fact that the takeover involves a securities exchange offer. Note, however, that a bidder may choose to publish a prospectus to take advantage of ‘passporting’ arrangements which are not available for an equivalent document.

7. Is a demerger an offer to the public?

Note that under the GR AMF the obligation to publish a prospectus does not apply to the disposal, issuance, or admission to trading on a regulated market of the securities offered, allotted or to be allotted in connection with a demerger provided that a document, subject to AMF scrutiny and containing information equivalent to that in the prospectus, is made available by the issuer.

In addition, where the securities issued in a merger, demerger or spin off represent less than 10 per cent. of the securities of the same category already listed on a regulated market, the issuer needs to issue a press release only, stating the number and type of securities and the terms and condition of the operation.

8. Who generally takes responsibility for the prospectus? Is it the company or the directors? Do the underwriters accept any responsibility for the document? How does the position differ whether it is debt or equity?

The company or its CEO takes responsibility for the prospectus, along with any persons accepting responsibility. Under the GR AMF, the persons responsible for the prospectus must be clearly identified therein. The signature of such persons must be preceded by a declaration confirming that, to the best of their knowledge, the information contained therein is in accordance with the facts and makes no omission likely to affect its import.

According to the GR AMF, where an investment services provider takes part in the first admission to trading of securities on a regulated market or in any offering during the first three years after first admission, the provider must certify to the AMF that it has exercised customary professional diligence and found no inaccuracies or material omissions likely to mislead investors or affect their judgement.

It is customary for underwriters to negotiate an indemnification clause with the issuer.

The position does not differ whether the offer is for debt or equity.

9. (a) What is the general structure and timing for public offers? For example, is it common to issue a prospectus containing a price range and then market with a view to
building the book or is the marketing carried out with a pathfinder/red herring document and the final prospectus only issued once the price has been determined? If a prospectus is issued containing a price range in what circumstances can you simply issue a price announcement as opposed to issuing another prospectus when the final price is determined? How long must the offer be kept open once the final price has been determined?

As a matter of principle, no documentation is circulated to investors prior to the AMF’s "visa". However, it is common for issuers to "test" market appetite prior to launch of the offer by presenting the transaction to major shareholders of the company and/or key target investors who have undertaken to maintain the confidentiality of information disclosed to them and to refrain from trading in the relevant stock until the contemplated offer is known to the public.

In terms of the price, a distinction must be made between an IPO and subsequent offers.

(i) IPO

It is common to issue a "note d’opération" (securities note) containing a price range. The AMF considers that the price range should be +/ – 10 per cent. of the indicative price. The lower limit may be indicative or mandatory. The issuer shall clearly indicate the option chosen in the securities note.

If the final price is outside the price range indicated in the "note d’opération", a supplemental securities note to be approved by the AMF must be published. A new subscription period then begins, which shall be no longer than two trading days after publication of the supplement. Previous subscriptions are either revocable or null, depending on the option chosen by the issuer in the prospectus. The supplement shall be published and distributed in the same manner and format in the same ways as the initial prospectus (usually a press release is made in accordance with the requirements of Article 212-27 II of the GR AMF).

If the final price is within the price range, the issuer must issue a press release in two financial newspapers distributed nationally and the initial offer period remains unchanged.

(ii) Subsequent capital increase

(a) For offerings with preferential subscription rights, the price must be determined in the prospectus.

(b) For other offerings, it is common to issue a prospectus containing a price range and then issue a press release once the price has been determined. The AMF considers that the price range should be +/ – 7.5

3 If the prospectus so indicates, the lower limit of the price range may be indicative. Therefore, if the final price for the offered shares is set below the lower limit, it may be disclosed by a press release (no need for a new AMF visa), if it would not have a significant impact on the other parameters set forth in the prospectus; otherwise, a new visa would be required. In the absence of a clear statement, a lower limit to the range is imperative, which means that a new visa would be required if the price set is outside the limit.
per cent.\(^4\) of an indicative price. In a private placement to institutional investors and simultaneous “retail” public offer containing a price range, the “retail” public offer price cannot exceed the private placement price. The “retail” public offer price is, as a matter of practice, aligned on the price resulting from the book building in the private placement. Under the GR AMF, where the final issue price cannot be included in the prospectus, the prospectus must set out: (i) the criteria or conditions in accordance with which the price is established; or (ii) the maximum price of the transaction. The final price must be filed with the AMF and published in the same manner as the prospectus. Where the criteria by which the price is established or the maximum price is not mentioned in the prospectus, investors must be entitled to withdraw their acceptance or subscription for the securities for at least two trading days following publication of the final price.

(b) **If you are making a public offer, is there a minimum amount of the securities that must be offered to retail investors?**

No, except in respect of initial public offerings where a sufficient number of securities must be distributed to the public. This is deemed to be the case either (i) when at least 25 per cent. of the subscribed capital represented by the class of securities concerned is held by the public or (ii) when, in view of the large number of securities of the same class and the extent of their distribution to the public, the market will function with a lower percentage. This percentage may not be lower than 5 per cent. and must represent a value of at least five million Euros calculated on the basis of the offering price.

Also under the GR AMF, the lead manager must use its best efforts to satisfy demands for securities from individual investors. This objective is deemed to have been met when there is a procedure, centralised by the market operator and characterised by an allotment proportional to applications submitted, under which at least 10 per cent. of the overall offering amount is put on the market and made accessible to retail investors.

The lead manager shall endeavour to avoid an obvious imbalance between allotment to retail investors and institutional investors to the detriment of the former. Thus, transfer mechanisms (clawback) to avoid such imbalance are often implemented.

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\(^4\) On 30 June 2009, the AMF amended its position on the rules relating to IPO pricing: until then, the price range given in the prospectus was mandatory and variations were limited to plus or minus 7.5 per cent. around the mid-point of the price range i.e. the median price of the range. Today, an IPO prospectus must clearly indicate whether an issuer has chosen to apply an indicative or mandatory lower limit of the price range, and the price range has been increased to plus or minus 10 per cent. (see above). However, we consider that these new rules are applicable only to IPO pricing, and that the former rules remain applicable for other capital raisings.
GERMANY

1. How has the Prospectus Directive been implemented in Germany?

Germany implemented the Prospectus Directive with the German Securities Prospectus Act (WpPG). The ESMA Recommendations have not been formally incorporated into German law, however BaFin has stated that it will give due regard to them. The German Securities Prospectus Act requires the publication of a prospectus: (i) for a public offer; and (ii) for admission to trading in Germany; both requirements are subject to certain, distinct, exceptions.

2. (a) Do pre-emptive offers to shareholders (such as a rights issue or open offer) require a prospectus either because it is a public offer or because there is a listing of the new shares (and, if applicable, the nil-paid rights)?

A rights offering to shareholders constitutes a public offer triggering the requirement for a prospectus (unless a general exemption is applicable, which will rarely be the case). The proportionate disclosure requirement available pursuant to Annex XXIV of the Prospectus Regulation is applicable in Germany. However, it remains to be seen whether this new regime will be acceptable to market participants.

(b) Can you exclude overseas shareholders from the offer? If so, are they compensated in any way for being excluded?

As a matter of corporate law it is generally not possible to exclude overseas shareholders from the offer. Depositary banks are generally prevented, by technical guidelines, from forwarding written materials in relation to an offer to overseas shareholders where the forwarding of such material is restricted in the jurisdiction to which it is to be sent. Where such information is not forwarded and accordingly the relevant shareholder does not take up the offer, the depositary bank will, on the penultimate day of the offer, in accordance with its standard terms, sell the rights due to such shareholder and account for any proceeds.

Similarly, so to exclude a public offering in the United States, German ADR-programmes include cash out provisions (mandatory sale of rights) for US shareholders in the event of a rights offerings.

(c) Can you issue the shares at a discount to their market price and if so what shareholder approval is required for a discounted issue?

A rights issue may be at a discount to the market price of the share. Where a company has sufficient authorised capital (genehmigtes Kapital), it may be able to conduct a rights issue without requiring specific shareholder authority. In other circumstances a shareholders’ resolution will be required. There are no limitations to the discount (other than that the subscription price must not be below the nominal value of the relevant share). However, the board must exercise due care (business judgement rule) in setting the discount so not to allow unnecessary dilution of the share price and earnings per share due do the corresponding increase in the number of shares outstanding. If shares are offered to third parties excluding pre-emptive rights, the capital increase must be for cash, must not exceed 10 per cent. of the registered capital and the discount must not exceed 3-5 per cent. (see (d) below).
The analysis differs if shares are offered at a premium to the prevailing market price. This may constitute a factual exclusion of subscription rights which requires a separate shareholders’ resolution.

**(d) What pre-emption rights do shareholders have and how can they be excluded?**

Under the German Stock Corporation Act, each shareholder is, as a rule, entitled to subscribe for shares newly issued in connection with a capital increase based on the shareholder’s stake in the current share capital.

Such subscription rights may be excluded by a 75 per cent. majority relative to the share capital represented in the shareholders’ meeting. Such an exclusion of subscription rights requires a report from the management board, which must justify the exclusion of the subscription rights by demonstrating that the company’s interests in the exclusion outweigh the shareholders’ interests in the granting of the subscription rights. Whether this is the case depends on the circumstances; examples are acquisitions in a share-for-share transaction or the offer of shares to employees. An exclusion of the subscription rights to newly issued shares of a listed company is deemed to be justified by law if:

(i) the company increases its capital against cash contributions;

(ii) the nominal amount of the capital increase does not exceed 10 per cent. of the existing share capital; and

(iii) the issue price of the new shares is not materially less than the market price.

**(e) What is the timetable and process for a pre-emptive offer to shareholders?**

A rights offering requires the preparation of a prospectus. The lead time for the preparation will be two to four months prior to the approval of the prospectus and the commencement of the subscription period. The subscription period must be no less than two weeks and rarely exceeds this minimum period.

A standard timetable for a rights offering would be as follows:

<table>
<thead>
<tr>
<th>Day</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Approval and publishing of prospectus</td>
</tr>
<tr>
<td>1</td>
<td>Publication of Subscription Offer; booking of rights into depositary accounts; old shares are traded “ex rights”</td>
</tr>
<tr>
<td>2</td>
<td>Commencement of subscription period</td>
</tr>
<tr>
<td>16</td>
<td>Latest time and date for acceptance and payment in full</td>
</tr>
<tr>
<td>17</td>
<td>Determination of acceptance level; endeavour to sell rump</td>
</tr>
<tr>
<td>18</td>
<td>Sub-underwriters, if any, informed of commitments</td>
</tr>
</tbody>
</table>
3. **(a) Do you need a prospectus to offer shares instead of cash dividends to shareholders?**

Shares offered as a dividend in kind are exempted from the requirement to prepare a prospectus pursuant to § 4(1) no. 4 of the German Securities Prospectus Act provided that they are of the same class as the shares in respect of which the dividend is paid. The listing of such shares on the relevant stock exchange does not require the preparation of a prospectus pursuant to § 4(2) no. 5 of the German Securities Prospectus Act. In each case limited information about the number and class of the shares and the reasons and details for the offer must be made available.

**(b) Does the answer differ if shareholders are offered a choice between cash or shares for their dividend?**

We believe that the answer should not differ if shareholders are offered the choice between cash or shares for the dividend provided that the shares distributed are of the same class as the shares in respect of which the dividend is paid.

**(c) Does the answer differ if the shares of the company concerned are listed in another jurisdiction and not in your jurisdiction?**

We believe that the answer should not differ if the shares are offered by a non-German corporation.

4. **If an overseas company wants to offer shares to employees in your jurisdiction as part of an employee share scheme what exemptions are available to the need to file a prospectus? Are there any other regulatory requirements in relation to the distribution of information regarding the share scheme?**

The German Securities Prospectus Act provides for an exemption to the requirement to publish a prospectus (both for purposes of the public offer and the listing) with regards to an offer of shares to the current and former executive directors and employees of an issuer (or of an affiliate of such issuer), where: (i) the issuer has its central office or its seat in the European Economic Area; (ii) the issuer’s securities are already admitted to an (in the case of a listing: the same) organized market (that is a market approved, regulated and supervised by a state in Germany, another member state of the EU or the EEA); or (iii) the issuer’s securities are already listed on a third-country market, the Commission has adopted an equivalence decision regarding the third-country market in question and sufficient information including the document referred to below is available (which may be drawn up in English); this does not extend, however, to shares listed for example in the US). In such circumstances there is a requirement to publish a document containing information about the number and the nature of the securities and the reasons and details of the offer.

5. **Is a scheme of arrangement an offer to the public?**

There is a strong argument for holding that a UK scheme of arrangement should not be considered to be an offer to the public, as individual investors are not able to take an investment decision but only have to vote on the arrangement and will receive shares even where they voted against the scheme. However, BaFin has refused to give official guidance on this question, and without such official guidance, market participants have been hesitant to act on the basis that a scheme of arrangement is not an offer to the public. So as to avoid confronting this issue
some offerors have opted to "cash-out" German shareholders instead of issuing shares in the resulting entity to them.

6. **Is a takeover by means of a stock offer an offer to the public?**

A takeover by means of a stock offer constitutes an offer to the public under German law. This is of little relevance to a takeover of a German target company, as the offer document in connection with the takeover offer must in any event include statements which are in compliance with the requirements of the Prospectus Regulation.

Where a German offeror makes a takeover offer in relation to a non-German target company, the offeror will often wish to have the new shares offered to the target shareholders admitted to trading on a German stock exchange. Arguably, in this context the offeror may rely on an exemption from the requirement to publish a listing prospectus if the shares were offered in connection with a share-for-share-takeover offer and a document is available which includes statements that are equivalent to those of a prospectus (§ 4(2) no. 3 of the German Securities Prospectus Act). Several questions arise in this context, namely:

(A) Whether the offer document includes all statements required under the Prospectus Regulation, namely risk factors, a business description and a Management Discussion and Analysis, in order to meet the equivalence-test.

(B) Whether the financial institution accompanying the listing is subject to prospectus liability by co-applying the listing exempted from the requirement to publish a separate prospectus with an equivalent document supporting the listing. According to Section 21(4) of the German Securities Prospectus Act, the offeror will be subject to prospectus liability as the offer document is a document on the basis of which the issuer is exempted to publish a listing prospectus. It has been argued in legal literature that the financial institution that co-applies the listing may be subject to prospectus liability for the equivalent document as well because such document serves similar purposes and by virtue of the listing-co-application the financial institutions assumes responsibility for the equivalent document.

(C) Whether the financial institution therefore requires disclosure opinions in connection with the offer document.

Where a domestic or non-domestic offeror wishes to direct a share offer for a non-German target company to German shareholders, the equivalence-test discussed above would be applicable. If the offeror is domiciled in the EEA, it could also passport a prospectus approved in its home member state for the purposes of the offer.

7. **Is a demerger an offer to the public?**

A demerger (Abspaltung) does in itself not constitute an offer to the public as, although shareholders are required to vote on the demerger, they are not able to individually elect whether to receive securities. However, the prospectus requirement will be triggered as the new shares will need to be listed on an exchange. Potentially, the demerger-report can serve the listing of the new shares to a German stock exchange, eliminating the need for a prospectus, if such report meets the requirements of the Prospectus Regulation and therefore constitutes an equivalent document.
8. Who generally takes responsibility for the prospectus? Is it the Company or the directors? Do the underwriters accept any responsibility for the document? How does the position differ whether it is debt or equity?

The issuer itself must always assume responsibility for the prospectus. § 5(3)(2) and § 5(4)(2) of the German Securities Prospectus Act require the accompanying financial institution to sign and take responsibility for the prospectus as well where the prospectus serves as a listing document. The directors are not required to assume personal responsibility for the prospectus.

The position does not differ whether it is a debt or equity prospectus. (Partially for this reason, debt instruments are often listed outside of Germany (e.g. in Luxembourg) where no responsibility needs to be assumed by a financial institution.)

9. (a) What is the general structure and timing for public offers? For example, is it common to issue a prospectus containing a price range and then market with a view to building the book or is the marketing carried out with a pathfinder/red herring document and the final prospectus only issued once the price has been determined? If a prospectus is issued containing a price range in what circumstances can you simply issue a price announcement as opposed to issuing another prospectus when the final price is determined? How long must the offer be kept open once the final price has been determined?

German market practice differentiates between so-called “decoupled” transactions and traditional offerings with a price range.

(A) A “decoupled” transaction consists of the following:

(i) a prospectus, which does not include a price range, being approved by BaFin. Such a prospectus will be required to state the maximum number of shares to be offered and the expected proceeds of the offer, although it is permissible to state that the exact proceeds are uncertain at the date of the prospectus;

(ii) a consultation of institutional investors so as to establish the estimated value of the company; and

(iii) the setting of a price range, together with the publication of a supplement to the prospectus and a short book building process of 3-5 days.

(B) In a traditional transaction, a prospectus including a price range is approved by BaFin and book building commences thereafter, typically taking up to two weeks. A supplement is not required when the deal is priced if the original prospectus included a price range. Accordingly, the price is often fixed on a Saturday and trading commences on the following Monday. At the time the final price has been determined the offer is no longer kept open. Upon pricing a “pricing package” will be sent to investors. If the participants wish to price outside the range, this would generally require a supplement to the prospectus, triggering a withdrawal right within two working days upon publication of the supplement; depending on the timing the offer period may need to be extended.
(b) If you are making a public offer, is there a minimum amount of the securities that must be offered to retail investors?

There is no minimum amount of securities that must be offered to retail investors. However, an exchange listing is subject to minimum amounts.
ITALY

1. **How has the Prospectus Directive been implemented in Italy?**

   Italy has implemented the Prospectus Directive by amending the CFA and the Issuer Regulation.

   While the ESMA Recommendations are not incorporated by reference into the Issuer Regulation, Consob generally adheres to the CESR Recommendations.

2. **(a) Do pre-emptive offers to shareholders (such as a rights issue or open offer) require a prospectus either because there is a public offer or because there is a listing of the new shares (and, if applicable, the nil-paid rights)?**

   Pre-emptive offers to shareholders are public offers of securities and require the drafting of a prospectus if none of the available exemptions apply. Being a pre-emptive offer deemed to be a public offer of securities, the issuer is required to draft a prospectus even if the newly issued shares are not admitted to trading on a regulated market. However, a proportionate disclosure regime, providing for reduced content requirements for prospectuses, applies in connection with rights issues and certain other types of secondary pre-emptive issues, where the issuer has shares of the same class already admitted to trading on a regulated market or on a multi-lateral trading facility, according to the Prospectus Regulation as amended by the EU Commission Regulation No 486/2012.

   However, if the offer falls within any of the exemptions described below in section 3 question 1, a prospectus will only be required where the new shares are to be listed on a regulated market, unless such shares represent less than 10 per cent. of the number of shares of the same class already admitted to trading on that same regulated market in the preceding twelve months.

   Any nil-paid rights which have not been taken up during the subscription period must be offered for at least five successive days on a regulated market in the month following the expiration of the subscription period. The trading of such nil-paid rights on a regulated market does not in itself require a listing prospectus as all the necessary information regarding the rights will be included in the rights issue prospectus itself.

   **(b) Can you exclude overseas shareholders from the offer? If so, are they compensated in any way for being excluded?**

   Under Article 92 of the CFA, Italian listed issuers must treat all shareholders equally and cannot arbitrarily discriminate between holders of similar financial instruments.

   Although there are no precedents, our view is that an Italian listed issuer may not exclude overseas shareholders from the offer by disapplying pre-emption rights, as this may breach the principle of equality.

   **(c) Can you issue the shares at a discount to their market price and if so what shareholder approval is required for a discounted issue?**

   A company may issue shares at a discount in a rights issue. The issue price of the shares and the discount can be determined at a shareholders’ meeting (following a proposal by the board of directors), provided that such price
is not lower than the par value. The resolution is passed with the quorum provided for extraordinary shareholders’ meetings (i.e. the attendance of the majority of the share capital and the favourable vote of 2/3 of the attendees).

(d) What pre-emption rights do shareholders have and how can they be excluded?

Existing shareholders have pre-emption rights, namely the right to subscribe for a number of new shares in proportion to their existing holding and, at their express request, a further right to subscribe for those shares that have not been taken up by other shareholders.

Pre-emption rights can be excluded or limited. However, the issue price must be determined on the basis of objective criteria, such as the market value of the shares and/or the value of the company’s net worth. In particular, pre-emption rights can be excluded or limited in the following cases:

(A) where the “interest of the company” requires shareholders’ pre-emption rights to be limited or excluded in connection with a rights issue. In this case:

   (i) the company’s directors must prepare a report setting out the reasons for such limitation or exclusion and the criteria used to determine the issue price. The report must be transmitted to the board of statutory auditors and to the company’s external auditors at least 30 days prior to the shareholders’ meeting (this period extends to 45 days for listed companies); and

   (ii) the issue price of the new shares must be based on the value of the company’s net worth, also taking into consideration the trading price of the shares registered in the last six months, and must be certified by the board of statutory auditors and the company’s external auditors;

OR

(B) where the articles of association of a listed company expressly allow for a disapplication of pre-emption rights in a rights issue and the new shares represent less than 10 per cent of the company’s share capital. The issue price must be equal to the current market value of existing shares and certified by the company’s external auditors.

Please note that there are no pre-emption rights in favour of existing shareholders for rights issues to be subscribed by way of a contribution in kind, or for rights issues reserved to employees of the issuer and its controlling and/or controlled entities. Where the subscription is by way of a contribution in kind, the provisions under (A) (i) and (A) (ii) above apply.

(e) What is the timetable and process for a pre-emptive offer to shareholders?

Assuming that the shareholders of the issuer have already approved the capital increase, the timetable for a rights issue is as follows. Please note that the timetable below refers to calendar days.
Day

0  Impact day: Announcement of the offer. Publication of the rights issue prospectus. Filing the pre-emptive offer to shareholders with the Company’s Registrar

1  Start of the pre-emptive offer. Dealings in pre-emptive rights commence

15  End of the subscription period

16  A notice providing details of the auction period and the number of pre-emption rights being auctioned is published in a daily Italian newspaper

17  Pre-emption rights that have not been exercised are auctioned on the stock exchange for at least five market days

3.  (a) Do you need a prospectus to offer shares instead of cash dividends to shareholders?

According to a specific exemption provided under Article 34-ter of the Issuer Regulation, there is no requirement for a prospectus where it is proposed to offer shares instead of cash dividends provided that the company makes available a document containing information on the number and nature of the shares and the reasons for and details of the offer.

  (b) Does the answer differ if shareholders are offered a choice between cash or shares for their dividend?

Although we are not aware of any precedent, if shareholders are offered a choice between cash or shares for their dividend a prospectus (or, alternatively, an information document in the form provided under the exemption mentioned in the paragraph above) may be required, also depending on how the transaction is structured.

  (c) Does the answer differ if the shares of the company concerned are listed in another jurisdiction and not in your jurisdiction?

No. The answer in 3 (a) will still apply provided that the shares of the company concerned are listed on a regulated market within the European Union.

4.  If an overseas company wants to offer shares to employees in your jurisdiction as part of an employee share scheme what exemptions are available to the need to file a
prospectus? Are there any other regulatory requirements in relation to the distribution of information regarding the share scheme?

The Issuer Regulation provides for specific exemptions for offerings of securities to employees, former employees, directors and former directors of the issuer or entities controlling, controlled by, or under common control with the issuer, and in particular:

(i) The exemption under Article 34-ter, paragraph 1, letter (m) of the Issuer Regulation is subject to the following conditions:

(a) the issuer’s head office or legal office is located in a country within the European Union; and

(b) a document containing information on the number and the nature of the securities as well as the reasons for and details of the offering (the “Information Document”) is made available to the offerees.

(ii) The exemption under Article 34-ter, paragraph 1, letter (m-bis) of the Issuer Regulation applies to non-EU issuers whose shares are already admitted to trading on a EU regulated market – no Information Document is required; and

(iii) the exemption under Article 34-ter, paragraph 1, letter (m-ter) of the Issuer Regulation to non-EU issuers, whose financial instruments are already admitted to trading on a third country market. In this case, the availability of the exemption is subject to the following conditions:

(a) adequate information as well as an Information Document drawn-up in a language customary in the sphere of international finance is made available to the offerees; and

(b) the European Commission has adopted an equivalence decision regarding the third-country market concerned pursuant to Article 4 of the Prospectus Directive.

No filing of the Information Document is required.

5. Is a scheme of arrangement an offer to the public?

Italian law does not have a direct equivalent to a scheme of arrangement. Schemes of arrangement do not easily translate into any known legal structure under Italian securities law. Previously, Consob has ruled that a scheme of arrangement qualifies as a takeover under Italian law, as the target’s shareholders are asked to pass a resolution binding them to transfer their financial products in exchange for cash and/or other securities. Please note that the CFA provides a broad definition of takeovers as “offers, invitations to offer or promotional messages, in whatsoever form effected, whose objective is the purchase or exchange of financial products” which are addressed to at least 150 offerees in Italy and have an aggregate value exceeding €5,000,000 on an EU-wide basis.

According to this interpretation, a notice convening the holders of securities to pass a resolution approving a transaction that entails amendments to their securities can in itself be regarded as a takeover and, in particular, an exchange offer. As a consequence, should none of the exemptions from the takeover rules apply, an offer document drawn-up in compliance with Consob’s forms and including the same information that would be
disclosed in a purely domestic takeover must be filed with Consob. After its approval, the offer document must then be published reasonably in advance of the shareholders’ meeting of the target convened to consider the scheme, and before the scheme documentation is sent to the Italian shareholders.

In addition, a scheme of arrangement involving Italian shareholders must also be considered from a solicitation perspective to the extent that securities are allotted by the bidder to the target’s shareholders. Indeed, this may constitute a public offer of securities and a prospectus would need to be produced, irrespective of whether the securities represent 10 per cent. or more of the relevant class of shares already admitted to trading.

Recently, Consob appears to have changed its approach on the matter. As a consequence of the financial crisis, a significant number of issuers were obliged to restructure their debts and Italian investors were often excluded from certain restructuring plans as a consequence of the strict solicitation rules in Italy. As a consequence of this, and noting the damage that Italian investors suffered for not being able to participate in such restructurings, Consob recently stated that the takeover rules should not apply in the case of a “consent solicitation”, i.e. a transaction where the holders of securities are called to resolve on amendments to the terms and conditions of their securities where the majority binds the minority. In fact, no proper acceptance by each recipient of the new securities is deemed to occur.

Should Consob confirm such an interpretation, the implementation of a scheme of arrangement could theoretically fall outside the ambit of the Italian takeover (and prospectus) rules. However, as the recent Consob communication does not expressly mention schemes of arrangement, it is advisable to seek advice, on a case by case basis, as to whether restructuring schemes fall within the category of “consent solicitation”.

6. **Is a takeover by means of a stock offer an offer to the public?**

A takeover by means of a stock offer is considered as an offer to the public and therefore requires a prospectus, unless any exemptions apply.

Please note that no prospectus needs to be filed in connection with an exchange offer if an offer document has already been approved by Consob for the purposes of the takeover rules. However, should the exchange offer be exempted from a takeover perspective – and, therefore, there would be no requirement for an offer document – this would not prevent the transaction from triggering prospectus requirements. In these circumstances, the implementation of a passporting procedure of a prospectus approved by another EU competent authority in connection with the same offer, if any, should be considered. Alternatively, Consob could be approached to enquire whether the scheme document may be recognised in Italy as an “equivalent document” pursuant to Article 4 (b) of the Prospectus Directive.

7. **Is a demerger an offer to the public?**

A demerger should not *per se* be considered as an offer to the public. A demerger does not necessarily involve an exchange of securities and in principle there is no need to make new investments or exchange existing shareholdings in the demerged entity.

However, if an issuer is demerged into a company that already runs its own business, the position of shareholders in the demerged issuer is substantially similar to that of shareholders of a company that has been absorbed.
by another entity. In this event, a prospectus may be necessary either for solicitation purposes or to list the beneficiary’s shares on the stock exchange, unless a document deemed “equivalent” to a prospectus by Consob is published.

8. Who generally takes responsibility for the prospectus? Is it the company or the directors? Do the underwriters accept any responsibility for the document? How does the position differ whether it is debt or equity?

The CFA provides that, unless it can be proved that proper due diligence was conducted to guarantee the completeness and accuracy of the information in the prospectus, the issuer and the underwriters are liable – each of them for the respective sections of the prospectus for which they are responsible – for any false, misleading or missing information in the prospectus, which could have an impact upon the investment decision of a reasonable investor. Although the CFA does not expressly impose liability on directors, the general principles of Italian corporate law may entail liability for damages caused to investors by false or misleading information included in the prospectus due to negligence or wilful misconduct. The position is applicable to both debt and equity offerings.

9. (a) What is the general structure and timing for public offers? For example, is it common to issue a prospectus containing a price range and then market with a view to building the book or is the marketing carried out with a pathfinder/red herring document and the final prospectus only issued once the price has been determined? If a prospectus is issued containing a price range in what circumstances can you simply issue a price announcement as opposed to issuing another prospectus when the final price is determined? How long must the offer be kept open once the final price has been determined?

Generally, a prospectus indicates a price range (or, as an alternative, a maximum price) and the final price is determined at the end of the offer period. Once the final price has been determined, the issuer or the offeror publishes a specific press release to disclose it to investors. If the prospectus does not include the criteria on which the price is determined, nor an indication of the maximum price, investors may withdraw from the offer within the term indicated in the prospectus or, in any case, within two business days of the date on which the final price is published.

(b) If you are making a public offer, is there a minimum amount of the securities that must be offered to retail investors?

No minimum amount is prescribed under Italian law.
THE NETHERLANDS

1. How has the Prospectus Directive been implemented in the Netherlands?

The Prospectus Directive has been implemented by FMSA and FMSA Exemption Regulation. Although the ESMA Recommendations and the ESMA Q&A have not been incorporated into Dutch rules, the AFM does consider ESMA communications when interpreting and applying FMSA rules.

2. (a) Do pre-emptive offers to shareholders (such as a rights issue or open offer) require a prospectus either because it is a public offer or because there is a listing of the new shares (and, if applicable, the nil-paid rights)?

Pre-emptive offers to shareholders require a prospectus because it is or results in an “offer of securities to the public” within the meaning of FMSA, unless an exemption applies. A prospectus will also be required as a result of a listing of new shares if the shares to be listed, together with any other new shares listed in the previous 12 months, represent 10 per cent. or more of the shares of the same class already admitted to trading on the relevant regulated market. In practice, the shares to be listed subsequent to a pre-emptive offer virtually always exceed this 10 per cent. threshold.

(b) Can you exclude overseas shareholders from the offer? If so, are they compensated in any way for being excluded?

In practice, overseas shareholders in problematic jurisdictions are excluded from a rights issue (only). In practice, excluded shareholders receive cash compensation out of any proceeds from the subsequent rump offering, provided that certain conditions set by the issuer and described in the prospectus are met (notably that such proceeds exceed a pre-determined amount). In making such exclusion it is assumed that shareholders residing in a problematic jurisdiction are not in the same position as other shareholders and therefore the general requirement to treat shareholders who are in the same position equally, does not apply. This is however untested in court.

(c) Can you issue the shares at a discount to their market price and if so what shareholder approval is required for a discounted issue?

A Dutch NV can issue shares at a discount, but not at a price below the nominal value of the shares.

The general meeting of shareholders may delegate the authority to issue shares to the management and/or supervisory board. Such delegation requires a simple majority, unless the articles of association require a greater majority. Under the DCC, such delegation lasts for a maximum renewable period of five years. The general meeting of shareholders of a listed Dutch NV often delegates authority to issue a maximum of 10 per cent. of the outstanding share capital for a period of 18 months. Within the parameters of the delegation and in accordance with the articles of association, the relevant board can then resolve to issue shares at a discount.

Under the DCC, however, the board must comply with the requirements of reasonableness and fairness towards its shareholders. In principle, this means that the discount must be justifiable as a business matter.
(d) What pre-emption rights do shareholders have and how can they be excluded?

Under the DCC, each shareholder has a pre-emptive right on any issue of shares pro rata to the aggregate amount of shares held (except when the shares are paid up in kind or offered to employees, and excluding holders of preference shares). Pre-emptive rights can, however, be restricted or excluded by the general meeting of shareholders. Such resolution requires a simple majority, unless less than one half of the issued share capital is represented at the meeting, in which case a majority of at least two-thirds of the votes cast is required.

In practice, the general meeting of shareholders delegates its power to restrict or exclude pre-emptive rights, together with the power to issue shares, to the management and/or supervisory board. Again, such resolution requires a simple majority, unless less than one half of the issued share capital is represented at the meeting, in which case a majority of at least two-thirds of the votes cast is required. Under the DCC, the delegation may last for a maximum renewable period of five years. Within the parameters of the delegation and in accordance with the articles of association, the relevant board can then resolve to restrict or exclude pre-emption rights.

(e) What is the timetable and process for a pre-emptive offer to shareholders?

A typical timetable for a Dutch NV rights issue looks as follows:

<table>
<thead>
<tr>
<th>Day</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>D – 44</td>
<td>Convocation meeting of shareholders; announcement of the rights issue</td>
</tr>
<tr>
<td>D – 2</td>
<td>Meeting of shareholders; record date</td>
</tr>
<tr>
<td>D – 1</td>
<td>Publication of prospectus</td>
</tr>
<tr>
<td>D</td>
<td>Shares trade ex-rights; rights trading starts; exercise period starts</td>
</tr>
<tr>
<td>D + 9</td>
<td>End of rights trading; end of exercise period</td>
</tr>
<tr>
<td>D + 10</td>
<td>Rump offering (usually only 1 day)</td>
</tr>
<tr>
<td>D + 10 (after trading hours)</td>
<td>Allotment of offer shares</td>
</tr>
<tr>
<td>D + 13</td>
<td>Listing and trading of offer shares; payment and delivery of offer shares</td>
</tr>
</tbody>
</table>

The above timetable refers to business days, except that the (minimum of) 42 days for the convocation of the meeting of shareholders are calendar days. In practice, the exercise period can also be longer or shorter. For the application of the proportionate disclosure regime to rights issues under the revised Prospectus Regulation, the exercise period will in principle need to be at least two weeks.

3. (a) Do you need a prospectus to offer shares instead of cash dividends to shareholders?

No prospectus will be required if the shares paid out as a dividend are of the same class as the shares in respect of which the dividend is paid and, if those shares are to be admitted to trading on a regulated market, the shares are of the same class as shares already admitted to trading on the same regulated market. However, a document must
be made available containing information on the number and nature of the shares and the reasons for and details of the offer, in order to benefit from this exemption not to publish a prospectus.

(b) Does the answer differ if shareholders are offered a choice between cash or shares for their dividend?

Where shareholders are offered a choice between cash or shares for dividend, a prospectus is required, unless an exemption applies. It is unclear if the exemption mentioned under question 3(a) above applies in this situation.

(c) Does the answer differ if the shares of the company concerned are listed in another jurisdiction and not in your jurisdiction?

No.

4. If an overseas company wants to offer shares to employees in your jurisdiction as part of an employee share scheme what exemptions are available to the need to file a prospectus? Are there any other regulatory requirements in relation to the distribution of information regarding the share scheme?

Two types of situations can be distinguished for shares offered or allotted, or to be allotted, to existing or former directors or employees by their employer or an affiliated undertaking:

(A) The company has its corporate seat or head office in the EEA:

(i) No prospectus is required for the offer of the shares;

(ii) No prospectus is required for an admission to trading on a regulated market if the shares are of the same class as shares already admitted to trading on the same regulated market.

(B) The company has its corporate seat or head office outside the EEA:

(i) No prospectus is required for the offer of the shares if the shares are already admitted to trading on: (i) a regulated market; or (ii) a third-country market for which the European Commission has adopted an equivalence decision and adequate information including the document referred to below, is available in English;

(ii) No prospectus is required for an admission to trading on a regulated market if the shares are of the same class as shares already admitted to trading on the same regulated market.

In each of the above-mentioned situations, the FMSA exemption applies only if a document is made available containing information on the number and nature of the shares being offered and the reasons for and details of the offer. The ESMA Recommendations detail recommendations for this document.
If the overseas company’s shares are not to be admitted to trading on a regulated market, the most relevant other exemptions from the prospectus requirement for the offer or allotment of shares in the context of an employee share scheme are the following:

- the shares are offered to fewer than 150 persons in the Netherlands;
- the shares are offered for no consideration and not in lieu of remuneration that the employee would otherwise receive; or
- the shares are included in an offer where the total consideration of the offer in the EEA is less than €2.5 million which shall be calculated over a period of 12 months (the Dutch legislator has chosen not to implement the threshold of €5.0 million from article 1(h) of the Prospectus Directive in the FSMA).

5. Is a scheme of arrangement an offer to the public?

Dutch law does not provide for the concept of a scheme of arrangement. However, as shareholders have no individual choice to accept or repudiate the shares allotted to them under a scheme of arrangement, in principle no offer of securities to the public is involved and no offer prospectus is required under FMSA (a listing prospectus may, however, be required if the shares were to be admitted to trading on a regulated market in the Netherlands).

6. Is a takeover by means of a stock offer an offer to the public?

A takeover by means of a stock offer entails an “offer of securities to the public”. The FMSA provides an exemption from the prospectus requirement if a document is available containing information which is regarded by the AFM as being equivalent to that contained in a prospectus. However, in practice, issuers generally opt for a prospectus because: (i) an “equivalent document” cannot be passported; and (ii) it is unclear what information should be included in an “equivalent document”.

7. Is a demerger an offer to the public?

As shareholders have no individual choice to accept or repudiate the shares allotted under a demerger, no “offer of securities to the public” is involved. If a demerger structure were to give each shareholder an individual choice, however, then there could be an “offer of securities to the public”.

8. Who generally takes responsibility for the prospectus? Is it the company or the directors? Do the underwriters accept any responsibility for the document? How does the position differ whether it is debt or equity?

The company (and not the directors) generally takes responsibility for the prospectus. In practice, underwriters do not explicitly accept responsibility for the prospectus. However, underwriters may be liable in a civil claim for damages as a result of a misleading prospectus. The above analysis applies equally to equity and debt.

9. (a) What is the general structure and timing for public offers? For example, is it common to issue a prospectus containing a price range and then market with a view to building the book or is the marketing carried out with a pathfinder/red herring
document and the final prospectus only issued once the price has been determined? If a prospectus is issued containing a price range in what circumstances can you simply issue a price announcement as opposed to issuing another prospectus when the final price is determined? How long must the offer be kept open once the final price has been determined?

The general structure and timing for public offers is as follows:

**Bookbuilding**
In most cases, bookbuilding is used and marketing is based on an approved prospectus containing a price range. In a retail offer, the prospectus must be made publicly available at a reasonable time in advance of, but ultimately at the start of the offer. If no retail offer is involved, the prospectus must be made publicly available at a reasonable time in advance of, but ultimately at the beginning of, the admission to trading on the regulated market.

**Price announcement**
After the price has been established, the issuer files a pricing statement with the AFM. The statement must be made publicly available in accordance with the publication requirement for prospectuses. Provided that no “new significant factor” occurs or “material mistake or inaccuracy” is noted between the approval of the prospectus and the final closing of the offer or, as the case may be, the time when trading on a regulated market begins, whichever occurs later, no supplemental prospectus is required.

**Final offer period**
Where a prospectus relating to an initial public offering or an initial admission to trading on a regulated market is concerned, the prospectus must be available to the public at least six business days either before the end of the offer or the admission to trading on the regulated market respectively. The period starts to run once the prospectus is approved and published, even where it does not contain the final price. Other than these mandatory “reading days” in case of an IPO, there is no requirement as to how long the offer must be kept open.

(b) If you are making a public offer, is there a minimum amount of the securities that must be offered to retail investors?

There is no minimum amount of securities that must be offered to retail investors under FMSA or the Euronext rules. However, if the securities are to be admitted to trading for the first time on Euronext Amsterdam, the harmonised Euronext rules prescribe that a sufficient number of securities must be distributed to the public. A sufficient number is deemed to be distributed if at least 25 per cent. are in the hands of the public. This percentage may be lower (to a minimum of 5 per cent. and representing a value of at least €5 million calculated on the basis of the offering price) if, in view of the large number of securities and their distribution to the public, the market can function at a lower percentage.
PORTUGAL

1. **How has the Prospectus Directive been implemented in Portugal?**

The Prospectus Directive has been implemented in Portugal by Decree-Law 52/2006 dated 15 March 2006. In addition, CMVM Regulation 3/2006, which mainly relates to takeover bids, contains specific rules on issuers, public offers and private placements.

Although the term for the transposition of the Amending Directive expired on 1 July 2012, the Amending Directive was implemented in Portugal several months later by Decree-Law 18/2013 dated 6 February 2013, which became effective on the following day. Decree-Law 18/2013 amended the PSC rules relating to public offers and the obligation to prepare and publish a prospectus in Portugal by implementing all the new exemption thresholds as set out in the Amending Directive.

In the intervening period, issuers and investors were able to benefit from the “vertical direct effect” of the Prospectus Directive, as amended by the Amending Directive, pursuant to a general statement of opinion on the Implementation of the Prospectus Directive issued by the CMVM, effective as from 1 July 2012, in compliance with case law of the EU Court of Justice.

While the ESMA Recommendations are not incorporated into Portuguese law, the CMVM often relies on them for guidance when interpreting the Prospectus Directive and related Portuguese provisions.

2. **(a) Do pre-emptive offers to shareholders (such as a rights issue or open offer) require a prospectus either because there is a public offer or because there is a listing of the new shares (and, if applicable, the nil-paid rights)?**

Unless an exemption applies, pre-emptive offers to shareholders require a prospectus, because there will be either a public offer of securities or a listing of new shares (and, if applicable, of the nil-paid rights).

According to the PSC, as amended by the relevant provisions of the Amending Directive, a public offer of securities is deemed to exist when addressed to individuals or legal entities resident or domiciled in Portugal whenever:

(i) the offer is made in whole or in part to unidentified addressees;

(ii) the offer is made to all the shareholders of a public company (as defined by law), even if its share capital is represented by registered shares;

(iii) the offeror, on or before the launching of the offer, carries out soliciting activities in connection with unidentified addressees, or is engaged in promotion or publicity activities regarding the offer; or

(iv) the offer is made to, at least, 150 non-qualified investors (as defined by law) resident or domiciled in Portugal.
In addition, the proportionate disclosure regime, as set out in the Amending Directive, has also been implemented in Portugal. Accordingly, pursuant to article 137, section 5 of the PSC, and the Prospectus Regulation, the following securities offers will be able to benefit from this regime:

(A) rights issues, provided that: (i) the shares in question are of the same category of shares already admitted to trading on a regulated market or a multi-lateral trading facility abiding by the Prospectus Regulation's requirements; and (ii) the issuer has not limited or suppressed the shareholders' legal pre-emption rights; and

(B) securities issued by small and medium-sized enterprises (as defined in the Prospectus Directive) and companies with reduced market capitalisation, which, for this purpose, will be those companies with shares admitted to trading on a regulated market with an average capitalisation lower than €100,000,000, based on the annual closing quote of the three calendar years preceding the offer.

(b) Can you exclude overseas shareholders from the offer? If so, are they compensated in any way for being excluded?

Overseas shareholders cannot be excluded from the offer because, under Portuguese law, all shareholders are entitled to pre-emption rights and must be treated equally.

(c) Can you issue the shares at a discount to their market price and if so what shareholder approval is required for a discounted issue?

Under PCC, shares may be issued at a discount to their market price provided that they are issued at or above their par value, or their accountable par value, and the discounted issue is approved by the shareholders.

Nonetheless, recent changes to the PCC have made the issuance of shares below their accountable par possible, provided that certain legal requirements are fulfilled. Namely, for this purpose, the board of directors must submit a report to the general shareholders’ meeting of the issuer evaluating the issue price and the financial effects of the issue to the company.

In this context, the rules of the PCC also permit underwriting expenses to be deducted from the value of an issue of shares.

To approve the discounted issue, shareholders representing at least one third of the issuer’s share capital must be present or represented in the meeting on first call. On second call, the general shareholders’ meeting may adopt resolutions regardless of the number of shareholders present or represented and the percentage of the company’s share capital which they represent.

The voting majority required for approval of the discounted issue is a qualified majority of two thirds of the issued votes, either on first or second call, unless on second call at least one half of the share capital is present or represented, in which case the corresponding resolutions may be passed by a simple majority of votes.
(d) What pre-emption rights do shareholders have and how can they be excluded?

Pre-emption rights for the subscription of new securities are granted in law to shareholders. Where a company has various classes of shares, all shareholders have the same pre-emption rights. However, where the new shares are of the same type as those of a pre-existing class, pre-emption rights shall first and foremost be conferred upon the holders of such shares. The remaining shareholders only have the right to subscribe for such shares which have not been subscribed for already.

Assuming the company has only one class of share, each shareholder may subscribe for shares pro rata to their existing holding and request additional shares if some remain unsubscribed.

Pre-emption rights can be limited or excluded by a separate resolution at the general shareholders’ meeting which approves the share capital increase, provided that the limitation or exclusion is duly grounded and is in the best interest of the issuer.

The quorum and majority rules set out in question 2(c) above apply.

In the event that the board of directors proposes to limit or exclude pre-emption rights, the board must submit a written report to the general shareholders’ meeting, stating: (i) the reasons behind such a proposal; (ii) the means of allotting the new shares; (iii) the conditions under which the shares are to be paid-up; (iv) the issue price; and (v) the criteria used to determine this price. Shareholders must be allowed to access this report for 15 days prior to the date of the general shareholders’ meeting.

(e) What is the timetable and process for a pre-emptive offer to shareholders?

**Calendar day**

<table>
<thead>
<tr>
<th>Calendar day</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>D-21</td>
<td>Pre-notification of CMVM</td>
</tr>
<tr>
<td>D-21</td>
<td>General shareholders’ meeting is summoned</td>
</tr>
<tr>
<td>D-TBD</td>
<td>CMVM submission of the draft prospectus and announcements</td>
</tr>
<tr>
<td>D</td>
<td>General shareholders’ meeting is held</td>
</tr>
<tr>
<td>D+1</td>
<td>Publication of the rights issue announcement (at least 5 business days prior to the beginning of the subscription period) and publication of the prospectus</td>
</tr>
<tr>
<td>D+1 – D+5</td>
<td>Legal publicity period</td>
</tr>
<tr>
<td>D+2</td>
<td>Shares start trading ex-rights</td>
</tr>
<tr>
<td>D+5 – D+15</td>
<td>Rights trading period</td>
</tr>
<tr>
<td>D+5 – D+19</td>
<td>Roadshow</td>
</tr>
<tr>
<td>D+5 – D+19</td>
<td>Subscription period (a minimum of 15 calendar days)</td>
</tr>
<tr>
<td>D+21</td>
<td>Settlement of shares subscribed for, pursuant to the exercise of rights</td>
</tr>
</tbody>
</table>
3. (a) Do you need a prospectus to offer shares instead of cash dividends to shareholders?

A prospectus is not required to offer shares instead of cash dividends provided that: (i) the shares belong to the same class as the shares in respect of which such dividends are paid; and (ii) a document is made available to the public containing information on the number and nature of the shares and the reasons for and details of the relevant public offer. This document must be sent to CMVM prior to the payment of dividends and the offeror may instead prepare a prospectus in accordance with applicable Portuguese laws and regulations.

(b) Does the answer differ if shareholders are offered a choice between cash or shares for their dividend?

Subject to CMVM confirmation, the offer of a choice between cash or shares may not require the publication of a prospectus, since the payment of cash dividends is not an offer of securities and the payment of dividends in shares constitutes an exempt offer as described in 3(a) above. To the best of our knowledge, there are no precedents on this issue.

(c) Does the answer differ if the shares of the company concerned are listed in another jurisdiction and not in your jurisdiction?

No, provided that CMVM is the competent authority to supervise the offer.

4. If an overseas company wants to offer shares to employees in your jurisdiction as part of an employee share scheme what exemptions are available to the need to file a prospectus? Are there any other regulatory requirements in relation to the distribution of information regarding the share scheme?

Exemptions from the obligation to file and publish a prospectus, in this case, may apply in a number of circumstances including:

(A) a private placement to qualified investors;

(B) an offer addressed to less than 150 retail investors provided that the company does not carry out soliciting activities in connection with unidentified address or engage in promotion or publicity activities regarding the offer;

(C) offers with a minimum total consideration per investor or specified denomination per unit of €100,000;

(D) offers of securities with a total consideration of less than €5,000,000; and
securities offered, allotted or to be allotted to existing or former directors or employees by their employer (or by an affiliated undertaking), provided that the company has its head office or registered office in the EU and provided that a document containing information on the number and nature of the securities and the reasons for and details of the offer is made available to the public and sent to CMVM prior to launch of the offer. The offeror may publish a prospectus, however.

The preceding paragraph is also applicable to a company established outside the EU whose securities are admitted to trading either on a regulated market or on a third-country market, provided that adequate information, including the information described in the preceding paragraph, is available at least in a language customary in the internal financial markets and that the Commission has adopted an equivalence decision regarding the relevant third-country market.

In relation to the distribution of information regarding the share scheme, the following regulatory requirements should be noted:

**Marketing Materials**

The PSC provides, as a general principle, that publicity, promotion and prospecting of investors fall within the scope of financial intermediation activity. Consequently, only authorised financial intermediaries or tied agents in Portugal may carry out such activities.

Advertising activities related to financial instruments (including securities) and/or activities subject to the PSC must also comply with the general legal framework on advertising, notably the Advertising Code.

Moreover, marketing materials related to public offers, including those where an exemption from the obligation to publish a prospectus applies, must be approved by the CMVM and should: (i) contain complete, truthful, updated, clear, objective and lawful information; (ii) if applicable, include references to the existence or future availability of the prospectus and places where the prospectus is available for inspection; and (iii) be consistent with the contents of the prospectus.

In the case of private placements or exempted offers, advertising/marketing materials (including the prospectus, if applicable) are not subject to CMVM’s prior approval, but can only be made available to qualified investors or to less than 150 non-qualified investors, in the context of restricted individual contact (such as personal visits, closed group meetings and personal telephone calls). Such materials cannot be distributed or made available to the public without triggering Portuguese laws and regulations on public offers.

It is also worth noting that, for the purposes of the promotion to less than 150 non-qualified investors, no marketing efforts may be directed to unidentified addressees and no promotion or publicity activities regarding the offer may be undertaken, even if the number of non-qualified investors finally making an investment does not exceed 150 because such efforts or activities could constitute a public offer and trigger Portuguese public offers laws and regulations.

**Information Requirements**

Without prejudice to the above, as a general rule, all information disclosed in Portugal concerning financial instruments, organised trading systems, financial intermediation activities, securities’ public offers and issuers must be complete, accurate, updated, clear, objective and lawful.
Use of local language

In addition, all information likely to influence investors’ decisions must be published in Portuguese, or accompanied by a Portuguese translation. CMVM may waive this requirement, in whole or in part, if it considers that investors’ interests are protected.

It is commonly accepted that information provided to investors within a private placement or an exempt offer, pursuant to Article 111, section 1 of the PSC, carried out in Portugal may be drafted in a language other than Portuguese.

5. Is a scheme of arrangement an offer to the public?

Portuguese law does not recognise the concept of a scheme of arrangement. Delivery of shares to shareholders resident or domiciled in Portugal participating in a scheme may be characterised as a public offer under Portuguese law if any of the conditions described in question 2(a) above are met.

6. Is a takeover by means of a stock offer an offer to the public?

A takeover by means of stock offer is a public offer under Portuguese law. According to PSC, if securities issued or to be issued are offered as consideration in a takeover, the takeover documentation should include all relevant information.

The Prospectus Directive exception allowing a takeover by means of an exchange offer without a prospectus, provided that a document containing equivalent information is made available, has not been implemented into Portuguese law.

7. Is a demerger an offer to the public?

A demerger could be characterised as a public offer under Portuguese law, provided that any of the conditions described in question 2(a) above are met.

The Amending Directive specifically refers to an exemption from the obligation to publish a prospectus in the case of mergers and demergers, provided that a document is published containing information which is regarded by the competent regulator as being equivalent to that of a prospectus, a rule which is already effective in Portugal, in this case restricted to offers of securities arising from mergers or demergers addressed to a minimum of 150 non-qualified investors (otherwise they would be deemed as private – and thus exempted – offers). A document replacing a prospectus must be accepted by the CMVM and made available to the public at least 15 days prior to the general shareholders’ meeting where the relevant merger or demerger will be considered.
8. **Who generally takes responsibility for the prospectus? Is it the company or the directors? Do the underwriters accept any responsibility for the document? How does the position differ whether it is debt or equity?**

The following persons may be held liable (jointly and severally) if a prospectus fails to comply with the quality of information principles as set out in the PSC:

(A) issuer/offeree;

(B) members of the issuer’s/offeree’s management board;

(C) any promoters in the case of an offer for subscription for the incorporation of a company;

(D) members of the supervisory board, auditors firms, chartered accountants and any other persons who have certified or, in any other way, verified the accounting documents on which the prospectus is based;

(E) financial intermediaries in charge of assisting the offer; and

(F) any other entities agreeing to be identified in the prospectus as responsible for any included information, forecast or study (for example, the underwriters).

The PSC provides that the following entities may be strictly liable:

(A) offeror (if the management board, financial intermediaries in charge of assisting the offer or any other entities agreeing to be identified in the prospectus as responsible for any information, forecast or study included therein are held responsible);

(B) issuer (if the management board, promoters, members of the supervisory board, auditors firms, chartered accountants and any other persons who have certified or, in any other way, verified the accounting documents on which the prospectus is based are held responsible); and

(C) leader of the placement consortium (if a member of the consortium is held responsible in its capacity as financial intermediary in charge of assisting the offer).

There is no liability if any of the above parties proves that the relevant addressee knew or should have known that the contents of the prospectus did not comply with the quality of information requirements at the time his contractual declaration was issued or still revocable. There is also no liability if damages were caused by the prospectus summary only (or its translations), except if the summary contains misleading, inaccurate or inconsistent information when read together with the other documents that form part of the prospectus.

The rules set out above cover both debt and equity securities.

9. **What is the general structure and timing for public offers? For example, is it common to issue a prospectus containing a price range and then market with a view to building the book or is the marketing carried out with a pathfinder/red herring**
document and the final prospectus only issued once the price has been determined? If a prospectus is issued containing a price range in what circumstances can you simply issue a price announcement as opposed to issuing another prospectus when the final price is determined? How long must the offer be kept open once the final price has been determined?

A public offer may only start after a prospectus is approved by CMVM.

If the final offer price and/or amount of securities offered to the public cannot be included in the prospectus prior to publication, the criteria and/or conditions according to which the offer price and/or amount of securities is to be determined (or, in the case of the price, the maximum price) must be set out instead. Subscriptions of securities may be withdrawn within two business days of the final offer price and/or amount of securities offered being disclosed.

It is common to issue a prospectus containing a price range and then market with a view to bookbuilding. The final price is announced through the issue of a pricing announcement.

The prospectus is deemed to be available to the public when published: (i) by insertion in one or more newspapers circulated in Portugal; (ii) in a printed form to be made available, free of charge, to the public at the offices of the relevant regulated market or at the registered office of the issuer and at the offices of the financial intermediaries; (iii) in electronic form on the issuer’s website or, if applicable, on the website of the financial intermediaries; (iv) in electronic form on the website of the regulated market where admission to trading is sought; or (v) in electronic form on CMVM’s website.

Where the prospectus is made available by publication in electronic form, a paper copy must be delivered to the investor, upon his request and free of charge, by the issuer, the offeror or the financial intermediaries placing or selling the securities.

At the end of the offer period, an offer results announcement must be published through the same means as the prospectus. To the extent that the pricing announcement includes reference to the amount of securities specifically placed in Portugal, it may be deemed to replace the offer results announcement and, therefore, publication of the latter may no longer be required.

**Final offer period**

The period during which the offer must be kept open after the final price has been determined depends on the tranche of the offer, and is set on a case by case basis, subject to the fulfilment of all regulatory requirements. However, the minimum period during which investors may withdraw acceptances is two business days after disclosure of the final offer price.

Although, if the prospectus contains criteria and/or conditions according to which the offer price will be determined or a maximum price for the offer, then the final price only needs to be announced after the offer has closed. In this case, there is no minimum period during which investors may withdraw acceptances.

The final approved prospectus must be made available to the public prior to the beginning of the offer period. Upon approval by CMVM, the final version of the prospectus, including the date of approval, shall be sent to CMVM...
and made available to the public by the offeror. The prospectus must be disclosed: (i) in the event of a public offer preceded by trading of rights, no later than the business day prior to the day on which the rights are detached; and (ii) in all other public offers, no later than the beginning of the public offer.

(b) If you are making a public offer, is there a minimum amount of the securities that must be offered to retail investors?

No. However, it is market practice to reserve a tranche to retail investors, the size of which is set on a case by case basis. The request for shares in this tranche is usually subject to minimum and maximum numbers.
SPAIN

1. How has the Prospectus Directive been implemented in Spain?

Spain has implemented the Prospectus Directive through the following:

(A) Articles 25-30 bis of LMV;

(B) RD 1310/2005;

(C) Order EHA/3537/2005; and

(D) ESMA Recommendations, which have not been incorporated into Spanish law but are commonly followed by CNMV.

LMV and RD 1310/2005 were amended by Act 9/2012 of 14 November, on the restructuring and resolution of credit institutions and by Royal Decree 1698/2012 of 31 December, to implement the Amending Directive.

2. (a) Do pre-emptive offers to shareholders (such as a rights issue or open offer) require a prospectus either because there is a public offer or because there is a listing of the new shares (and, if applicable, the nil-paid rights)?

A pre-emptive offer to shareholders normally requires a prospectus because there is a public offer of new shares, unless an exemption applies (Article 30 bis of LMV and Articles 38 and 41 of RD 1310/2005). A prospectus may also be required as a result of a listing of new shares if the shares to be listed, together with any other new shares listed in the previous 12 months, represent 10 per cent. or more of the shares of the same class already admitted to trading on the relevant regulated market.

(b) Can you exclude overseas shareholders from the offer? If so, are they compensated in any way for being excluded?

Spanish corporate law provides that any secondary offer must be pre-emptive unless its exclusion is specifically authorised by a shareholders’ meeting or the board of directors if authorised by the shareholders’ meeting. Based on the Spanish corporate law principle of shareholder equality regarding listed companies (expressly regulated in Article 514 LSC), overseas shareholders cannot be excluded from an offer, even if such exclusion is authorised by the shareholders. In circumstances where overseas shareholders are resident in a country whose regulations prevent an offer from being made to such shareholders, the shares may be sold to a third party by a depositary bank and the proceeds of the sale delivered to the overseas shareholders.
(c) Can you issue the shares at a discount to their market price and if so what shareholder approval is required for a discounted issue?

In a pre-emptive offer, shares may be issued at a discount to their market value with no limit or floor, other than the shares’ nominal value (i.e. face value). Any such offer must be approved by shareholders’ meeting, where there is:

(A) a quorum of shareholders representing at least 50 per cent. of voting shares and a majority of more than 50 per cent. of the attending or represented shareholders; or

(B) a quorum of shareholders representing at least 25 per cent. of voting shares and a majority of more than two thirds of the attending or represented shareholders, if the issue was not approved in first call.

Higher quorums and majorities may be required by the company’s articles of association. Also, the shareholders’ meeting may delegate into the board of directors the authority to increase the company’s share capital up to a maximum of one half of company’s share capital at the time of the resolution, within the term of five years.

Where shares are issued on a non pre-emptive basis they may be issued at a discount to their market price:

(A) by a resolution of shareholders provided that the shares are issued at any price above its book value (valor neto patrimonial) (or the market price is the company is trading below its book value), as determined by an auditor’s report; or

(B) by a resolution of the board of directors, acting under authority granted by the shareholders’ meeting to increase share capital, provided that the shares are issued at fair value (valor razonable) (which corresponds to the market value) according to an auditors’ report.

(d) What pre-emption rights do shareholders have and how can they be excluded?

Subject to the paragraph below, any offer for new shares must be made to existing shareholders pro-rata to their existing holding. Any offer to existing shareholders must be open for a period of at least 15 days from the date of the publication of a subscription offer notice in the Official Gazette of the Mercantile Registry.

Articles 308, 504 and 505 LSC provide that the shareholders, when approving a share capital increase at a shareholders’ meeting, may wholly or partially exclude pre-emption rights when it is in the company’s interest to do so.

To exclude pre-emption rights:

(A) a report must be prepared by the directors specifying the value of the new shares (and its book value) and setting out the proposal in detail, along with the consideration to be paid for the new shares. This report shall also list the parties to whom the new holdings are to be attributed;

(B) an auditor appointed by the Mercantile Registry must prepare a report detailing: (i) the book value of the shares; (ii) the theoretical value of the pre-emption rights intended to be excluded; and (iii) the reasonableness of the information contained in the directors’ report;
(C) the notice convening the shareholders’ meeting must include: (i) the proposal to exclude the pre-emption rights; (ii) information on the main aspects of the capital increase (including the issue price) and on the shareholders’ right to examine and request copies of the reports referred to;

(D) the face value of the new shares plus, as appropriate, the share premium, must be in line with the value allocated to the shares in the auditor’s report;

(E) the quorum and majorities requirements of Article 194 LSC (as set out in the answer to question 2(c)) must be met; and

(F) a public deed must be granted notarizing the resolutions approved by the shareholders meeting, which must be registered with the Mercantile Registry.

As indicated in question 2(c) above, shareholders may authorise directors to increase the share capital and exclude the pre-emption rights provided that the shares are issued at fair value according to an auditor’s report.

The LSC states that the same procedure applies to exclude the pre-emption rights of shareholders in the issuance of convertible debentures.

There are no pre-emption rights in the event of:

(A) capital increases against non-monetary contributions;

(B) a capital increase implemented as a result of the takeover of another company or of all or part of the equity spun off from another company or from the conversion of bonds into shares; and

(C) takeover bids when shares are offered as consideration.

(e) What is the timetable and process for a pre-emptive offer to shareholders?

A standard timetable for a pre-emptive offer process would be as follows (all the days refer to business days unless otherwise specified):

<table>
<thead>
<tr>
<th>Day</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Resolution by either the shareholders or the directors to increase capital. First announcement of the offer</td>
</tr>
<tr>
<td>1</td>
<td>Approval and registration of the prospectus with CNMV</td>
</tr>
<tr>
<td>2</td>
<td>Publication of the notice in the Official Gazette of the Mercantile Registry</td>
</tr>
<tr>
<td>3</td>
<td>Commencement of subscription period for pre-emption rights holders and trading of the pre-emption rights on the relevant stock exchanges for 15 calendar days</td>
</tr>
</tbody>
</table>
Day

18  End of the pre-emption rights holders’ subscription period unless the offer allows shareholders to request additional shares that remain unsubscribed (in this case the timetable will be extended for at least 5 business days)

19  Funding of the capital increase by the shareholders. Submission of a relevant fact notice (an announcement published on CNMV’s website) to CNMV

20  Granting of public deed of capital increase

27  Registration of the public deed of capital increase with the Mercantile Registry and registration of the new shares in Iberclear. Delivery of listing applications to the Stock Exchanges and the CNMV

28  Listing approval by the CNMV (generally on a Tuesday or a Thursday)

29  Trading of the new shares

30  Settlement and allocation of book-entries by Iberclear to final investors

It is possible to negotiate an urgent timetable with the Commercial Registry and the CNMV and shorten the registration, delivery and listing period to two or three days since notarization of the share capital increase.

3.  (a) Do you need a prospectus to offer shares instead of cash dividends to shareholders?

According to Articles 26.1.(e) and 41.1.(d) of RD 1310/2005, dividends paid in shares are not subject to prospectus requirements as long as a document containing information on the number and nature of the securities and the rationale and details of the offer is published. Shares offered as dividend must belong to the same class as the shares giving the right to receive the dividend.

(b) Does the answer differ if shareholders are offered a choice between cash or shares for their dividend?

No. According to existing practice, offering a choice between cash or shares as a way to pay out dividends is not subject to prospectus requirements as explained in 3(a) above.

(c) Does the answer differ if the shares of the company concerned are listed in another jurisdiction and not in your jurisdiction?

We believe that the answer should not differ.

4.  If an overseas company wants to offer shares to employees in your jurisdiction as part of an employee share scheme, what exemptions are available to the need to file a prospectus? Are there any other regulatory requirements in relation to the distribution of information regarding the share scheme?

An offer of shares by an issuer to its current or former directors or employees, or by another entity in the issuer’s group domiciled in the EU, is exempt from publishing a prospectus.
In such a case, the issuer must publish a document, for the benefit of its employees, containing information on the number and nature of the securities and the reasons for and details of the offer.

5. **Is a scheme of arrangement an offer to the public?**

The scheme of arrangement is an English corporate law mechanism which does not have a Spanish law equivalent. Since the Prospectus Directive came into force, the only Spanish precedent of a cross-border corporate transaction implemented through a scheme of arrangement has been the merger of Scottish Power Plc and Iberdrola, S.A. In order to facilitate this transaction, Iberdrola, S.A. drafted a registration document and a securities note for the issue and admission of the relevant shares. In this particular case, CNMV decided that it was necessary to publish a prospectus for the merger of companies via a scheme of arrangement.

However, we believe that CNMV decisions are made on a case by case basis and CNMV may take a different approach in future transactions.

6. **Is a takeover by means of a stock offer an offer to the public?**

The offer of shares as consideration in a takeover falls within the definition of a public offer. However, Articles 41.1.(b) and 26.1.(c) of RD 1310/2005 provide that a public offer and an admission to trading of securities offered as payment in relation to a takeover bid (oferta pública de adquisición) are exempted from the obligation to publish a prospectus. This is subject to the condition that a document is made available containing information which is regarded by the CNMV as being equivalent to that of the prospectus.

Due to the fact that the information included in a takeover bid prospectus differs from information required in an equity issue prospectus, the CNMV is currently requesting to include an abridged securities note following Annex III of the Prospectus Regulation in the takeover bid prospectus.

7. **Is a demerger an offer to the public?**

The obligation to publish a prospectus does not apply to the offering of shares resulting from a demerger, provided that a document is available containing information which is regarded by the CNMV as being equivalent to that of the prospectus.

8. **Who generally takes responsibility for the prospectus? Is it the company or the directors? Do the underwriters accept any responsibility for the document? How does the position differ whether it is debt or equity?**

Under RD 1310/2005, the following parties are responsible for information given in the prospectus (and any supplement):

(A) issuer, offeror or persons requesting the admission to trading on a regulated market;

(B) directors of the persons referred to in (A) above, under the terms of the LSC;

(C) persons who expressly assume responsibility for the prospectus;
(D) persons, not included in (A) to (C) above, who have completely or partially authorised the contents of the prospectus, provided the prospectus states that such persons have given the authorisation; and

(E) the guarantor (which shall only be responsible in respect of the information it has prepared).

The above is applicable to both equity and debt offerings.

With regard to underwriters, the Spanish regime applies to global coordinators (or any other entity engaged by the company to design and coordinate the transaction) who may be liable in case they do not take all reasonable care to ensure that the information contained in the securities note of the IPO regarding the transaction or the securities being offered is not false or omits relevant information.

9. (a) What is the general structure and timing for public offers? For example, is it common to issue a prospectus containing a price range and then market with a view to building the book or is the marketing carried out with a pathfinder/red herring document and the final prospectus only issued once the price has been determined? If a prospectus is issued containing a price range, in what circumstances can you simply issue a price announcement as opposed to issuing another prospectus when the final price is determined? How long must the offer be kept open once the final price has been determined?

<table>
<thead>
<tr>
<th>Day</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Execution of the underwriting and placement undertaking protocol for the Spanish retail tranche</td>
</tr>
<tr>
<td>1</td>
<td>Approval and registration of the prospectus with CNMV</td>
</tr>
<tr>
<td>2</td>
<td>Commencement of institutional tranche bookbuilding period (purchase proposals). Commencement of retail tranche non-binding offers period</td>
</tr>
<tr>
<td>12</td>
<td>End of retail tranche non-binding offers period. Announcement of the maximum retail price. Execution of retail tranche underwriting and placement agreement</td>
</tr>
<tr>
<td>13</td>
<td>Commencement of retail tranche binding offers period</td>
</tr>
<tr>
<td>14</td>
<td>End of the retail tranche binding offers period</td>
</tr>
<tr>
<td>17</td>
<td>End of institutional tranche bookbuilding period. Announcement of the institutional and retail tranche price. Selection of institutional investors’ purchase proposals. Execution of the Spanish institutional tranche underwriting agreement</td>
</tr>
<tr>
<td>18</td>
<td>Allocation of shares to institutional investors. Confirmation of institutional investors’ purchase proposals</td>
</tr>
<tr>
<td>19</td>
<td>Trading of the new shares</td>
</tr>
<tr>
<td>21</td>
<td>Settlement. Commencement of stabilisation period</td>
</tr>
<tr>
<td>51</td>
<td>End of stabilisation period</td>
</tr>
</tbody>
</table>
**Price announcement**
A public offer starts when the prospectus is registered with CNMV. The securities note will normally include a non-binding price range. In the Spanish market, the final price is announced through the issue of a relevant fact notice (*hecho relevante*) and no additional document is required. No unapproved or preliminary prospectuses should be used during the bookbuilding process in the Spanish market.

**Final offer period**
According to market practice, the duration of the offer period after pricing depends on the tranche of the offer:

(A) Institutional investors have until the following morning, usually 8:30 am, to accept the offer at the final price.

(B) Retail investors normally have 3 days to revoke non-binding mandates after the maximum retail price is announced.

(b) If you are making a public offer, is there a minimum amount of the securities that must be offered to retail investors?

There is no minimum amount of securities that must be offered to retail investors. Other than offers purely addressed to qualified investors, it is common market practice in Spain to reserve a tranche of the offer (usually 20 per cent. to 30 per cent.) to retail investors. In this tranche, the retail investors are usually subject to a minimum and maximum number of shares they may subscribe for, and a request to subscribe for a minimum number of shares is normally respected in the event of oversubscription.
UNITED KINGDOM

1. **How has the Prospectus Directive been implemented in the UK?**

The UK has implemented the Prospectus Directive through the following:

(A) Part 6 of FSMA;

(B) the Prospectus Rules; and

(C) the ESMA Recommendations which are indirectly incorporated into the UK regime by the Prospectus Rules, which state that, in determining whether the UK prospectus regime has been complied with, the FCA will take into account whether a person has complied with the ESMA Recommendations.

2. **(a) Do pre-emptive offers to shareholders (such as a rights issue or open offer) require a prospectus either because there is a public offer or because there is a listing of the new shares (and, if applicable, the nil-paid rights)?**

A pre-emptive offer will require a prospectus because it is a public offer unless one of the exemptions in FSMA or the Prospectus Rules applies. The main relevant exemptions apply where:

(A) an offer has a minimum total consideration per investor of €100,000 (or equivalent amounts);

(B) the offer is made to or directed at fewer than 150 persons per EEA state; or

(C) the total consideration for the transferable securities being offered in the EEA is less than €5,000,000 in any 12 month period (or an equivalent amount).

A prospectus will also be required for a pre-emptive offer, as a result of a listing of new shares, where the new shares listed, together with any other new shares listed in the previous 12 months, represent 10 per cent. or more of the number of shares of the same class already admitted to trading on the same regulated market.

A proportionate disclosure regime, providing for reduced content requirements for prospectuses, applies in connection with rights issues and certain other types of secondary pre-emptive issues, where the issuer has shares of the same class already admitted to trading on a regulated market or on a multi-lateral trading facility (“MTF”).

**(b) Can you exclude overseas shareholders from the offer? If so, are they compensated in any way for being excluded?**

Where pre-emption rights have been disapplied (as explained in question 2 (d) below) overseas shareholders can be excluded from the offer. Where such disapplication has been made, the issuer will have the flexibility of not making the offer to certain, or all, overseas shareholders.

In the case of a rights issue, if pre-emption rights are disapplied, the rights attributable to excluded overseas shareholders can be aggregated and sold in the market, for the benefit of the overseas shareholders, once the offer
period has closed. In the case of a non-compensatory open offer, a shareholder to whom the offer is not made would generally not be compensated.

Where pre-emption rights have not been disapplied, overseas shareholders cannot be excluded. However, the offer may be made to non-EEA overseas shareholders by causing it, or a notice specifying where a copy of it can be obtained or inspected, to be published in the London Gazette.

(c) Can you issue the shares at a discount to their market price and if so what shareholder approval is required for a discounted issue?

There is no restriction on the level of discount at which a rights issue can be offered. Under CA06, however, shares cannot be issued at a discount to their nominal or par value. So, if a company's shares are trading close to their nominal value, a capital reorganisation will be necessary to accommodate any discount.

The Listing Rules prevent issuers with a premium listing from making open offers at more than a 10 per cent discount to the prevailing mid-market price at the date of announcement of the open offer (or at the time of agreeing any associated placing (as the case may be)). A larger discount is allowed where shareholder approval is obtained.

(d) What pre-emption rights do shareholders have and how can they be excluded?

The Companies Act

CA06 provides that if a company proposes to issue equity securities for cash, it must first offer the shares to holders of ordinary shares in proportion to the nominal value of their existing shareholdings. For these purposes “equity securities” are:

(A) shares that carry an unlimited right to participate in a distribution of income and capital (ordinary shares); and

(B) a right to subscribe for, or convert securities into, ordinary shares.

The pre-emption rules do not apply to:

(A) the allotment of shares under an employee share scheme;

(B) the allotment of subscriber shares and bonus shares; or

(C) the allotment of equity securities paid-up wholly or partly otherwise than in cash. Therefore, the pre-emption provisions will not apply to vendor placings and share issues (such as placings and rights issues) utilising a cash box structure – because the shares are issued for non-cash consideration (either the vendors’ shares in the target or shares in a cash box company).

The Listing Rules

The Listing Rules state that issuers with a premium listing must also comply with pre-emption rules. LR 9.3.11R provides that such a listed company that proposes to issue equity securities for cash, or sell treasury shares that are equity securities for cash, must first offer those securities to its existing equity shareholders (other than the
company itself by virtue of it holding treasury shares) and to holders of other equity securities who are entitled to be offered them (for example under the terms of those securities) in proportion to their existing holdings.

The Listing Rules are more flexible than CA06 pre-emption rules, and LR 9.3.12R provides that on a rights issue or open offer pre-emption rights can be ignored with regards to:

(A) fractional entitlements; or

(B) overseas shareholders where the company considers it necessary or expedient to exclude them from the offer on account of the laws or regulatory requirements of another territory.

**Disapplication of pre-emption rights**

The pre-emption rights under CA06 and the Listing Rules can be disappplied under CA06 by a special resolution of shareholders, requiring a 75 per cent. majority.

**Pre-Emption Group Statement of Principles**

A Pre-Emption Group Statement of Principles has been issued by the Pre-Emption Group, supported by the Association of British Insurers (ABI), the National Association of Pension Funds and the Investment Management Association. The Statement of Principles is aimed at listed companies and provides that for non-pre-emptive offers, a routine disapplication of pre-emption rights should, generally, be limited to 5 per cent. of ordinary share capital in any one year and there should be a cumulative limit of 7.5 per cent. of ordinary share capital in any three year rolling period. No shares should be issued under a specific disapplication of pre-emption rights at a discount of more than 5 per cent.

These general parameters are not intended to be an absolute limit or to restrict the issuer’s ability to undertake rights issues and open offers. If issuers wish to exceed these parameters, it is recommended that they raise the issue of such a non-routine request with shareholders (through such bodies as the ABI and, perhaps, some key institutional investors) “at the earliest opportunity”.

**(e) What is the timetable and process for a pre-emptive offer to shareholders?**

Assuming that an issuer wishes to conduct a rights issue which does not exceed the usual annual CA06 shareholder authorities to allot shares and to disapply pre-emption rights, the timetable will be as follows:

<table>
<thead>
<tr>
<th>Day</th>
<th>(Business days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Impact day:</td>
</tr>
<tr>
<td></td>
<td>Announcement of offer through a Regulatory Information Service (“RIS”), approval and publishing of prospectus and posting of Provisional Allotment Letters (“PALs”)</td>
</tr>
<tr>
<td>1</td>
<td>Dealings in new shares, nil paid, commence</td>
</tr>
<tr>
<td></td>
<td>Where pre-emption rights are not disappplied, notice of offer published in the London Gazette so as to inform non-EEA overseas shareholders</td>
</tr>
</tbody>
</table>
3. (a) Do you need a prospectus to offer shares instead of cash dividends to shareholders?

A prospectus is not required where dividends are paid out in the form of shares. The shares paid out must be of the same class as the shares in respect of which the dividends are paid and, in the case that those shares are to be admitted to trading on a regulated market, they must be of the same class as shares already admitted to trading on the same regulated market. The issuer is required to make a document available containing information on the number and nature of the shares and the reasons for, and details of, the offer. ESMA has issued guidance as to what it would expect such documents to include (see paragraphs 173-176 of the ESMA Recommendations).

(b) Does the answer differ if shareholders are offered a choice between cash or shares for their dividend?

The analysis outlined in question 3(a) above applies where shareholders are entitled to elect to receive shares instead of all or part of a cash dividend, and no prospectus is required. If a circular is sent to shareholders, detailing the terms of such an offer, it must meet certain content requirements outlined in LR 13.8.6R and LR 13.8.7R of the Listing Rules.

(c) Does the answer differ if the shares of the company concerned are listed in another jurisdiction and not in your jurisdiction?

Assuming that the overseas company is not seeking a listing of its shares on a UK regulated market, then the analysis outlined in question 3(a) above applies, and no prospectus will be required. However, a prospectus will be required if the company concerned wishes to have the shares that are to make up the dividend listed on a UK regulated market as well as in the other jurisdiction, and there are no shares of the same class already admitted to trading on that UK regulated market.

4. If an overseas company wants to offer shares to employees in your jurisdiction as part of an employee share scheme what exemptions are available from the need to file a prospectus? Are there any other regulatory requirements in relation to the distribution of information regarding the share scheme?

Assuming that the overseas company is not listing its shares on a UK regulated market, an offer of securities to employees based in the UK can be made without the requirement to produce a prospectus if the employing company:

(A) has its head or registered office in the EU;
(B) is established outside of the EU and has its securities admitted to trading on an EU regulated market; or

(C) is established outside of the EU and has securities admitted to trading on a third-country market provided that the Commission has adopted an equivalence decision regarding the third country market in question.

The employer is required to make available a document containing information on the number and nature of the shares being offered to employees as well as the reasons for, and details of, the offer. ESMA has issued guidance as to what it would expect such documents to include (see paragraphs 173-176 of the ESMA Recommendations). The grant of standard, non-assignable employee share options will not require a prospectus, nor will the exercise of share options. Likewise, an award of free shares to employees will not require a prospectus.

**Financial Promotion**

The communication of the offer to the employee will amount to a financial promotion, the communication of which is generally prohibited by FSMA.

A number of exemptions apply allowing such financial promotions to be communicated:

(A) the person communicating or causing the communication of the financial promotion is authorised by the FSA;

(B) the content of the financial promotion has been approved by a person who is authorised by the FSA; or

(C) the communication is within a category of exempt communication prescribed by the FPO.

The overseas company will invariably not be authorised by the FSA and it is very unlikely that an authorised person would be prepared to approve such offer documents.

In communicating the offer, the communication therefore will have to fall within an exception found in the FPO.

Under the FPO, the financial promotion restriction does not apply to any communication by a person, where the communication is for the purposes of an employee share scheme, and relates to shares offered by that person.

The meaning of an employee share scheme, in our context, is very broad. It will include all arrangements made, or to be made, by the overseas company (or a member of the same group), to enable or facilitate the holding of those shares by, or for the benefit of, employees or former employees of the overseas company (or any member of the same group) or their family members.

Further exemptions may apply depending on the context.

5. **Is a scheme of arrangement an offer to the public?**

A scheme of arrangement under CA06 typically involves:

(A) cancelling an issuer’s existing share capital;
(B) capitalising the reserve in the issuer, created by that cancellation, by the issue of new shares in the issuer to a new holding company; and

(C) in consideration for the issue of these shares, the holding company issues shares to the shareholders of the issuer.

This process is in itself generally not considered to involve an offer to the public for the purposes of FSMA and the Prospectus Rules. This is because a scheme of arrangement does not contain an offer which would enable investors to buy or subscribe for securities; instead, there is a court procedure under which members are asked to vote on and approve an arrangement.

It is the generally accepted view that no prospectus (or equivalent document) will be required for a scheme of arrangement provided that any transferable securities issued under the scheme of arrangement are not admitted to trading on a regulated market. (Informal guidance issued in 2009 by the FCA's predecessor, the FSA, indicated that a prospectus would be required if a mix and match facility is offered under which shareholders can elect a preferred combination of cash and shares, rather than being issued with shares only. However, we do not consider this guidance to be correct, and it has not been repeated in the current formal guidance notes adopted by the FCA.)

If transferable securities are issued under a scheme of arrangement which are to be listed on a regulated market, then a prospectus will be required unless the shares issued amount to less than 10 per cent. of the same class already admitted to trading on the same regulated market.

6. Is a takeover by means of a stock offer an offer to the public?

Where the bidder offers shares or a share alternative as consideration for shares held by members of the public, a takeover structured as a contractual offer will be considered to be an offer to the public. However, a prospectus will not be required if a document is produced containing information equivalent to that required in a prospectus. This exemption to avoid producing a prospectus applies by virtue of the fact that the takeover involves a securities exchange offer.

However a bidder may still choose to opt for a prospectus where it wants to take advantage of the ‘passporting’ arrangements which allow a prospectus approved by the competent authority of one Member State to be used throughout the EU without additional approvals or information (except for a translation of the summary information) being required. These passporting arrangements do not apply to an equivalent document.

Where the takeover is structured as a scheme of arrangement, the analysis in question 5 will apply and the takeover will not be considered to be an offer to the public. Accordingly, no prospectus will be required unless
securities representing 10 per cent. or more of the existing issued shares are to be admitted to trading on a UK regulated market.

7. **Is a demerger an offer to the public?**

A demerger, whereby company A distributes securities that it holds in company B to its shareholders, in proportion to the shares held by each shareholder in company A, for example through a reduction of capital or dividend, is not considered to be an offer to the public. This is provided that the shareholders in company A are not given a right to elect whether to receive securities held in company B or to receive or continue to hold other securities. The demerger is not considered to be an offer to the public as there is no relevant decision to buy or subscribe for securities under FSMA.

8. **Who generally takes responsibility for the prospectus? Is it the company or the directors? Do the underwriters accept any responsibility for the document? How does the position differ whether it is debt or equity?**

**Equity shares**

In the case of equity shares, including warrants or options to subscribe for equity shares, the following persons are responsible for a prospectus:

(A) the issuer of the securities (and in some cases the offeror of the securities, e.g. a selling shareholder);

(B) each person who is a director of the issuer (or any such offeror) when the prospectus is published;

(C) each person who has authorised himself to be named, and is named, in the prospectus as a director or as having agreed to become a director of the issuer either immediately or at a future time;

(D) each person who is a senior executive of any external management company of the issuer;

(E) each person who accepts, and is stated in the prospectus as accepting, responsibility for the prospectus; and

(F) any other person who has authorised the contents of the prospectus.

**Other securities**

In the case of all other non-equity securities, including preference shares, debt securities and depositary receipts, the following persons are responsible for a prospectus:

(A) the issuer of the securities (and in some cases the offeror of the securities);

(B) each person who accepts, and is stated in the prospectus as accepting, responsibility for the prospectus;

(C) any guarantor for the issue; and

(D) any other person who has authorised the contents of the prospectus.
In the UK underwriters generally do not accept responsibility for the prospectus.

9. (a) What is the general structure and timing for public offers? For example, is it common to issue a prospectus containing a price range and then market with a view to building the book or is the marketing carried out with a pathfinder/red herring document and the final prospectus only issued once the price has been determined? If a prospectus is issued containing a price range, in what circumstances can you simply issue a price announcement as opposed to issuing another prospectus when the final price is determined? How long must the offer be kept open once the final price has been determined?

**Bookbuilding**

Where a company is coming to the market for the first time it is usual, but not essential, for the company to first issue an unapproved pathfinder (or red herring) prospectus or an approved price range prospectus for the purposes of bookbuilding before the IPO is finally priced. An unapproved pathfinder prospectus will not set out a price or price range, but the underwriters may provide informal price guidance to potential investors. In contrast, an approved price range prospectus will contain a price range.

The advantage of an approved price range prospectus is that it may be issued to any potential investor, whereas an unapproved pathfinder prospectus may only be issued to institutional investors. However, where an approved price range prospectus is used, an issuer will be required to issue a supplementary prospectus if a significant new factor, material mistake or inaccuracy relating to the information included in the approved prospectus arises or is noted which is capable of affecting the assessment of the securities to which that prospectus relates, either before the final closing of the offer, or, as the case may be, the time when trading of the securities on a regulated market begins, whichever is the later.

Bookbuilding will normally take place over a period of about 2 weeks starting with the date that the unapproved pathfinder or approved price range prospectus is published. During the bookbuilding process, the banks managing the issue will receive indications from potential investors as to their level of demand at any given price. This will enable the final price to be set.

**Price announcement**

The manner in which the price is announced at the end of the bookbuilding process depends upon the type of prospectus that was used during the bookbuilding period.

If an approved price range prospectus was used, and the final price is within the price range and there is no other material information that needs updating in the original prospectus, the issuer can simply issue a pricing statement.

If an approved price range prospectus was used, but the final price is not within the price range or there is material information that needs to be updated in the prospectus, the issuer will have to publish a supplementary prospectus.

If an unapproved pathfinder prospectus was used during the bookbuilding period, the final prospectus including the price will need to be approved by the FCA for the purposes of seeking admission to trading.
Final offer period

The Prospectus Rules provide that in the case of an offer to the public the prospectus must be available to the public at least six working days before the end of the offer. Where an approved price range prospectus is used, the period may start to run once the price range prospectus is published, even though it does not contain the final price. However, where an offering is only made to institutional investors using a pathfinder prospectus, the FCA has issued guidance confirming that the six-day minimum requirement does not apply.

(b) If you are making a public offer, is there a minimum amount of the securities that must be offered to retail investors?

In order for a class of shares to be listed, the UKLA generally requires that at least 25 per cent. of the class of shares for which the application has been made must be in public hands in one or more EEA Member States, often referred to as the “free float”. For these purposes, shares are not considered to be in public hands if they are held by:

(i) a director, or a person connected with a director, of the company or any of its subsidiaries;

(ii) trustees of any employee share scheme or pension fund established for the benefit of any directors and employees of the company and its subsidiaries;

(iii) any person who, under any agreement, has a right to nominate a person to the board of the directors of the company; or

(iv) any person or persons in the same group or persons acting in concert who have an interest in 5 per cent. or more of the shares of the relevant class.

The UKLA may accept a free float lower than 25 per cent. if it considers that the market will operate with sufficient liquidity even with a lower free float percentage. The FTSE Policy Group requires a 25 per cent. minimum free float for inclusion in the FTSE UK Index Series, even where the UKLA grants an exception to the 25 per cent. rule.

Further, in order to gain admission to the Official List of the UK Listing Authority, the expected aggregate market capitalisation of all the shares to be listed (including free float and non-free float shares) must be at least £700,000. This requirement does not apply if shares of the same class are already listed.
SECTION 2: PASSPORTING UNDER THE PROSPECTUS DIRECTIVE

Articles 17 and 18 of the Prospectus Directive offer a “passporting” facility for issuers wishing to publicly offer securities or admit securities to trading on a regulated market in a Member State other than their home Member State. One of the main aims of the Prospectus Directive was to facilitate the use of one prospectus for offers to the public and admissions to trading in more than one Member State and to replace the old mutual recognition system.

Under Article 17 of the Prospectus Directive, a prospectus and any supplement approved for use by the competent authority of the home Member State is valid for public offers and admissions to trading in any number of host Member States provided the competent authorities in those states are notified in accordance with Article 18. The competent authority of the home Member State provides a certificate of approval and a copy of the prospectus plus a translation of the summary if required. An issuer wishing to take advantage of the passporting facility may either request a certificate of approval simultaneously with the application for approval of the prospectus or request a certificate after the approval of the prospectus. In the former case, the certificate will be issued within one working day of the approval of the relevant prospectus and in the latter case, within three working days of the request being made.
PASSPORTING REQUIREMENTS IN CERTAIN JURISDICTIONS

FRANCE

1. Passorting prospectuses into France

Under the GR AMF, an issuer wishing to passport its prospectus in France must request its home authority to provide the AMF with a:

(A) certificate of approval;\(^5\)

(B) copy of the prospectus (either in English or French); and

(C) French summary of the prospectus (an electronic version of the summary must be provided to the AMF for its website).

The home authority must also notify the AMF of the means by which the prospectus is locally published or communicated.

The same procedure applies to any supplementary prospectus required in the home Member State.

If significant new factors, material mistakes or inaccuracies arise after approval of the prospectus by the home authority, AMF may draw the home authority’s attention to such factor, mistake or inaccuracy.

2. Are there any additional responsibilities being assumed by the company, the directors or the underwriters by virtue of the passporting into your jurisdiction?

The issuer and responsible persons in the home Member State remain liable for the relevant section of the ‘passported’ prospectus.

If the AMF establishes that irregularities were committed in connection with an offer to the public in France by the issuer or responsible persons, it shall inform the home authority and if the laws or regulations applicable thereto continue to be violated the AMF may, after having informed the home authority, take all necessary measures to protect investors.

The AMF informs the European Commission of such measures as soon as possible.

3. Are there additional documents which require approval, as well as the prospectus?

No.

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\(^5\) Pursuant to the Amending Directive, an issuer is now notified of the certificate of approval at the same time as the AMF.
1. **Passporting prospectuses into Germany**

A prospectus approved by the competent authority of a Member State other than Germany will be valid with respect to an offer or the admission of securities to trading in Germany and may be passported into Germany without a further approval procedure. In order to passport a prospectus into Germany:

(A) A certificate of approval for the prospectus from the home competent authority according to the provisions of the home Member State together with a copy of the prospectus must be emailed to BaFin (the certificate of approval must also be faxed to BaFin). There is no requirement to email documents incorporated by reference to BaFin.

(B) The prospectus must either be in German or in English. If it is not in German, the summary must be translated into German. (There is no requirement for a translation of the summary for the admission to trading of non-equity securities whose denomination per unit amounts to at least €100,000).

(C) The issuer or a representative (e.g. investment bank acting in the offering or the issuer’s lawyers, who must produce a power of attorney for this purpose) must inform BaFin without undue delay (i.e. on the day of publication) of the date and place of the publication of the prospectus (there is no longer a requirement to publish a notice as to the publication of the prospectus in a newspaper).

BaFin will neither review a passported prospectus nor the summary as to completeness, comprehensibility or coherence since the certificate of approval issued by the home competent state will attest that the prospectus has been drawn up in accordance with the provisions of the home Member State.

Where a base prospectus is used, the final terms of the offer, which must be provided to investors, must also be filed with BaFin, as host competent authority.

2. **Are there any additional responsibilities being assumed by the Company, the directors or the underwriters by virtue of the passporting into your jurisdiction?**

No (except if the passporting serves a listing in Germany, in which case reporting obligations for listed companies would be triggered).

3. **Are there additional documents which require approval, as well as the prospectus?**

No.

**ITALY**

1. **Passporting prospectuses into Italy**

An issuer seeking to passport a prospectus into Italy must apply to the competent authority of its home Member State to request that the following documents are sent to Consob:
(A) a certificate of approval confirming that the prospectus has been drawn-up in accordance with the Prospectus Directive and the Prospectus Regulation;

(B) a copy of the passported prospectus; and

(C) a translation into Italian of the summary note of the prospectus.

Italian publication of the passported prospectus is permitted only if Consob receives the above passporting documentation from the competent authority of the home Member State. No formal communication is made or authorisation given by Consob prior to the start of the offering.

The Issuer Regulation provides that the passported prospectus may be drafted in Italian or in a language “customary in the sphere of international finance”. ESMA guidelines state that an issuer who requires a prospectus to be passported into Italy may choose to draft it in either Italian or English. ESMA guidelines also recommend the inclusion of a statement clarifying that the document is a translation of the prospectus approved by the competent authority of the home Member State and that such translation is the sole responsibility of the issuer.

2. Are there any additional responsibilities being assumed by the company, the directors or the underwriters by virtue of the passporting into your jurisdiction?

No, unless the issuer seeks to obtain a listing of its securities in Italy. In this case, specific reporting obligations applicable to foreign companies would be triggered.

3. Are there additional documents which require approval, as well as the prospectus?

Article 98(2) of the CFA provides that a supplement to any prospectus that has been approved by the competent authority of the home Member State can be passported into Italy in accordance with the procedure described in question 1 above. Article 98(3) also provides that Consob may request additional information from the competent authority of the home Member State relating to the offering.

THE NETHERLANDS

1. Passporting prospectuses into the Netherlands

The competent authority from the home Member State must provide the AFM with a certificate of approval in respect of the prospectus, together with a copy of the approved prospectus. The AFM will send the competent authority of the home Member State a confirmation of receipt, although such confirmation is not required to passport the prospectus.

If the prospectus is written in English, no further formalities are required. If the prospectus is originally drawn up and approved in any language other than English or Dutch, the AFM will accept an English (or Dutch) translation of the entire prospectus.
2. Are there any additional responsibilities being assumed by the company, the directors or the underwriters by virtue of the passporting into your jurisdiction?

No. However, an offer of securities in the Netherlands may be subject to Dutch civil law provisions on prospectus liability, namely liability for damages caused by misleading information in the prospectus.

3. Are there additional documents which require approval, as well as the prospectus?

No.

PORTUGAL

1. Passporting prospectuses into Portugal

The home Member State’s competent authority must provide CMVM with the following documents:-

(A) a certificate of approval attesting that the prospectus has been drawn up in accordance with the Prospectus Directive and, as applicable, justifying any information exemptions;

(B) a copy of the prospectus;

(C) a Portuguese translation of the summary, prepared by and under the responsibility of the issuer (without being subject to CMVM’s approval); and

(D) documents incorporated by reference in the prospectus.

Addenda, amendments or supplements to the prospectus are subject to the same procedure.

The issuer must publish the prospectus and Portuguese translation of the summary after the prospectus passport is received and, in any case, by the beginning of the public offer at the latest.

According to our experience, these documents are normally made available, in electronic form, on the websites of the home country regulator and CMVM.

The Portuguese passport process usually takes no more than 24-48 hours from receipt of the application.

2. Are there any additional responsibilities being assumed by the company, the directors or the underwriters by virtue of the passporting into your jurisdiction?

The company, directors and underwriters are subject to the requirements of the PSC, as set out in section 1, question 8 as if the prospectus had been approved by CMVM.
3. Are there additional documents which require approval, as well as the prospectus?

All related advertising and marketing materials to be distributed to prospective investors in Portugal are subject to the prior approval of CMVM. The marketing materials may be submitted to CMVM by the issuer/offeror directly, or through their legal advisers, by email.

Such materials shall:

(A) comply with the principles concerning the quality of information set out in the PSC, namely complete, accurate, updated, clear, objective and lawful information;

(B) refer to the existence or future availability of a prospectus; and

(C) be consistent with the content of the prospectus.

As a general rule, all information disclosed in Portugal that is likely to influence the decision of investors, including marketing material, must be written in Portuguese or accompanied by a Portuguese translation. CMVM may waive this requirement when it considers that the interests of investors are protected. It is commonly accepted that information provided to investors within a private placement or exempt offer can be drafted in a language other than Portuguese.

SPAIN

1. Passporting prospectuses into Spain

The competent authority of the home Member State must provide ESMA and CNMV with:

(A) a certificate declaring that the prospectus has been duly registered in the home Member State;

(B) a copy of the prospectus and a translation of the prospectus into Spanish or English; and

(C) a Spanish translation of the summary prepared by and under the responsibility of the issuer. Under Spanish regulations, the summary must be drafted in a common format (in accordance with the applicable regulations, as provided under Annex XXII to the Commission Delegated Regulation (EU) No. 486/2012 of 30 March), in a concise manner and in non-technical language and its content should convey the key information to aid investors when considering whether to invest in the securities. This key information shall include, at least, the following elements: (i) a short description of the risks associated with and essential characteristics of the issuer and any guarantor, including the assets, liabilities and financial position; (ii) a short description of the risks associated with and essential characteristics of the investment in the relevant security, including any rights attaching to the securities; (iii) general terms of the offer, including estimated expenses charged to the investor by the issuer or the offeror; (iv) details of the admission to trading; and (v) reasons for the offer and use of proceeds.

A supplementary prospectus would be passported into Spain in the same manner as described above.
Once the CNMV has received the aforementioned documents, it records the prospectus in the registry of prospectuses and publishes the Spanish translation of the summary of the prospectus containing key information relating to the offer on its website and it records translation of the summary.

The CNMV adopts the email communication system established by ESMA. Based on experience, obtaining a prospectus passport in Spain usually takes 24-48 hours from receipt of the passporting application.

2. **Are there any additional responsibilities being assumed by the company, the directors or the underwriters by virtue of the passporting into your jurisdiction?**

Yes. The company, directors and underwriters are subject to the requirements of the LMV, as set out in section 1, question 8 as if the prospectus had been approved by the CNMV. There are no ongoing obligations.

3. **Are there additional documents which require approval, as well as the prospectus?**

No.

**UNITED KINGDOM**

1. **Passporting prospectuses into the UK**

The issuer will be required to submit to the home competent authority an email containing electronic versions of the approved prospectus and a translation of the prospectus summary into English. The request to the host competent authority should make it clear whether the passport is required for the purposes of admission to trading on a regulated marked in the UK or for a public offer or both. The home competent authority will be required to email the FCA an approved copy of the prospectus and a certificate of approval. Confirmation of receipt email will be sent by the FCA to the overseas competent authority within 24 hours. A list of all documents passported into the UK will be available on the FCA website.

The FCA will only accept a passported prospectus that has been translated into English in its entirety. With regard to Article 19(2) of the Prospectus Directive, the FCA effectively interprets the provision “a language customary in the sphere of international finance” to mean only the English language.

Passporting a prospectus into the UK does not automatically result in the admission to listing and/or trading of the securities relating to the prospectus because the listing and prospectus regimes are separate. Compliance with the UK prospectus regime does not necessarily mean that the issuer satisfies the eligibility requirements for listing under the Listing Rules. An issuer that wishes its securities to be added to the Official List of the UK Listing Authority must apply by submitting certain documents including an eligibility letter to the UKLA setting out how the issuer satisfies the relevant listing criteria, irrespective of which EEA authority is the competent authority for the purposes of the Prospectus Directive. The timing of the eligibility letter should be agreed in advance with the UKLA, but this will be no later than when the first draft of the prospectus is submitted for review by the competent authority in the relevant Member State. Further, the London Stock Exchange has requirements within its Admission and Disclosure Standards that would have to be satisfied for the securities to be admitted to trading on its Main Market.
2. Are there any additional responsibilities being assumed by the company, the directors or the underwriters by virtue of the passporting into your jurisdiction?

No, unless the passported prospectus is used to admit a company’s securities to trading on a regulated market in the UK. If that is the case, then the company and its directors will be subject to certain obligations under the Listing Rules and Disclosure and Transparency Rules.

3. Are there additional documents which require approval, as well as the prospectus?

No.
SECTION 3: EXEMPTIONS FROM THE REQUIREMENT TO PUBLISH A PROSPECTUS

1. Exemptions from the requirement to publish a prospectus

Issuers making a public offer of securities are exempt from the obligation to produce a prospectus in circumstances that include the following:

(A) the total consideration of the offer, when aggregated with the consideration for all other offers of the same securities, throughout the EEA, over a period of 12 months, is less than €5.0 million; and/or

(B) the offer is made solely to “qualified investors”; and/or

(C) the offer is addressed to fewer than 150 natural or legal persons, other than qualified investors, in each Member State; and/or

(D) the offer is for a minimum total consideration per investor of €100,000; and/or

(E) the offer is for securities whose denomination per unit amounts to at least €100,000; and/or

(F) the offer is for securities with a total consideration of less than €100,000 in the EEA, calculated over a period of 12 months; and/or

(G) there is any subsequent resale, or final placement, of securities through financial intermediaries provided a valid prospectus is available and the issuer gives written consent to its use.

The term “qualified investors” is defined as those persons classified as professional clients or eligible counterparties in accordance with MiFID.

In the Netherlands, the threshold referred to under (A) is €2.5 million instead of €5.0 million.

Where no prospectus is required, any advertisement must include a warning to that effect (unless the issuer chooses to publish a prospectus voluntarily).

2. Can you combine or mix and match any of the exemptions?

In all seven jurisdictions, it is not generally possible to mix and match the exemptions. However, exemptions (B) and (C) can be combined on an aggregate basis, allowing an offer to be made to both qualified investors and up to 149 persons in each Member State who are not qualified investors.

Standard selling restrictions for inclusion in offer documents exempt from the Prospectus Directive are included in Appendix 1.
SECTION 4: MARKETING, ANALYSTS’ RESEARCH AND PRESENTATIONS

Research prepared by connected brokers may be regarded by the market as being informed or as having been authorised, expressly or by implication, by the issuer or by other members of the underwriting syndicate. This gives rise to legal implications for the issuer and the other underwriters.

For these purposes, “research” means any newly-issued or previously-issued reports, brokers’ circulars or other research material (or portions thereof), including single-company reports regarding the issuer, or industry or country specific or other reports discussing the issuer. It also includes screen-based material or reports or material distributed through electronic means.
1. **What are the rules and procedures for dissemination of IPO related analyst research?**

Any communication or publicity made directly or indirectly by the issuer or the underwriters and through advertising, cold calling or use of financial service providers made before the prospectus receives the AMF approval ("visa") must comply with the requirements concerning promotional communications. One such requirement is that all promotional communications in France concerning an offering must be communicated to the AMF prior to dissemination.

Research reports released or distributed ("produits et/ou diffusés") in France must be prepared honestly, fairly and impartially and released promptly to ensure their newsworthiness.

2. **When can analyst research be distributed in the context of an IPO?**

Research guidelines addressed to members of the underwriting syndicate specify that analysts cannot distribute their research during a blackout period which usually lasts between two/three weeks prior to the AMF’s approval ("visa") of the prospectus.

3. **What procedures should be followed for the presentation of such research?**

Among others:

- Research reports must contain accurate and precise information and must not contain or be based upon (i) privileged or insider information ("information privilégiée"); or (ii) false or misleading information likely to have an effect on the market price.

- Research reports must be fairly presented. This obligation includes, *inter alia*, the obligation (i) to distinguish facts from interpretations, estimates, opinions and other kinds of non-factual information and (ii) to disclose the expected frequency of updates to the research reports, as well as any material changes in the policy with regard to the issuer.

- All sources must be reliable. If this is not the case, the research reports must state so clearly.

- All projections, forecasts, price targets and assumptions must be indicated as such.

- All important sources must be disclosed, including, where applicable, the fact that the report was communicated to the issuer and that its conclusions were modified as a consequence of such communication.

- Any basis or method used to value securities of the issuer, or the issuer itself, or to establish a target price for the securities, must be summarised.
• The meaning of any recommendation made, such as “buy”, “sell” or “hold”, as well as any time horizon associated with such recommendation, must be adequately explained, and any appropriate risk warning (including a sensitivity analysis of the assumptions used) must be indicated.

4. What disclaimer should appear in the analysts’ research reports?

A prominent disclaimer should appear in the research report stating, *inter alia*, that any investment decision should be based solely on the contents of the prospectus and not on the research report. Analysts should also limit the audience to whom the research may be distributed. A disclaimer may not, however, exclude liability in all circumstances.

Please see the form of disclaimer attached as Appendix 2.

5. Can the issuer review the draft research before it is published?

Analysts are under no legal obligation to submit a draft research report to the issuer (or its advisors) for comment. However, in practice, analysts do submit a draft to the issuer and take into account any comments on factual inaccuracies, although analysts are under no obligation to make any changes as a result of any comments received, but should they make any changes, these must be disclosed in this report.

6. What are the relevant guidelines for the production and distribution of roadshow presentation materials?

Any communication relating to an offer, whether oral or written, must be consistent with the information provided in the prospectus. The following precautions should be taken in relation to roadshows and “one-on-one” presentations with institutional investors:

(A) All presentations should be prepared on the basis of a detailed script to ensure, in particular, the accuracy of its content and consistency with the prospectus;

(B) There must be no communication of information which will not be contained in the prospectus;

(C) In particular, the issuer should avoid statements involving predictions, projections or forecasts concerning its operations or comments on the value of the issuer or its securities other than those set forth in the prospectus; and

(D) No document other than those made available to French investors must be provided to and kept by participants at roadshows or “one-on-one” presentations.

7. In relation to analysts’ research and roadshow presentation materials, do any of these documents require approval by the regulator?

These documents do not require approval by the regulator. However the AMF frequently attends press conferences and financial analyst presentations and frequently requests a copy of any related slide-show presentations for a consistency check with the prospectus.
GERMANY

1. What are the rules and procedures for dissemination of IPO related analyst research?

Arguably, analysts research relating to an IPO constitutes a financial promotion for the purposes of §15 of the German Securities Prospectus Act. As such, statements in research reports must not be untrue or misleading and may not deviate from the statements in the prospectus. Dissemination of research reports should comply with the following restrictions:

(A) Research should be prepared and delivered only in physical form and should not be distributed electronically (other than by facsimile) or included in any electronic retrieval system or posted on a website. Previous research posted on websites or with third party research services may generally remain in place but should not be updated or referred to by transaction participants.

(B) Every recipient of research must be sent the formal offer document as soon as possible. However, the offer document should only be sent in accordance with the applicable rules as to its distribution.

(C) Research must not be given to the press or “on line” data providers or other media outlets, including public relations companies or consultants, wire services and information vendors.

(D) Research should not be distributed at any roadshow presentation or with any preliminary offer document or final offer document and it should not be accompanied by any marketing materials or other descriptive materials concerning the issuer.

(E) Research may not be issued or distributed by or on behalf of the issuer or any selling shareholder.

Persons who distribute research should only issue such number of research reports and to such clients as is consistent with their past practice in transactions of a similar nature. The number of research reports should be controlled and a record should be kept of the person to whom each report is sent.

2. When can analyst research be distributed in the context of an IPO?

It is generally customary to have a gap (or “blackout”) of a few weeks between the release of the research and launch of the offering, the idea being to disassociate the research from the offering documentation in the event that the research contained inaccuracies or opinions which subsequently proved unfounded and allowing the recipient of such research to claim that it formed part of the offering documentation that he relied on it in making his investment decision. During the blackout period research should not be published and previously published reports should no longer be distributed. Common practice has been to impose a blackout period from two weeks before the date of the prospectus until 30 days after settlement/listing. After expiration of the blackout period, research should be distributed in updated form only.

3. What procedures should be followed for the presentation for such research?

Section 34(b) of the German Securities Trading Act sets out the requirements for research reports, including:
(A) The author of a research report must have the required knowledge and needs to be diligent in preparing the report;

(B) Enterprises that prepare and distribute research reports must be structured in such a way, and have in place appropriate control mechanisms, so as to exclude conflicts of interest;

(C) Research reports must state whether any conflicts of interest relating to the production or distribution of the report exist; and

(D) Drafts of a research report that is made available to the issuer must not contain a recommendation or target price.

4. What disclaimer should appear in the analysts’ research reports?

A prominent disclaimer should appear in the research stating, among other things:

(A) that any investment decision should be based solely on the offer document and not the research report;

(B) whether the research has been prepared by an institution that is acting as underwriter to the offering;

(C) where the offer document may be obtained; and

(D) restrictions on the distribution of the report into certain jurisdictions such as the United States, Japan, Australia and Canada.

A German form of a disclaimer is attached as Appendix 3.

5. Can the issuer review the draft research before it is published?

It is common practice in Germany to permit an issuer to review a draft of a research report for the purpose of verifying the accuracy of the factual statements contained in the report and to compare the information with that in the draft offer document.

Submission of a draft research report to an issuer is not permitted if that research contains a recommendation or target price. Research reports for an IPO typically do not contain a recommendation or a target price (but an estimate of the enterprise value). However, many financial institutions have established a policy of providing the issuer with a “redacted” version of a draft research report where any evaluation of the enterprise value has been deleted. Some financial institutions have extended this policy so that other syndicate banks are only provided with a redacted report as well.

6. What are the relevant guidelines for the production and distribution of roadshow presentation materials?

The following guidelines should be followed in preparing investor presentations to market the securities of a German issuer at roadshows:
(A) All the information conveyed at an investor presentation must be consistent with what is in the prospectus or other formal offering document. No material information should be presented at a road show but omitted from the prospectus.

(B) All investors who agree to subscribe or purchase securities in the offer should, prior to such agreement, be provided with the prospectus. Where only a draft prospectus is available the investors should be provided with the details of all material changes made since the production of the version of the prospectus they have received.

(C) Where abridged information from the prospectus is presented at investor presentations, care should be taken to ensure that any extraction or summary does not create a misleading impression.

(D) Opinions and statements about the future, such as predictions, forecasts and similar, some of which may be routinely produced by the issuer for internal purposes, should not be divulged to potential investor, unless they are in the prospectus.

(E) Inside information must not be disclosed at any stage to anyone at a road show, unless it is announced to the market.

(F) Supplementary information may be requested by attendees before or after the presentation. It may be acceptable to provide this information if it is publicly available or in the prospectus. Care should, however, be taken and no material should be given to one investor which is not given to others. In addition, any information provided needs to be verified to the same standard as the presentation material.

(G) Investors present at a road show should not be permitted to take away with them any material (including copies of the slides) relating to the securities being offered. Where it is decided (having taken appropriate legal advice) that they may take any material away with them, it must clearly be marked confidential and made clear that it is not offering material. It will also need to contain suitable disclaimers.

7. In relation to analysts’ research and roadshow presentation materials, do any of these documents require approval by the regulator?

No.

ITALY

1. What are the rules and procedures for dissemination of IPO related analyst research?

The distribution of analyst research reports is an “investment service” and may only be carried out by “authorised intermediaries” in accordance with Articles 18(1) and 1(5)(f) of the CFA. The rules governing dissemination of such research reports are contained in the CFA and Issuer Regulation, either explicitly or by reference to principles governing dissemination of information during public offerings. Please note that according to market practice, the term “analyst research report” includes any broker’s circular, opinion, recommendation or other research material in whatever form regarding or referring to the issuer and/or its group, including, without limitation, pre-deal reports, company-specific ordinary course reports, industry or country reports, updates or reissues of previously
distributed reports, screen-based material and other material distributed through electronic means as well as any excerpts from, or copies of, any of the foregoing.

Research reports prepared in conjunction with an IPO and before the prospectus is published should be distributed only to “qualified investors”. Any distribution of reports to the public may be considered as a “solicitation” which can only be carried out through the publication of a prospectus. Any breach of the rules on public offers of securities is sanctioned by an administrative fine between one quarter to twice the value of the offer.

If analysts wish to disseminate research reports relating to the issuer or the securities offered in the published prospectus to the public, rules relating to the distribution of “recommendations” apply. These rules contain more stringent procedures and content requirements than those applicable to research reports distributed to qualified investors. In order to avoid the application of these rules, research reports should only be sent to qualified investors, in accordance with the procedures described in the following paragraphs, and they should not be distributed through distribution channels (i.e. channels through which the information is, or is likely to become, available to a large number of people). If the research report breaches any of the rules on “recommendations”, a fine between €5,000 and €500,000 will be applicable to the firm that prepared the report as well as to its directors and employees.

As a general principle, the information disclosed in analyst reports, as any other information disseminated in whatever form to qualified investors in the context of marketing activities, must be consistent with the information that must be disclosed in a retail prospectus according to the principle of equal treatment of the addressees of a public offer. Moreover, should the information disclosed in analyst reports include either price-sensitive information or financial data intended to be reported in the issuer’s annual and interim financials, the issuer would be obliged to disclose such information to the public pursuant to Article 114 of the CFA.

2. When can analyst research be distributed in the context of an IPO?

Italian law does not explicitly provide for a “blackout period” between the publication of analyst research and the launch of an offer. Nevertheless, it is common practice to observe such a time gap in the context of IPOs to dissociate research reports from other offering material. The aim is to make investors aware that these reports should not be relied upon and to avoid any related risk.

Blackout periods usually start 15 days prior to the launch of an offer and last until 40 days after its closing, although, as these periods are not prescribed by law, they may not be strictly followed. Research reports should not be re-issued following the end of the blackout period.

3. What procedures should be followed for the presentation of such research?

The Issuer Regulation and CFA contain certain requirements which must be met by offerors, issuers and lead managers when disseminating information in the context of an IPO, even if the information is sent to qualified investors only:

(A) Article 34-sexies of the Issuer Regulation requires that the issuer, the offeror and the lead managers ensure factual consistency between the research reports and the prospectus. Therefore, particular care must be
taken to clearly distinguish between the analysts’ own opinions, valuations and projections, and factual information provided by the issuer.

(B) Copies of the research reports must be sent to Consob (confidentially) as soon as they are finalised, making it clear in the transmission letter that the reports are being distributed to qualified investors in Italy only. It is also recommended to send a copy to the Italian Stock Exchange (again subject to confidentiality).

(C) Article 114(8) of the CFA requires that information contained in research reports is presented “correctly” and that any interest, or conflicts of interest, held by analysts in relation to the financial instruments which are the subject of the report be disclosed. This does not apply to reports by credit rating agencies.

The following guidelines have been devised by global co-ordinators in IPOs for the distribution of research. The guidelines are not imposed by law but market practice. They should be followed as a matter of prudence:

(A) Research should be prepared and delivered only in physical form and in one mailshot. It should not be distributed by email or electronic form. Reports should not be sent to the press or financial public relations companies. Reports should not be published on any screen-based or electronic information service or database.

(B) Reports should not be distributed at roadshow presentations or investor meetings.

(C) Analysts or other persons should only distribute research reports to such clients and in such quantities as is consistent with past practice. A record should be kept of the number of research reports distributed and the names of recipients. The recipients should also be sent a copy of the offer documentation under a separate cover.

(D) An effective Chinese wall must be maintained between the analysts preparing the research report and the investment banking team responsible for the IPO. This is to ensure that the analysts do not receive any inside information and at the same time, maintain their objectivity.

(E) Research reports should not make any reference to the IPO and, in particular, should not contain an explicit valuation or investment recommendation in relation to the securities which are being analysed. Research reports should not refer to the securities available for purchase from the Lead Managers in the IPO. However, research reports may discuss the analysts’ own view as to the most appropriate method to be used in valuing the securities.

4. **What disclaimer should appear in the analysts’ research reports?**

A disclaimer should be prominently included on the front page of the report, or inside the front or back cover provided a reference to the disclaimer is included on the front page. The disclaimer should be in substantially the same form as in Appendix 4.

It would also be prudent to include additional wording as a footer to each page of the research report indicating that the research report should not be distributed in particular jurisdictions where its dissemination may be prohibited.
5. Can the issuer review the draft research before it is published?

Draft research reports can be submitted to the issuer for the purpose of verifying facts, provided the valuation section and the executive summary are removed from the draft.

6. What are the relevant guidelines for the production and distribution of roadshow presentation materials?

Article 34-sexies of the Issuer Regulation applies to all information disseminated in the context of an IPO, including roadshow presentation material. Consistency with the information contained in the prospectus must be ensured and any conflicts of interest must be disclosed (see question 3 above).

It is also advisable to hold roadshow presentations or other investor meetings, even with qualified investors, after the prospectus has been published in order to minimise the risk that any material information is disclosed to investors while the prospectus and offering documentation are still being negotiated.

7. In relation to analysts’ research and roadshow presentation materials, do any of these documents require approval by the regulator?

Where these documents are addressed to qualified investors only, copies may have to be sent to Consob (and the Italian Stock Exchange) as described in question 3 above but no formal approval is required by the regulatory authorities.

THE NETHERLANDS

1. What are the rules and procedures for dissemination of IPO related analyst research?

Dutch law does not provide specific rules for dissemination of IPO related analyst research.

However, the following more generic requirements must be observed:

Conduct of business rules (“MiFID”)

The Dutch rules implementing MiFID, which in principle only applies to (i) investment firms with a Dutch licence and (ii) other investment firms to the extent that they are a Dutch branch issuing the research, contain specific rules with respect to “investment research” and “investment advice”. In addition, these investment firms will be subject to conduct of business rules (such as know your customer requirements) and organisational requirements (such as the requirement to establish Chinese walls) which may have a bearing on their dissemination of IPO related analyst research.

Market Practice

There are a number of practices, such as blackout periods and legends, applied by investment firms so as to avoid the impression that the research has been authorised by the issuer or syndicate in order to distinguish the research from the offering and the offering documentation (and to reduce potential liability).
Market abuse

Recommendations
In relation to “recommendations” within the meaning of the MAD, FMSA contains fairly detailed rules aimed at: (i) disclosure of the identity of the person drawing up or publishing the recommendations; (ii) the recommendation containing a fair representation; and (iii) disclosure of circumstances which may reasonably be assumed to impair the objectivity of the recommendation.

Insofar as investment firms are concerned, these rules in principle apply to:

(A) recommendations made from within or in the Netherlands relating to financial instruments listed or to be listed on a regulated market or on a multi-lateral trading facility (“MTF”) in the Netherlands;

(B) recommendations made from within or in a non-EEA State relating to financial instruments listed or to be listed on a regulated market in the Netherlands or a MTF in the Netherlands; and

(C) recommendations made from within or in another EEA State relating to financial instruments listed or to be listed on a MTF in the Netherlands.

Market manipulation
Under FMSA, it is prohibited to disseminate information which is likely to give a false or misleading signal as to the supply, demand, or price of financial instruments, when the distributor of the information knows or must reasonably know that such information is false or misleading.

Tipping
FMSA prohibits persons with inside information from:

(A) disclosing inside information to another person (unless in the normal course of employment, profession or duties); and

(B) recommending or inducing another person to conclude or effect transactions in the relevant instruments.

Civil liability for misleading information
On the basis of a specialis of tort, a person may be held liable for damages caused by publishing misleading information.

2. When can analyst research be distributed in the context of an IPO?

Dutch law does not provide specific rules regarding the calendar for distribution of research reports. Research reports are distributed according to the guidelines set forth in a memorandum distributed to syndicate members. Such guidelines take into account Dutch market practice and international market restrictions, and provide for a publication date.

A gap (or “blackout period”) of a few weeks between the release of the research report and launch of the offering normally exists to disassociate the research report from the offering documentation. During the blackout period, research reports should not be published and previously published reports should not be distributed.
The market practice is not very precise but blackout periods tend to be from at least two weeks before the date of publication of the prospectus until 30 days after listing.

3. What procedures should be followed for the presentation of research:

The following are recommended guidelines for the distribution of research:

(A) Research should be prepared and delivered only in a physical form and should not be distributed electronically (other than by facsimile) or included in any electronic retrieval system or posted on a website. Previous research posted on internet websites or with third-party research services may generally remain in place but should not be updated or referred to by transactions participants.

(B) Every recipient of research must be sent the formal offer document as soon as possible. However, the offer document should only be sent in accordance with the applicable rules as to its distribution.

(C) Research must not be given to the press or “on-line” data providers or other media outlets, including public relations companies or consultants, wire services and information vendors.

(D) Research should not be distributed at any roadshow presentation or with any preliminary offer document or final offer document and it should not be accompanied by any marketing materials or other descriptive materials concerning the issuer.

(E) Research may not be issued or distributed by or on behalf of the issuer or any selling shareholder.

(F) All persons who distribute research should only issue such number of research reports and to such clients as is consistent with their past practice in transactions of a similar nature of the offer. The number of research reports should be controlled and a record should be kept of the person to whom each report is sent.

4. What disclaimer should appear in the analysts’ research reports?

No specific disclaimer is required under Dutch rules.

However, pursuant to the rules on “recommendations” within the meaning of the MAD:

(A) investment firms giving recommendations must publish in generic terms the organisational and administrative measures adopted by it to prevent conflicts of interest; and

(B) a recommendation by an investment firm must contain: (a) clear and conspicuous mention of the name and function of the person who has drawn up the recommendation and the name of the person responsible for the publication of the recommendation; (b) a statement that the AFM is the competent supervisor; (c) a clear and conspicuous description of any circumstances which may reasonably be assumed to impair the objectivity of the recommendation; and (d) the other elements set forth in sections 16 – 19 of the FMSA Decree on Market Abuse.
5. Can the issuer review the draft research before it is published?

The issuer cannot review draft “investment research” within the meaning of the MiFID before it is published if such draft contains a recommendation or target price.

6. What are the relevant guidelines for the production and distribution of roadshow presentation materials?

Consistency with the prospectus

Under FMSA, an issuer is not allowed to make any oral or written statements relating to the offer or to the listing of the securities, which is inconsistent with the prospectus. Issuer advertisements must:

(A) state that a prospectus has been published or will be published;

(B) indicate where the prospectus can be obtained;

(C) be clearly recognisable as an advertisement;

(D) not contain information that is inaccurate or misleading; and

(E) be consistent with the information contained in the prospectus.

Non-public roadshow information

Under FMSA, the issuer must, with respect to material information disclosed by it to qualified investors or others (including information which is material for assessing the assets and liabilities, financial position, profit and losses and prospects of the issuer) in the context of meetings relating to offers of securities or the listing either:

(A) where a prospectus is published, include that information in the prospectus (or in a supplement); or

(B) where no prospectus is published, provide that information to those to whom the offer of securities is addressed.

Civil liability of issuer (and possibly of lead manager/listing agent)

In 2009, the Supreme Court of the Netherlands ruled, in brief, that under Dutch civil liability rules, generally:

(A) an issuer should, where the relevant market has an incorrect perception or where there is confusion or uncertainty on a subject matter that is relevant for potential investors and which is caused by statements made by or on behalf of the issuer or that can be attributed to the issuer, make a public announcement in addition to the publication of a prospectus (e.g. by means of a press release) to clarify the matter. It cannot be excluded that such duty also rests on the issuer in circumstances that the incorrect perception, confusion or uncertainty is not caused by or cannot be attributed to the issuer, especially if the subject matter is of material relevance for an investment decision.

(B) a lead manager must use its best efforts to prevent that, in relation to the issuer, an incorrect perception is created with potential investors. Depending on the specific circumstances of the case, this may imply that
the lead manager prepares and instructs the issuer and its management in relation to, for example, a press conference in order to prevent public announcements by or on behalf of an issuer from contradicting what is stated in the prospectus and therefore cause confusion.

(C) a lead manager may, depending on the specific circumstances of the case (in particular the division of tasks among the managers), have the obligation under (A).

7. In relation to analysts’ research and roadshow presentation materials, do any of these documents require approval by the regulator?

No, analysts’ research and roadshow materials do not require the prior approval of the AFM.

PORTUGAL

1. What are the rules and procedures for dissemination of IPO related analyst research?

There are no restrictions under Portuguese law as to who may receive analyst research.

This notwithstanding, the following prerequisites must be observed:

(A) To the extent that the research activities are characterised as financial intermediary activities (under the PSC, general investment recommendations constitute an ancillary investment service, therefore a financial intermediary activity), the Portuguese regulatory regime regarding financial intermediaries’ organisation and conduct of business rules must be observed, in particular the financial intermediary authorisation requirements.

(B) Investment recommendations have to comply with the requirements set out in Articles 12-B to 12-E of the PSC, which provide for the contents thereof, disclosure of conflicts of interest, dissemination of investment recommendations produced by third parties and dissemination by reference.

(C) Moreover, investment recommendations must comply with the quality of information and language requirements. Accordingly, all information included in research reports disclosed in Portugal shall be complete, accurate, updated, clear, objective and lawful. All such information likely to influence investors’ decisions, such as research reports, must be published in Portuguese language, or accompanied by a Portuguese translation.

(D) Furthermore, on 12 August 2008, the CMVM issued a set of recommendations (although with no binding value) on research reports (“CMVM Recommendations on Research Reports”), which shall also apply, addressed to several market players involved in conducting research activities, i.e., the issuers financial intermediaries and other financial analysts, journalists and investors. For further development please see 3 below.
2. When can analyst research be distributed in the context of an IPO?

There are no specific restrictions as to when analyst research can be distributed in the context of an IPO. However, it should be noted that blackout periods in connection with pre-offer research may apply in Portugal generally for the purpose of foreign law restrictions.

3. What procedures should be followed for the presentation for such reports?

CMVM Recommendations on Research Reports state, *inter alia*, that a research report should:

(A) disclose the relationship between the financial analyst and issuer and, in particular: (i) the material agreements entered into between them; (ii) the participation of the financial analyst in syndicates relating to the assistance or placement of securities issued by the issuer within twelve months prior to the issuance of the research report; and (iii) any financial instruments held by the financial analyst, and/or collaborating financial intermediaries, which are the object of the research report;

(B) expressly indicate if the issuer has acknowledged the contents of the investment recommendation and if it has validated the respective assumptions, prior to disclosure of the research report;

(C) include warnings addressed to non-qualified investors relating to the risks inherent in the research;

(D) disclose or indicate any public suggestion by the financial analyst to invest or disinvest in the relevant financial instruments;

(E) disclose on the respective website for three months, a file containing the research reports issued and disclosed by the relevant financial analyst within the past 12 months; and

(F) disclose whether the financial analyst has attended meetings concerning participation of the relevant financial intermediary in public offers, or a placement of securities issued by the company that are the subject of the report.

4. What disclaimer should appear in the analysts’ research reports?

Analysts’ research reports should include a disclaimer stating, *inter alia*, that such a document does not constitute an offer to buy or sell securities issued by the company and that any investment decision should be based upon the information contained in any associated offering document, in particular, information contained in the prospectus. The form of such disclaimer is set out in Appendix 5.

5. Can the issuer review the draft research before it is published?

Draft research may be reviewed by the issuer before it is published. The issuer may only review the accuracy of factual statements included in the research report. It may not comment on the analysis or review any target investment recommendations.
Under CMVM Recommendations on Research Reports, research reports must indicate if the issuer has acknowledged the contents and validated any assumptions prior to disclosure.

6. What are the relevant guidelines for the production and distribution of roadshow presentation materials?

Marketing materials, such as roadshow presentation materials, shall:

(A) comply with PSC principles concerning quality of information (i.e. should be complete, accurate, updated, clear, objective and lawful);

(B) refer to the existence or future availability of a prospectus;

(C) be accurate and not misleading; and

(D) consistent with the content of the prospectus.

In addition, all information disclosed in Portugal that is likely to influence the decision of investors, such as research reports, must be written in Portuguese or accompanied by a Portuguese translation. CMVM may waive, in whole or part, the translation when it considers that the interests of investors are protected.

7. In relation to analysts’ research and roadshow presentation materials, do any of these documents require approval by the regulator?

Under PSC and CMVM guidance, any public offer of marketing materials (including roadshow presentations) must get the prior approval of CMVM.

As a general rule, marketing materials can only be disclosed to the public when the relevant prospectus has been registered with CMVM. However, when CMVM considers the approval of the prospectus or registration of the offer to be viable, following its preliminary analysis of the application, it may authorise marketing materials to be released to the public earlier, so long as this does not cause disruption to the addressees of the offer or to the market.

SPAIN

1. What are the rules and procedures for dissemination of IPO related analyst research?

The LMV contains a set of general principles relevant to research activity and the preparation of research reports. These principles must be read together with the rules established in the Spanish Code of Conduct for the securities market approved by Royal Decree 217/2008, of 15 February 2008, on the legal regime of investment services firms. Only investment services firms authorised to perform research activities in Spain are allowed to distribute research reports.

RD 1310/2005 also contains rules on the marketing of public offerings. In addition, research reports must also comply with the Spanish General Advertising Law (Law 34/1988) which, among other things, prohibits misleading
advertising. For the purposes of a research report, misleading advertising includes advertising with omissions of material information.

Failure to comply with these rules may result in the removal of the relevant member from the prospective syndicate, in addition to other administrative sanctions or liabilities which may arise as a result of the breach of Spanish securities regulations. In particular, carrying out investment services without authorisation may lead to severe penalties and sanctions for the relevant entity.

2. **When can analyst research be distributed in the context of an IPO?**

Spanish regulations do not provide specific rules regarding the calendar for distribution of research reports. Research reports are distributed according to the guidelines set forth in a memorandum distributed by the issuer to syndicate members. Such guidelines take into account Spanish market practice and international market restrictions, and provide for a publication date.

A gap (or “blackout period”) of a few weeks between the release of the research report and launch of the offering normally exists to disassociate the research report from the offering documentation. During the blackout period, research reports should not be published and previously published reports should no longer be distributed.

It is common practice to impose a blackout period four weeks before the date of the pathfinder until 30-40 days after listing. However, such a period may not be achievable and much shorter blackout periods may be adopted.

There should be no distribution of research reports once the pathfinder has been published so as to avoid potentially conflicting information about the issuer being in the market at the same time.

3. **What procedures should be followed for the presentation of such research?**

Presentation of research is not expressly regulated under Spanish law. In accordance with international market practice, the following guidelines are considered when distributing research reports:

(A) Prospective syndicate members and financial advisors must guarantee equal treatment of all clients. Although this rule is strict, we understand that it would be reasonable to justify segmentation of clients into objectively defined categories (for example, institutional investors, private banking clients, clients who typically receive these kinds of reports, clients in different industries and sectors, etc.). There should be no discrimination within any category either in terms of timing or content of information provided. However, CNMV has not confirmed our understanding. In any event, “equal treatment of clients” is a business conduct principle of general application to banks and investment firms and so any prospective syndicate member will be familiar with it and have procedures in place for such purpose.

(B) Prospective syndicate members who distribute research reports should issue such a number of reports as is consistent with past practice in similar equity transactions. Research reports should be distributed only through channels customarily used to contact investors.

(C) Research reports should be prepared and delivered in physical form and not via e-mail or website, database or electronic retrieval system.
Research reports should not be sent to the press or other media and must not be distributed at any roadshow presentations.

All research reports must include the day, month and year of publication on the outside front cover.

All prospective syndicate members should maintain records of the names and addresses of recipients of research reports.

4. **What disclaimer should appear in the analysts’ research reports?**

The report must state in a prominent place that it does not constitute an offer to sell or subscribe for securities of the company and that any investment decision should be taken on the basis of offering documents (including the prospectus when published). An example is set out in Appendix 6.

5. **Can the issuer review the draft research before it is published?**

Spanish regulations do not forbid the issuer from reviewing research reports. In practice, the issuer reviews a draft for the purpose of verifying the accuracy of factual statements and compliance with the syndicate member’s legal obligations. A draft research report may contain a target price. In order to preserve the independence of analysts’ research reports, the issuer does not comment on the analysis included in the report.

6. **What are the relevant guidelines for the production and distribution of roadshow presentation materials?**

The prospectus should be the principal marketing material. Additional marketing materials, such as roadshow presentations, must comply with the following guidelines:

(A) all materials must be clearly identified as marketing materials;

(B) the information contained in any roadshow presentation must be accurate and not misleading and be consistent with information contained in the prospectus; and

(C) any roadshow presentation materials must expressly state that a prospectus has been registered with CNMV and where it is available for collection.

During the marketing period, the company, its shareholders or any other person acting on their behalf is prevented from making any statements (whether oral or written) regarding profit forecasts, business opportunities or other financial projections unless such information is included in the prospectus or supplementary prospectus.

7. **In relation to analysts’ research and roadshow presentation materials, do any of these documents require approval by the regulator?**

These documents are not subject to the regulator’s approval. However, it is customary for CNMV to be invited to (and it usually attends) analysts’ presentations prior to the release of analysts’ reports. CNMV may require information contained in the analyst presentation to be included in the prospectus so as to avoid any
discrimination between qualified and retail investors. There are also precedents of CNMV asking for copies of research reports for informational purposes.

UNITED KINGDOM

1. **What are the rules and procedures for dissemination of IPO related analyst research?**

   The research is a financial promotion under FSMA and distribution will normally be restricted to persons covered by an exemption to the financial promotion requirements. Primarily this will mean high net worth entities and investment professionals.

2. **When can analyst research be distributed in the context of an IPO?**

   Market practice is to impose a blackout period ahead of the publication of the price range (or pathfinder) prospectus. During this period, research reports should not be published by analysts connected with prospective members of the underwriting syndicate, and previously published reports should no longer be distributed. The purpose of the blackout period is to impose a chronological gap between publication of research and publication of the first formal IPO offering documents to make it harder for any recipient of such research to argue that it formed part of the offering documentation which the recipient relied upon in making an investment decision. Common practice has been to impose a blackout period from at least two weeks before the date of the pathfinder until at least 30 days after listing.

3. **What procedures should be followed for the presentation of such research?**

   The following are recommended guidelines for the distribution of research:

   (A) Research should be prepared and delivered only in physical form and should not be distributed electronically (other than by facsimile) or included in any electronic retrieval system or posted on a website. Previous research posted on internet websites or with third-party research services may generally remain in place but should not be updated or referred to by transaction participants.

   (B) Every recipient of research must be sent the formal offer document as soon as possible. However, the offer document should only be sent in accordance with the applicable rules as to its distribution.

   (C) Research must not be given to the press or “on-line” data providers or other media outlets, including public relations companies or consultants, wire services and information vendors.

   (D) Research should not be distributed at any roadshow presentation or with any preliminary offer document or final offer document and it should not be accompanied by any marketing materials or other descriptive materials concerning the issuer.

   (E) Research may not be issued or distributed by or on behalf of the issuer or any selling shareholder.
All persons who distribute research should only issue such number of research reports and to such clients as is consistent with their past practice in transactions of a similar nature to the offer. The number of research reports should be controlled and a record should be kept of the person to whom each report is sent.

4. **What disclaimer should appear in the analysts’ research reports?**

A disclaimer should appear in a prominent position on or inside the front cover of the research report stating, inter alia, that any investment decision should be based solely on the contents of the prospectus and not the research and that the research is the author’s work and has not been authorised or approved by the issuer (or the lead underwriter or any other syndicate member). Furthermore it should limit the audience to whom the research may be distributed.

Please see the form of disclaimer attached as Appendix 7.

5. **Can the issuer review the draft research before it is published?**

The involvement of the issuer will reduce the independence of the research and increase the likelihood that the issuer will assume liability for any inaccurate or misleading statements. However, issuers may wish to review the draft research reports before publication so that they may be checked for any inaccurate or misleading information. This is not permitted where the research is classified as investment research under the FCA Conduct of Business Rules and the research contains a recommendation or target price.

6. **What are the relevant guidelines for the production and distribution of roadshow presentation materials?**

The following guidelines should be followed in preparing investor presentations to market the securities of a UK issuer at a UK roadshow:

(A) All the information conveyed at an investor presentation must be consistent with what is in the prospectus or other formal offering document. No material information should be presented at a roadshow but omitted from the prospectus.

(B) All investors who agree to subscribe or purchase securities in the offer should, prior to such agreement, be provided with the prospectus. Where only a draft (pathfinder) prospectus is available the investors should be provided with the details of all material changes made since the production of the version of the prospectus they have received.

(C) Where abridged information from the prospectus is presented at investor presentations, care should be taken to ensure that any extraction or summary does not create a misleading impression.

(D) Opinions and statements about the future, such as predictions, forecasts and similar, some of which may be routinely produced by the issuer for internal purposes, should not be divulged to potential investors, unless they are in the prospectus.
Inside information must not be disclosed at any stage to anyone at a roadshow, unless it is announced to the market.

Supplementary information may be requested by attendees before or after the presentation. It may be acceptable to provide this information if it is publicly available or in the prospectus. Care should, however, be taken and nothing material should be given to one investor which is not given to others. In addition, any information provided needs to be verified to the same standard as the presentation material.

Investors present at a roadshow ideally should not be permitted to take away with them any material (including copies of the slides) relating to the securities being offered. Where it is decided (having taken appropriate legal advice) that they may take any material away with them, it must clearly be marked confidential and make clear that it is not offering material. It will also need to contain suitable disclaimers.

In relation to analysts’ research and roadshow presentation materials, do any of these documents require approval by the regulator?

There is no need for regulatory approval of analysts’ research and roadshow presentation materials.
SECTION 5: STABILISATION

The provisions of the Buy-Back and Stabilisation Regulation (2273/2003/EC) (the “Stabilisation Regulation”), have direct effect throughout the EU and supplant previous rules in the area which they cover.

As a result of the Market Abuse Directive (2003/6/EC) (“MAD”) and the Stabilisation Regulation, the only stabilisation safe harbour for the market abuse provisions derived from MAD is provided by the Stabilisation Regulation. MAD covers market abuse on “regulated markets”, correspondingly the Stabilisation Regulation provides a stabilisation safe harbour in respect only of regulated markets. Falling outside of the safe harbour does not imply that the transaction will necessarily be abusive. The transaction must be assessed on a case by case basis under MAD.

Stock borrowing to settle over-allotments is common in all seven jurisdictions.
FRANCE

1. Are the provisions of the Stabilisation Regulation the only stabilisation rules in France?

In addition to MAD and the Stabilisation Regulation, the following rules apply in France:

(A) Book VI of the GR AMF and more particularly articles 631-5 to 631-10;

(B) AMF’s Decisions accepting liquidity contracts and share buyback programs as market practices; and

(C) AMF Instruction n°2005-06 dated February 22, 2005 on disclosure of transactions under a share buyback program and during stabilisation of securities.

2. What is the effect of overseas stabilisation?

There is no specific French regulation dealing with overseas stabilisation.

We have never been consulted on such transactions but we believe that the AMF would analyse the transactions with regard to their effect on the French market under French stabilisation rules and without taking into account the fact that such transactions may benefit from safe harbours under the relevant foreign country’s applicable rules.

3. What are the disclosure obligations in relation to the over-allotment option and purchase of shares in stabilising transactions?

The following information must be disclosed:

(A) stabilisation may be undertaken;

(B) stabilisation may be stopped at any time;

(C) beginning and end of the stabilisation period;

(D) identity of the stabilisation manager for each relevant jurisdiction, unless this is not known at the time of publication; and

(E) stabilisation transactions may result in a market price that is higher than would otherwise prevail.

The issuer, offeror or entity undertaking the stabilisation must provide the AMF with details of all stabilisation transactions no later than the seventh trading day after the execution date. The existence of and arrangements for stabilisation as well as the exercise of the greenshoe option must be made public within one week of the end of the stabilisation period through a press release posted both on the AMF’s and the issuer’s website.

Anyone who directly or indirectly holds financial or other instruments which entitle their holder to acquire shares that have already been issued, whose issuer’s home country is France, that are admitted to trading on a regulated
market of a State of the European Economic Area, must promptly upon obtaining, exceeding, or no longer holding 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 33 %, 50 %, 66 %, 90 % and 95% of the share capital or the voting rights, and within no later than four trading days, provide notice thereof to the issuer and to the AMF.

Holdings of financial instruments are disclosable if the instrument results in an entitlement to acquire, on the holder’s own initiative alone, under a formal agreement, shares or voting rights, and the instrument gives the holder an unconditional or discretionary right to acquire existing shares or voting rights.

In the case of a capital increase, the over-allotment option is provided by the issuer, then it should not fall within the description of financial instrument given above, because it is an option to acquire new (not “existing”) shares. After a brief informal exchange with the AMF, they have confirmed to us that such transaction would also not be seen as an instrument having “similar economic effects”.

In the case of a secondary offering of shares, the over-allotment option may theoretically fall within the description of financial instrument given above. However, we believe that the intent of the law is probably not to include transaction resulting from the exercise of over allotment-option as the banks acting as underwriters are not intended to keep the securities they hold in their trading book.

The penalty incurred by a shareholder who did not provide notice of threshold crossing to the issuer and to the AMF is the following: shares in excess of the fraction which should have been declared are stripped of the voting right for any shareholders’ meeting held within two years of the date of effective notification. The AMF may also impose administrative penalties in accordance with articles L. 621-14 and L. 621-15 of the FMFC for breach likely to undermine investor protection or the orderly operation of the market.

But in practice, the AMF does not seem to require any notification of holding of over-allotment option or impose a sanction when no notification has been made.

4. Can you refresh the short position?

The provisions of the Stabilisation Regulation do not specifically address whether a refreshment of the short position is permitted. Such activities do not benefit from safe harbour exemptions and need to be examined on a case by case basis to determine whether they constitute market abuse.

5. How do any of the above answers differ in relation to debt or convertible securities?

The above answers do not differ in relation to debt or convertible securities.

GERMANY

1. Are the provisions of the Stabilisation Regulation the only stabilisation rules in Germany?

In Germany the rules implementing the MAD are applicable to financial instruments:

(A) admitted to trading on the regulated market in Germany or included in the over-the-counter-trading;
Admitted to an organised market in the EU or EEA.

An application for listing which has been publicly announced is equivalent to an admission to trading.

Actions that may fall under the definition of market manipulation:

(A) do not amount to market manipulation if they are exempted under the Stabilisation Regulation;

(B) may be permissible if effected abroad and falling under the exemption set forth below under 2; or

(C) do not amount to market manipulation if they constitute a permissible market practice accepted by BaFin and the acting person has legitimate reasons in this context.

The latter exemption has no practical relevance as BaFin has so far not accepted any actions beyond what is permitted under the Stabilisation Regulation.

2. What is the effect of overseas stabilisation?

Provided that any overseas stabilisation is compliant with the rules of the relevant foreign market and that such rules are equivalent to those of the Stabilisation Regulation, such stabilisation will be considered to be within the safe harbours contained in German law. Although BaFin has made no public statement as to which foreign markets are considered to have stabilisation rules equivalent to the Stabilisation Regulation, the prevailing legal opinion is that the UK and US rules governing stabilisation in regulated markets constitute “equivalent” provisions. Also, national rules of other Member States that are compliant with the Stabilisation Regulation are likely to fall into this category.

3. What are the disclosure obligations in relation to the over-allotment option and purchase of shares in stabilising transactions?

Pursuant to Article 9(1) (e) of the Stabilisation Regulation disclosure must be made prior to the commencement of an offer period that:

(A) a greenshoe-option has been provided;

(B) the volume of such greenshoe-option; and

(C) the period for which the option has been provided.

Art. 9(3) of the Stabilisation Regulation specifying post stabilisation obligations requires publication of:

(A) the fact that stabilisation measures have been effected;

(B) the date when such measures were commenced and terminated;

(C) the price range within which stabilisation measures were effected on each date.
There is no requirement to disclose the total volume of shares that were repurchased.

Article 11(f) of the Stabilisation Regulation provides that an announcement must be made when a greenshoe-option is exercised. This includes in particular the number of shares acquired. In Germany this notification is in most instances combined with the details set forth in the preceding paragraph.

Furthermore, the general notification rules apply. Anyone who directly or indirectly holds financial or other instruments which entitle their holder to acquire, unilaterally under a legally binding agreement, shares in an issuer whose home state is the Federal Republic of Germany that carry voting rights and have already been issued, must promptly upon obtaining, exceeding, or no longer holding 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of voting rights, and within no later than four trading days, provide notice thereof to the issuer and simultaneously to the BaFin (Sections 25 and 25a German Securities Trading Act). Holdings of financial instruments are disclosable if either:

(A) the instrument results in “an entitlement to acquire, on the holder’s own initiative alone, under a formal agreement, shares to which voting rights are attached”, and the instrument gives the holder an unconditional or discretionary right to acquire existing shares; or

(B) the instrument has “similar economic effects” (which are defined broadly) to an instrument described in (A), unless the instrument is subject to conditions which are beyond the control of the parties.

Whether these notification requirements apply to an overallotment/greenshoe-option depends on the specific structure of the transaction, in particular whether the greenshoe-option is made available by the issuer (new shares) or a selling shareholder (existing shares with the option to redeem cash).

Shares which are purchased in the market to cover over-allotments may likewise be disclosable under general transparency rules. The general rule requires that anyone who, due to an acquisition, sale or other event, obtains, exceeds, or no longer holds 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of the voting rights in an issuer whose home country (Herkunftsstaat) is Germany must promptly, and within no later than four trading days, notify the issuer and simultaneously the BaFin (Section 21(1) German Securities Trading Act). However, the stabilisation manager may be able to make use of the exemption for shares held in its trading book. Provided that the daily balances of voting shares do not exceed 5 per cent. of the issuer’s voting shares then the holdings are exempt from disclosure so long as the manager ensures that the voting rights are not exercised or otherwise used to intervene in the management of the issuer.

4. Can you refresh the short position?

It is unclear whether the German rules on market manipulation permit the refreshment of a short position, i.e. a transaction where the stabilisation manager first purchases shares in order to stabilise and, when the market price subsequently exceeds the offer price, sells shares back into the market and ultimately exercises the greenshoe-option. Furthermore, the refreshment of the shoe raises questions about the contractual position vis-à-vis the seller of the option, namely:

(A) the level at which the stabilisation manager may resell the shares into the market (potentially affecting the market price negatively);
the length of time that the stabilisation manager may wait with resales; and

how to allocate the trading gain from the refreshment of the shoe.

On 15 May 2009 CESR issued guidelines on "refreshing the greenshoe" that are restrictive and will prohibit sales of securities in almost any circumstances. BaFin is likely to follow these guidelines in its market surveillance.

5. How do any of the above answers differ in relation to debt or convertible securities?

German rules on stabilisation in general do not differ between equity securities and debt/equity linked securities (all falling into the definition of a financial instrument). However, market practices as to this issue vary. For example, it is not customary to structure a greenshoe option around the issuance of a straight debt instrument. Equity linked products are often settled only weeks after allocation; in the meantime these instruments are traded on a when issued basis in the OTC market with special structures facilitating stabilisation measures.

ITALY

1. Are the provisions of the Stabilisation Regulation the only stabilisation rules in Italy?

Article 34-septies of the Issuer Regulation explicitly incorporates Part III of the Stabilisation Regulation. In particular, Article 15(2) provides that an entity making a stabilising transaction in Italy must act so as to "minimise the impact on the market, taking into account its conditions at the time"; and Article 15(3) imposes disclosure obligations to be fulfilled after the stabilising period has expired (see question 3 below).

Compliance with the requirements and restrictions set out under the Stabilisation Regulation – and incorporated by reference in the Issuer Regulation – provides a safe harbour exemption from the application of market abuse provisions and, in particular, from criminal liability for abuse of inside information and market manipulation.

By means of resolution No. 16839 of 19 March 2009 Consob established two “accepted market practices” dealing, respectively, with stabilisation activities (outside of an IPO) and repurchase of financial instruments for purposes other than the ones covered by the Stabilisation Regulation. With particular reference to the stabilisation market practice, the authority clarified that the aim of the practice is to allow an issuer to enhance the liquidity of its financial instruments for a limited period of time, by entering buy and sell orders into the market in a way to ensure regular trading activity and avoid price fluctuations. Such stabilization activities must be carried out via an independent financial intermediary appointed by the issuer, on the basis of a specific liquidity enhancement agreement whose contents must be disclosed to Consob and the Italian Stock Exchange. Compliance by the financial intermediary with the restrictions set out under the Stabilisation Regulation in terms of prices and volumes, allows the issuer to limit the risk of application of the administrative sanctions provided for market manipulation.

2. What is the effect of overseas stabilisation?

The Stabilisation Regulation does not recognise non EEA rules; therefore, stabilisation activity in accordance with overseas’ jurisdictions may not fall within a safe harbour. The equivalence of any foreign jurisdiction’s stabilisation rules to those of the Stabilisation Regulation for Italian securities law’s purposes must be assessed on a case-by-case basis as Consob has not released any public statement thereon.
3. **What are the disclosure obligations in relation to the over-allotment option and purchase of shares in stabilising transactions?**

Article 34-septies of the Issuer Regulation provides that information which must be disclosed pursuant to Part III of the Stabilisation Regulation must be communicated by stabilisation managers to at least two news agencies and to the Italian Stock Exchange. In particular, a disclosure notice, in the form provided at Annex 1L to the Issuer Regulation detailing the number of shares purchased/sold for each transaction and the relevant consideration must be published within one week of the end of the stabilisation period. A copy of the disclosure notice must be sent also to Consob by the stabilisation managers.

Article 119 of the Issuer Regulation requires a holder of a right to buy voting shares in a listed company to disclose such right to the listed company and Consob. Such disclosure must be made where the exercise would result in that holder’s shareholding reaching, exceeding or falling below 5, 10, 15, 20, 25, 30, 50 or 75 per cent. of the company’s share capital. Consequently the stabilisation manager may be required to disclose its holding of the over-allotment option.

In accordance with Article 117 of the Issuer Regulation, the number of shares actually purchased pursuant to the over-allotment option, or in stabilising transactions in general, must be disclosed to the issuer and Consob if the holder’s shareholding reaches, exceeds or falls below 2, 5, 10, 15, 20, 25, 30, 50, 66.6, 90 and 95 per cent. of the issuer’s share capital.

A specific exemption from the application of the above disclosure requirements has been recently introduced in the Issuer Regulation for qualified investors provided that: (i) the shareholding is below the 5 per cent. threshold; (ii) the shares have been purchased in the context of a public offer by the underwriters; (iii) the relevant voting rights are not exercised by the holders; and (iv) the holders undertake to sell the shares within 18 months of the purchase date.

4. **Can you refresh the short position?**

The provisions of the Stabilisation Regulation and of the Issuer Regulation do not specifically address whether a refreshment of the short position is permitted. Such activities do not benefit from safe harbour exemptions and need to be examined on a case by case basis to determine whether they constitute market abuse.

5. **How do any of the above answers differ in relation to debt or convertible securities?**

The obligations imposed by Article 34-septies of the Issuer Regulation relate to any “financial instrument”, which includes debt or convertible securities.

Convertible securities or warrants giving the holder a right to acquire issued and paid-up shares carrying voting rights in listed companies must be disclosed where the relevant thresholds under Article 119 (question 3 above) are reached but only if such right can be exercised within 60 days. The subsequent acquisition of such shares must also be disclosed pursuant to Article 117 of the Issuer Regulation.
1. Are the provisions of the Stabilisation Regulation the only stabilisation rules in the Netherlands?

FMSA provides that the MAD market manipulation prohibition and Stabilisation Regulation also apply to market manipulation:

(A) taking place from within or in the Netherlands, with respect to financial instruments admitted to trading on an MTF in the Netherlands (such as Alternext Amsterdam), another EEA Member State or on an exchange outside the EEA comparable to a regulated market or MTF; or

(B) taking place from within or in another EEA Member State or a non-EEA State, with respect to financial instruments admitted to trading on an MTF in the Netherlands.

In addition, the FMSA Regulation on Accepted Market Practices applies in the Netherlands. This regulation relates to liquidity contracts.

2. What is the effect of overseas stabilisation?

Overseas stabilisation rules are not recognised in the Netherlands. To the extent that the FMSA prohibition on market manipulation applies, overseas stabilisation must comply with the Dutch rules.

There are currently no “accepted market practices” within the meaning of the MAD exempting overseas stabilisation from the Dutch prohibition on market manipulation. However, the AFM has indicated that in principle, where a Dutch entity acts in another Member State in compliance with the “accepted market practice” of that Member State, the Dutch prohibition on market manipulation does not apply.

3. What are the disclosure obligations in relation to the over-allotment option and purchase of shares in stabilising transactions?

For equity securities, the Prospectus Regulation requires disclosure in the prospectus of the over-allotment option, greenshoe and (possibility of) stabilisation.

The Stabilisation Regulation requires (i) weekly notification of all stabilisation transactions to the competent authority of the relevant market; and (ii) publication, within one week of the end of the stabilisation period, of certain details on the stabilisation.

FMSA does not contain any specific disclosure obligations with respect to the over-allotment option or purchase of shares in stabilising transactions. However, it does contain notification requirements for holdings of 5 per cent. (as per 1 July 2013 this will be 3 per cent.) and more in Dutch companies listed on a regulated market and non-EEA companies listed on Euronext Amsterdam, but these are unlikely to apply to the stabilising manager.
Note that in relation to liquidity contracts, FMSA Regulation on Accepted Market Practices requires the issuer to issue a press release on:

(A) it having entered into a liquidity contract, stating the trade name of the investment firm, the amount of money or the number and type of shares to which the liquidity contract relates and the trading venue on which the investment firm will conclude or effect transactions under the liquidity contract;

(B) each amendment to the liquidity contract;

(C) on a quarterly basis or upon termination of the contract, the performance under the liquidity contract, stating the number of purchase and sale transactions effected under the liquidity contract and the average size of these transactions.

4. Can you refresh the short position?

The AFM’s view is that selling securities acquired through stabilising purchases, including selling them to facilitate subsequent stabilising activity, does not fall within the safe harbour of the Stabilisation Regulation. On the other hand, this does not mean that such sales automatically constitute market manipulation. ‘Refreshing the greenshoe’ or similar behaviour should be carried out in a way that minimises the impact on the market and attention should be paid to prevailing market conditions at all times, so as to reduce the risk that ‘refreshing the greenshoe’ constitutes market manipulation.

5. How do any of the above answers differ in relation to debt or convertible securities?

The prohibition on market manipulation also applies to debt and convertible securities. The safe harbour of the Stabilisation Regulation, however, is only available in respect of shares.

PORTUGAL

1. Are the provisions of the Stabilisation Regulation the only stabilisation rules in Portugal?

Yes. The PSC refers directly to the Stabilisation Regulation, although the sanction for non-compliance (criminal liability) is provided by Portuguese law.

2. What is the effect of overseas stabilisation?

Stabilisation in accordance with the laws and regulations of non-EEA-members may amount to market abuse. The Stabilisation Regulation does not grant a “safe harbour” exemption to overseas stabilisation.
3. What are the disclosure obligations in relation to the over-allotment option and purchase of shares in stabilising transactions?

The disclosure obligations are set out in the Stabilisation Regulation. In particular, issuers, offerors or entities undertaking the stabilisation on behalf of such persons, shall, before the opening of the offer period, publicly disclose the following:

(A) the fact that stabilisation may be undertaken and that there is no assurance that it will be undertaken and stopped at any time;

(B) the fact that stabilisation transactions are aimed at supporting the market price of the relevant securities;

(C) the beginning and end of the stabilisation period;

(D) the identity of the stabilisation manager, unless this is not known at the time of publication in which case it must be publicly disclosed before any stabilisation begins; and

(E) the existence and maximum size of any over-allotment facility or greenshoe option, and any conditions for the use of the over-allotment facility or exercise of the greenshoe option.

Under the Stabilisation Regulation, the details of the stabilisation activity must be notified by issuers, offerors, or entities undertaking the stabilisation activity to CMVM until the end of the seventh daily market session following the date of execution of the relevant activity.

In addition, within one week of the end of the stabilisation period, issuers, offerors, or entities undertaking the stabilisation activity must disclose the following information to the public:

(A) whether stabilisation was undertaken;

(B) the date when stabilisation started;

(C) the date when stabilisation last occurred; and

(D) the price range within which the stabilisation was carried out for each during the stabilisation period.

The exercise of the greenshoe option must also be disclosed to the public, together with all appropriate details, including the date of exercise and the number and nature of relevant securities involved.

Furthermore, the general notification rules apply. Any individual or legal entity who acquires or reduces a direct or indirect holding which, in aggregate or together with the shares already held, reaches, exceeds or falls below 2%, 5%, 10%, 15%, 20%, 25%, 1/3, 50%, 2/3 and 90% of the voting rights attached to the shares of a public company, which is an issuer of shares admitted to trading on a regulated market located or functioning in Portugal, is required to, within no later than four trading days, provide notice thereof to the issuer and simultaneously to the CMVM. (Transparency Framework)
In addition, any entity reaching or exceeding a long position of 2%, 5%, 10%, 15%, 20%, 25%, 1/3, 40%, 45%, 50%, 55%, 60%, 2/3, 70%, 75%, 80%, 85% and 90% of the share capital of a public company, which is an issuer of shares admitted to trading on a regulated market located or functioning in Portugal, is required to, within no later than four trading days, provide notice thereof to the issuer and simultaneously to the CMVM. Long positions include the shares whose voting rights are attributable to the holder and the agreements or financial instruments of similar economic effect to holding shares, that alone do not generate the attribution of voting rights. “Similar economic effect” to holding shares means the exposure to benefits resulting from the increase and to the risks due to depreciation of share prices via an agreement or the acquisition of a financial instrument. (Long Positions Framework)

The stabilisation manager’s rights under the over-allotment (or greenshoe) option constitute holdings of financial instruments which are disclosable if either:

(A) the instrument results in an entitlement to acquire, on the holder’s own initiative alone, under a formal agreement, shares to which voting rights are attached, and the instrument gives the holder an unconditional or discretionary right to acquire existing shares, in which case the holding shall be disclosed under both the Transparency Framework and the Long Positions Framework; or

(B) the instrument has “similar economic effects” to an instrument described in (A), in which case disclosure is made solely under the Long Positions Framework.

If the over-allotment option is provided by the issuer, then it should not fall within (A), because it is an option to acquire new (not “existing”) shares. If the over-allotment option is provided by a selling shareholder, then both (A) and (B) will be relevant.

Shares which are purchased in the market to cover over-allotments may be disclosable under both the Transparency Framework and the Long Positions Framework.

Finally, please note that if a holder, as a result of holding certain financial instruments subject to both the Transparency Framework and the Long Positions Framework, reaches, exceeds or no longer holds a threshold that is common for both the Transparency Framework and the Long Positions Framework (2%, 5%, 10%, 15%, 20%, 25%, 1/3, 50%, 2/3 and 90%), disclosure is only mandatory under the Transparency Framework.

4. **Can you refresh the short position?**

Yes. However, the Stabilisation Regulation only provides a safe harbour for stabilisation transactions that aim to keep market prices constant and not to short selling transactions in general. Further, under Portuguese Law, short selling transactions may still be considered, upon fulfilment of all relevant legal requirements, as market abuse or breach of the duty to protect the market.

5. **How do any of the above answers differ in relation to debt or convertible securities?**

The Stabilisation Regulation and the Portuguese specific rules as set out above apply equally to both debt and convertible securities.
SPAIN

1. Are the provisions of the Stabilisation Regulation the only stabilisation rules in Spain?

Yes.

2. What is the effect of overseas stabilisation?

The Stabilisation Regulation does not recognise stabilisation rules of non-EEA members. Although this does not necessarily imply that overseas stabilisation is market abuse, such actions are not within the safe harbours of the Stabilisation Regulation.

3. What are the disclosure obligations in relation to the over-allotment option and purchase of shares in stabilising transactions?

The Stabilisation Regulation provides that issuers, offerors, entities undertaking the stabilisation or any person acting on behalf of such persons shall, before the opening of the offer period of the relevant securities, disclose:

(A) the fact that stabilisation activity may take place and be stopped at any time;

(B) the fact that stabilisation is aimed at supporting the market price of the relevant securities;

(C) the beginning and end of the stabilisation period;

(D) the identity of the stabilisation manager; if unknown at the time of disclosure, the identity must be publicly announced before any stabilisation activity begins; and

(E) the existence and maximum size of any over-allotment facility or greenshoe option, the exercise period of the greenshoe option and any conditions for the use of the over-allotment facility or exercise of the greenshoe option.

The details of all stabilisation transactions must be notified to CNMV no later than the end of the seventh daily market session following the date of execution of the transaction.

Within one week of the end of the stabilisation period, the following information must be adequately disclosed by public announcement (hecho relevante) published on CNMV’s and the company’s websites:

(A) whether stabilisation activity was undertaken;

(B) the date on which stabilisation activity started;

(C) the date on which stabilisation activity last occurred; and

(D) the price range within which stabilisation was carried out, for each day of stabilisation.
Furthermore, the general notification rules apply. Anyone who directly or indirectly holds financial or other instruments which entitle their holder to acquire shares that have already been issued, whose issuer’s home country is Spain, that are admitted to trading on a Spanish official secondary market or on another regulated market of the European Union and that carry voting rights, must promptly upon obtaining, exceeding, or no longer holding 3 %, 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 35 %, 40 %, 45 %, 50 %, 60 %, 70 %, 75 %, 80 % and 90 % of voting rights, and within no later than four trading days, provide notice thereof to the issuer and to the CNMV. Holdings of financial instruments are disclosable if the instrument results in an entitlement to acquire, on the holder’s own initiative alone, under a formal agreement, shares to which voting rights are attached, and the instrument gives the holder an unconditional or discretionary right to acquire existing shares.

For these purposes, transferable securities, options, futures, swaps, forward rate agreements and any other derivative contracts, as referred to in Section C of Annex I of Directive 2004/39/EC, shall be considered to be financial instruments, as long as they meet the requirements set out above.

If the over-allotment option is provided by the issuer, then it should not fall within the description of financial instrument given above, because it is an option to acquire new (not “existing”) shares. If the over-allotment option is provided by a selling shareholder, then the description will be relevant.

Shares which are purchased in the market to cover over-allotments may likewise be disclosable under general transparency rules. The general rule requires that anyone who, due to an acquisition, sale or other event, obtains, exceeds, or no longer holds 3 %, 5 %, 10 %, 15 %, 20 %, 25 %, 30 %, 35 %, 40 %, 45 %, 50 %, 60 %, 70 %, 75 %, 80 % and 90 % of the voting rights in an issuer whose home country is Spain and whose shares are admitted to trading on a Spanish official secondary market or on another regulated market of the European Union must promptly, and within no later than four trading days, notify the issuer and the CNMV.

4. Can you refresh the short position?

The Stabilisation Regulation defines stabilisation as any purchase or offer to purchase securities in the context of a significant distribution of such relevant securities exclusively for supporting the market price. Sales made to refresh the short position fall outside of the definition and may not benefit from any safe harbour.

5. How do any of the above answers differ in relation to debt or convertible securities?

All of the above answers apply to debt and convertible securities.

UNITED KINGDOM

1. Are the provisions of the Stabilisation Regulation the only stabilisation rules in the UK?

Although the offence of market abuse under MAD applies to regulated markets only, the UK has chosen to implement MAD so that the offence applies to a wider category of “prescribed markets”, which are all UK markets, whether regulated or not.

The Stabilisation Regulation provides a safe harbour from committing the offence of market abuse in the UK in respect of stabilisation activities on regulated markets. However, the FCA continues to make its own
supplementary rules which provide a safe harbour in respect of stabilisation activities on prescribed markets (such as AIM), any recognised overseas investment exchange (such as EUREX, SIX Swiss Exchange and NASDAQ), and certain other named international, non-EEA exchanges (such as the NYSE, Tokyo Stock Exchange and Hong Kong Stock Exchange).

Behaviour which is in conformity with the FCA’s stabilisation rules does not amount to market abuse and is also exempt from the criminal provisions of the CJA and FSMA.

2. What is the effect of overseas stabilisation?

The Stabilisation Regulation only provides a safe harbour for stabilisation activities which meet all of the requirements of that Regulation. The safe harbour does not extend to activities which may comply with overseas rules, but which do not comply with the Stabilisation Regulation. Accordingly, for any security admitted to trading on a regulated market, or the subject of a request for such admission, the only safe harbour from committing the offence of market abuse in the UK is that set out in the Stabilisation Regulation. This may cause difficulties where the rules of multiple jurisdictions apply, e.g. because the shares are listed on more than one market. The FSA (the FCA’s predecessor) gave private assurance to market representatives that stabilisation conducted responsibly in accordance with US rules would not ordinarily be regarded by the FSA as market abuse in the UK. More recently, guidance issued by CESR (ESMA’s predecessor) noted the inconsistencies between the Stabilisation Regulation and US and Japanese rules, and clarified that stabilisation outside of the Regulation’s safe harbour should not be regarded as market abuse simply because of that fact. This is not a particularly comfortable place for stabilising managers to be left in, but little can be done absent a change to the Stabilisation Regulation.

However, under the FCA’s supplementary rules for stabilisation activities on “prescribed markets”, recognised overseas investment exchanges and certain other named international, non-EEA exchanges (see question 1 above), international stabilisation in accordance with US, Japanese and Hong Kong laws and regulations should be afforded recognition.

3. What are the disclosure obligations in relation to the over-allotment option and purchase of shares in stabilising transactions?

Disclosure and Transparency Rules

Chapter 5 of the Disclosure and Transparency Rules requires disclosure of certain voting rights held through direct or indirect holdings of shares or certain financial instruments. A person is required to make disclosure if they hold aggregate voting rights which equal or exceed the disclosure threshold (3% for a UK issuer).

The stabilisation manager’s rights under the over-allotment (or greenshoe) option constitute a holding of a “financial instrument” for these purposes. Holdings of financial instruments are disclosable if either:

(A) the instrument results in “an entitlement to acquire, on the holder’s own initiative alone, under a formal agreement, shares to which voting rights are attached”, and the instrument gives the holder an unconditional or discretionary right to acquire existing shares; or

(B) the instrument has “similar economic effects” (which are defined broadly) to an instrument described in (A), unless the instrument is subject to conditions which are beyond the control of the parties.
If the over-allotment option is provided by the issuer, then it will not fall within (A), because it is an option to acquire new (not “existing”) shares. However, informal guidance issued by the FSA (the FCA’s predecessor) indicated that financial instruments relating to shares that are not yet issued – such as options to acquire new shares – are covered by (B). If the over-allotment option is provided by a selling shareholder, then both (A) and (B) will be relevant. Regardless of whether (A) or (B) applies, an instrument which is subject to conditions which are beyond the control of the parties will not be caught. Therefore, if the exercise of the over-allotment option is made conditional on such a matter, then the stabilisation manager’s interest under that option is not disclosable.

There is an exemption in DTR 5.1.3R(6) of the Disclosure and Transparency Rules where shares are borrowed to settle over-allotments, notwithstanding that the stabilisation manager as borrower acts as principal and obtains title to the shares borrowed.

Shares which are purchased in the market to cover over-allotments may be disclosable under Chapter 5 of the Disclosure and Transparency Rules. However, the stabilisation manager may be able to make use of the exemption for shares held in its trading book. Provided that the daily balances of voting shares do not exceed 5 per cent. of the issuer’s voting shares then the holdings are exempt from disclosure so long as the manager ensures that the voting rights are not exercised or otherwise used to intervene in the management of the issuer.

**Stabilisation Regulation**

The Stabilisation Regulation requires: (i) notification to the FCA of details of all stabilisation transactions, no later than the end of the seventh daily market session following the date of execution of the transaction; and (ii) announcement, within one week of the end of the stabilisation period, of certain details regarding stabilisation activity.

4. **Can you refresh the short position?**

The stabilising manager may wish to sell securities acquired by stabilising transactions in order to re-establish a “short” position. The stabilising manager might do this because further stabilising purchases are deemed necessary where the price remains or falls back below the issue price. Short sales are not expressly covered by the Stabilisation Regulation or the FCA’s supplementary rules. However, guidance provided by CESR (ESMA’s predecessor) and informal guidance published by the FSA (the FCA’s predecessor) stated that whilst such sales do not benefit from the Regulation’s safe harbour they do not necessarily of themselves amount to market abuse, especially if conducted in a way which minimises market impact and has regard to market conditions.

5. **How do any of the above answers differ in relation to debt or convertible securities?**

The above answers apply to both debt and convertible securities.
SECTION 6: ACCOUNTANTS’ ENGAGEMENT LETTERS

FRANCE

1. **What are the restrictions upon accountants capping their liability?**

Since 2005, accountants are legally required to provide a completion letter (“*lettre de fin de travaux*”) for offerings in France and refuse to provide underwriters and sponsors with a comfort letter (“*lettre de confort*”) in the context of a French offering. In practice, underwriters and sponsors obtain comfort letters for any international part of an offering.

**Completion letter:**
(A) Under the GR AMF, accountants are required to provide the issuer with a completion letter confirming that they have applied their professional standards in verifying the accuracy of the prospectus. The existence of the completion letter and any material observations made by the accountants is noted by the person responsible for the prospectus. The completion letter is also forwarded to the AMF by the issuer prior to approval of the prospectus.

(B) In practice, accountants do not cap their liability in relation to the completion letter.

**Comfort letters**
(A) Comfort letters are letters requested by underwriters and sponsors in the context of international offerings but are not part of the legal mission of the accountants. Comfort letters must comply with industry guidance set by the Compagnie Nationale des Commissaires aux Comptes.

(B) Comfort letters are purely contractual and subject to negotiation with the accountants. Theoretically, the letter can include liability caps, although in practice such caps are very rare.

2. **Generally to whom are the accountants’ comfort letters addressed?**

The underwriters and sponsors.

3. **What financial reports in the prospectus will the accountants take responsibility for?**

Accountants take responsibility for the interim, consolidated or annual financial statements, as well as pro forma financials, of the past three financial years that have undergone an audit or limited review and are presented in a prospectus, registration document or any updates or corrections thereto.

GERMANY

1. **What are the restrictions upon accountants capping their liability?**

In Germany accountants generally do not assume responsibility for the contents of a prospectus nor is there a general statutory “expert” liability. For their services rendered in relation to a prospectus (review, circle up),
accountants generally set a limitation of liability to an issuer of €4 or €5 million, which is similar to that statutorily required in relation to an audit.

Any comfort letters delivered to underwriters are issued pursuant to the contractual relationship between the accounting firm and the issuer. It is unclear under German law whether an accountant’s liability for such a comfort letter would be subject to any cap agreed between the accountant and the issuer. For this reason, comfort letters, issued according to German standards, are typically issued on the basis of an engagement letter which provides for a specified cap for the accountant’s liability vis-à-vis the recipient. The level of such cap varies depending on the type and size of the transaction and the issuer. Comfort letters issued under foreign standards, in particular SAS 72, do not explicitly provide for such caps.

2. **Generally to whom are the accountants’ comfort letters addressed?**

Comfort letters are addressed both to the issuer (but not personally to the board) and the underwriting banks covering the same points (one document is produced only).

3. **What financial reports in the prospectus will the accountants take responsibility for?**

The accountants do not assume explicit responsibility for any financial statements or audit reports included in the prospectus. However, the historic short form audit reports will be reproduced in the financial section of the prospectus.

**ITALY**

1. **What are the restrictions upon accountants capping their liability?**

Under Italian law, auditors may cap their liability in relation to the issuer or the underwriters/banks to a specific amount, except for liability due to their gross negligence or willful misconduct, according to the terms and conditions of the relevant engagement letters.

2. **Generally to whom are the accountants’ comfort letters addressed?**

The issuer’s auditors are required to issue certain comfort letters and bring-down letters for the benefit of the underwriters and the sponsor, in order to ensure that the financial data contained in the prospectus have been verified.

According to the Italian association of auditing firms (ASSIREVI), an auditor may deliver a comfort letter exclusively to a person with whom it has agreed the terms and conditions of an engagement letter. This engagement letter sets out the procedures to be carried out by the auditors in relation to the prospectus and contains a statement of responsibility from the client regarding the accuracy of the information included. In most cases, comfort letters are delivered to the issuer and to the underwriters on a confidential basis.
3. What financial reports in the prospectus will the accountants take responsibility for?

Auditors usually take responsibility for their review of the financial data included in the prospectus (including pro-forma information), provided that such data is included in the company’s financial statements or derived from the company’s statutory accounts.

THE NETHERLANDS

1. What are the restrictions upon accountants capping their liability?

Accountants may in principle cap their liability to the issuer and syndicate members. Normally, Dutch accountants state their specific responsibilities, depending on the arrangements agreed upon, in their comfort letters and auditor’s report. Comfort letters generally refer to the firm’s general terms and conditions, which in turn, usually contain a fairly strong limitation of liability. It tends to be difficult for underwriters to negotiate an exclusion of the limitation.

Accountants can in principle not cap their liability to third parties (including investors) for reports contained in the prospectus.

2. Generally to whom are the accountants’ comfort letters addressed?

Accountants’ comfort letters are usually addressed to the joint or sole global co-ordinator(s) of the underwriting banks involved. The comfort letters are not publicly available and reliance is restricted to the addressees.

3. What financial reports in the prospectus will the accountants take responsibility for?

Under Dutch accounting and reporting rules, accountants are responsible for the auditor’s report, which often includes statements in relation to historical annual financial information and, if applicable, pro forma financial information. Under Dutch civil liability rules, accountants owe a duty of care to a large circle of third parties (which generally includes investors).

The AFM does not treat accountants as “experts” within the meaning of the Prospectus Regulation, so any material interest in the issuer, as well as the statement of consent as to the form and context of the included information, is not required. In practice, however, a statement of consent is often included in the report.

PORTUGAL

1. What are the restrictions upon accountants capping their liability?

Auditors may be civilly liable to the issuer and/or stakeholders for damages caused by malpractice.

Partial protection against auditors is given to third parties under, *inter alia*:

(A) Article 82 of the PCC, which protects the audited company, its creditors and shareholders from damage caused by the legal certification of accounts undertaken by auditors;
(B) Article 10 of the PSC, which protects the audited company and third parties from damage caused by the external auditor’s report; and

(C) Article 149 of the PSC, which protects addressees of the prospectus from damage caused by incomplete, inaccurate, outdated, unclear, non-objective and unlawful information therein.

The enforceability of limitation clauses is ambiguous in Portuguese law. However, even if the contractual limitation of auditors’ liability is accepted under Portuguese law, a liability cap agreed between an auditor and the audited company is unlikely to be effective against third parties whose rights are damaged by an auditor’s malpractice.

2. Generally to whom are the accountants’ comfort letters addressed?

Accountants’ comfort letters are generally addressed to the joint lead managers and to the issuer’s directors.

3. What financial reports in the prospectus will the accountants take responsibility for?

Under the PSC, accountants take responsibility for all certified or verified financial reports and accounting documents on which the prospectus is based. Accountants are liable unless they can prove the following: (i) that they have acted without fault; or (ii) that the relevant addressee knew or should have known that the contents of the prospectus did not comply with the quality of information requirements when the contractual declaration was issued or still revocable.

Under the PCC, accountants must express an opinion as to whether the report gives a true and fair view (“imagem verdadeira e apropriada”) of the company’s situation and, whenever appropriate, it is in accordance with the applicable legal requirements. This opinion may be issued: (i) favourably, without reservations; (ii) favourably, with reservations; (iii) unfavourably; or (iv) under the form of an excuse where the auditor considers it is in no position to express an opinion.

SPAIN

1. What are the restrictions upon accountants capping their liability?

Under Spanish law, there are no restrictions upon accountants capping their liability towards addressees of their engagement letters, except in relation to fraudulent or wilful misconduct.

It is market practice that accountants’ limit their liability to issuers to the fees received, or to a multiple of the fees received. However, it is also market practice that accountants do not limit their liability to the issuer’s managers.

2. Generally to whom are the accountants’ comfort letters addressed?

Accountants’ comfort letters are addressed to the issuer’s global coordinators and to each of the co-managers. In addition, comfort letters are commonly addressed to the issuer’s directors on the same terms.
3. **What financial reports in the prospectus will the accountants take responsibility for?**

Accountants take responsibility for the reports issued in connection with audited historical financial information and, if applicable, any interim financial information, pro-forma financial information reports and profit forecasts included in the prospectus.

**UNITED KINGDOM**

1. **What are the restrictions upon accountants capping their liability?**

In 1995 a moratorium was agreed on the imposition of a cap on liability in engagement letters between accountants and issuers involving the issue of public or private reports in connection with public documents, comfort letters for IPOs and reports issued under the requirements of the UK Listing Authority and for other public transactions by listed companies. The generally accepted position continues to be that reporting accountants do not cap their liability to issuers in respect of reports to be included in an investment circular. Moreover, to the extent accountants authorise inclusion of their report in a prospectus, liability to third parties cannot be excluded.

2. **Generally to whom are the accountants’ comfort letters addressed?**

Generally, the accountants will provide opinion or comfort letters to the issuer, directors of the issuer, the sponsor and, in certain cases, all of the underwriters, as to whether:

(A) the directors of the issuer have a reasonable basis upon which to make a statement in the prospectus regarding the sufficiency of the issuer’s working capital;

(B) the directors of the issuer have established sufficient financial reporting procedures; and

(C) there has been a significant change in the financial or trading position of the issuer between the date of the latest published (audited or interim) accounts and the date of the prospectus.

The accountants will also provide a letter addressed solely to the sponsor to confirm that the accountant has fulfilled the responsibilities of the reporting accountant and that it has disclosed to the sponsor all material matters which have come to its attention.

3. **What financial reports in the prospectus will the accountants take responsibility for?**

The directors of the issuer will be responsible for the historical financial information and any pro forma financial information contained within the prospectus. However the accountants will provide and take responsibility for a report and opinion, to be published in the prospectus, as to whether the historical financial information gives a true and fair view for the purposes of the prospectus. A report and opinion as to whether any pro forma financial information has been properly compiled on the basis stated and that such basis is consistent with the accounting policies of the issuer will be provided by the accountants and set out in the prospectus.
APPENDIX 1: SELLING RESTRICTIONS

The following selling restrictions should be included in a document, published within the EEA, offering securities pursuant to an exemption from the requirement to publish a prospectus under the Prospectus Directive. The “general legend” and “EEA selling restriction” should be included unless such an exemption applies in all EEA states:

General legend
This document has been prepared on the basis that all offers of the Securities will be made pursuant to an exemption under the Prospectus Directive (and amendments thereto, including Directive 2010/73/EU), as and to the extent implemented in Member States of the European Economic Area (“EEA”), from the requirement to produce a prospectus for offers of the Securities. Accordingly, any person making or intending to make any offer within the EEA of the Securities which are the subject of the offer/placement contemplated in this document should only do so in circumstances in which no obligation arises for the Issuer or the managers of the Offer to produce a prospectus for such offer. Neither the Issuer nor the managers of the Offer have authorised, nor do they authorise, the making of any offer of Securities through any financial intermediary, other than offers made by the Issuer or the managers of the Offer which constitute the final placement of Securities contemplated in this document.

European Economic Area selling restriction
In relation to each Member State of the European Economic Area which has implemented the Prospectus Directive (each a “Relevant Member State”), an offer to the public of any shares which are the subject of the offering/placement contemplated by this document (the “Securities”) may not be made in that Relevant Member State except that an offer to the public in that Relevant Member State of Securities may be made at any time under the following exemptions under the Prospectus Directive if they have been implemented in that Relevant Member State:

(A) to any legal entity which is a qualified investor as defined under the Prospectus Directive;

(B) to fewer than 100 or, if the Relevant Member State has implemented the relevant provision of the 2010 PD Amending Directive, 150, natural or legal persons (other than qualified investors as defined in the Prospectus Directive), as permitted under the Prospectus Directive; or

(C) in any other circumstances which do not require the publication by the Issuer or the managers of the Offer of a prospectus pursuant to Article 3 of the Prospectus Directive,

provided that no such offer to the public shall result in a requirement for the publication by the Issuer or the managers of the Offer of a prospectus pursuant to Article 3 of the Prospectus Directive.

For the purposes of this provision, the expression “an offer to the public” in relation to any Securities in any Relevant Member State means the communication in any form and by any means of sufficient information on the terms of the Offer and the Securities so as to enable an investor to decide to purchase or subscribe for Securities as the same may be varied in that Relevant Member State by any measure implementing the Prospectus Directive in that Relevant Member State, the expression “Prospectus Directive” means Directive 2003/71/EC (and amendments thereto, including the 2010 PD Amending Directive, to the extent implemented in the Relevant Member State) and includes any relevant implementing measure in the Relevant Member State and the expression “2010 PD Amending Directive” means Directive 2010/73/EU.
FRANCE

In addition to the EEA wide selling restrictions, set out above, what selling restrictions should be included in a document, offering securities pursuant to an exemption under the Prospectus Directive, published in France?

This Offering Memorandum has not been prepared in the context of a public offering of securities in France within the meaning of Article L.411-1 and seq. of the French Code monétaire et financier and Articles 211-1 and seq. of the Autorité des marchés financiers (“AMF”) General Regulations and has therefore not been submitted to the AMF for prior approval or otherwise and does not require a prospectus to be submitted for approval to the AMF. The Securities have not been offered or sold and will not be offered or sold, directly or indirectly, to the public in France and neither this Offering Memorandum nor any other offering material relating to the Securities has been distributed or caused to be distributed or will be distributed or caused to be distributed to the public in France, except only to persons licensed to provide the investment service of portfolio management for the account of third parties (“personnes fournissant le service d’investissement de gestion de portefeuille pour compte de tiers”) and/or to “qualified investors” (“investisseurs qualifiés”) (as defined in Article L.411-2 and D.411-1 of the French Code monétaire et financier) [and/or to a limited circle of investors (“cercle restreint d’investisseurs”) (as defined in Article L.411-2 and D.411-4 of the French Code monétaire et financier)] on the condition that no such Offering Memorandum nor any other offering material relating to the Securities shall be delivered by them to any person nor reproduced (in whole or in part). Such “qualified investors” or members of a limited circle of investors are notified that they must act for their own account in accordance with the terms set out by Article L.411-2, L.411-1, D.734-1, D.744-1, D.754-1 and D.764-1 of the French Code monétaire et financier. No re-transfer, directly or indirectly, of the Securities in France, other than in compliance with applicable laws and regulations and in particular those relating to a public offering (which are, in particular, embodied in Articles L.411-1, L.411-2, L.412-1 and L.621-8 and seq. of the French Code monétaire et financier) shall be made.

GERMANY

In addition to the EEA wide selling restrictions, set out above, what selling restrictions should be included in a document, offering securities pursuant to an exemption under the Prospectus Directive, published in Germany?

This prospectus has not been and will not be submitted for approval to the German Federal Financial Services Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin). This prospectus does not constitute a public offer under the German Securities Prospectus Act (Wertpapierprospektgesetz). This prospectus and any other document relating to the Securities, as well as any information contained therein, must therefore not be supplied to the public in Germany or used in connection with any offer for subscription of the Securities to the public in Germany, any public marketing of the Securities or any public solicitation for offers to subscribe for or otherwise acquire the Securities. The prospectus and other offering materials relating to the offer of the Securities are strictly confidential and may not be distributed to any person or entity other than the designated recipients hereof.

6 The Loi Toubon might be applicable, and advice should be thought on a case-by-case basis.
ITALY

In addition to the EEA wide selling restrictions what selling restrictions should be included in a document, offering securities pursuant to an exemption under the Prospectus Directive, published in Italy?

This offer has not been notified to Consob pursuant to Italian applicable securities laws and implementing regulations. Accordingly, no securities may be offered or sold, and copies of this offering document or any other document relating to this offer and/or the related securities may not be distributed in Italy except to “qualified investors”, as defined in article 34-ter of Consob Regulation no. 11971 of May 14, 1999, as amended (the “Issuers’ Regulation”), provided that such qualified investors will act in their own capacity and not as depositaries or nominees for other shareholders, or in any other circumstance where an express exemption to comply with public offering restrictions provided by Legislative Decree no. 58 of February 24, 1998 (the “Consolidated Financial Act”) or the Issuers’ Regulation applies, including those provided for under Article 100 of the Consolidated Financial Act and Article 34-ter of the Issuers’ Regulation. Any such offer or sale or distribution of copies of this offering document or any other document relating to the offer in Italy must be (i) made in accordance with all applicable Italian laws and regulations, including any relevant notification requirement or limitation which may be imposed by Consob or the Bank of Italy or any other Italian authority and (ii) performed by a financial intermediary duly authorized to perform the relevant financial service in Italy in accordance with Legislative Decree No.385 of 1 September 1993, as amended, the Consolidated Financial Act, Consob Regulation No.16190 of 29 October 2007 as amended and any other applicable laws and regulations.

Pursuant to Article 100 bis of the Consolidated Financial Act any subsequent resale to the public of securities which were previously offered in the context of an offer exempted from the obligation to publish a prospectus shall be regarded as a separate offer to the public within the meaning of Article 1, paragraph 1, letter (t) of the Consolidated Financial Act, unless it is exempted from the rules on public offers pursuant to Article 100 of the Consolidated Financial Act and Article 34-ter of the Issuers’ Regulation.

THE NETHERLANDS

In addition to the EEA wide selling restrictions, set out above, what selling restrictions should be included in a document, offering securities pursuant to an exemption under the Prospectus Directive, published in the Netherlands?

If securities are offered in the Netherlands pursuant to an exemption from the requirement to publish a prospectus referred to in (C), (D), (E) or (F) of Section 3 of this guide, the following text and picture must be included in the offer, advertisements and “documents that hold out the prospect of the offer”.

Attention! This investment falls outside AFM supervision. No prospectus required for this activity.

Under AFM Conduct of Business Rules, this picture must be centred at the bottom and right across the width of the first page of the relevant document. The picture must have a height of at least 10 per cent. of the document. The AFM has stated that if this Dutch picture is included in a document, (for Dutch purposes) the requirement to include
a warning pursuant to Article 34(2) Prospectus Regulation is complied with as well. Please note that the FMSA definition of “advertisement” is slightly different from the definition in Article 2(9) Prospectus Regulation.

The following Dutch selling restriction must be included in a document offering securities in the Netherlands pursuant to an exemption from requirement to publish a prospectus referred to in (C), (D), (E) or (F) of Section 3 of this guide:

[Each Underwriter and each Dealer] has represented and agreed, and each further [Underwriter and Dealer] appointed will be required to represent and agree, that it shall state in:

(A) any offer of Securities to the public in the Netherlands other than an offer:

   (i) in respect of which a prospectus (and, as the case may be, any supplement or supplements if required) approved by the Netherlands Authority for the Financial Markets (Stichting Autoriteit Financiële Markten) (the “AFM”) (or, where appropriate, by the competent authority in another Relevant Member State which has notified to the AFM in accordance with the Prospectus Directive) has been made generally available;

   or

   (ii) only to qualified investors as defined under the Prospectus Directive; and

(B) any advertisement relating to such an offer, and any document in which the prospect of such offer is held out;

that:

(a) no prospectus approved by the AFM has been or will be made generally available; and

(b) such offer is not supervised by the AFM;

in such manner as prescribed by the AFM from time to time.

PORTUGAL

In addition to the EEA wide selling restrictions, set out above, what selling restrictions should be included in a document, offering securities pursuant to an exemption under the Prospectus Directive, published in Portugal?

No offer or sale of the Securities may be made in Portugal except in compliance with the rules concerning the marketing of such Securities generally applicable under the laws and regulations of Portugal. No notification has been made nor has any been requested from the Securities Market Commission (Comissão do Mercado de Valores Mobiliários, “CMVM”) for the marketing of the Securities referred to in this document, therefore the same cannot be offered to the public in Portugal. No prospectus or equivalent document has been or will be registered, approved or passported into Portugal in respect of the Securities and therefore the Securities may not be or caused to be offered, marketed or distributed in Portugal, nor may this document be or caused to be distributed, disseminated or addressed to Portuguese-resident investors in circumstances which would constitute an offer of securities to the
public under the Portuguese Securities Code. This document and other offering materials relating to the offer of
the Securities are strictly confidential and may not be distributed to any person or entity other than the designated
recipients hereof.

SPAIN

In addition to the EEA wide selling restrictions, set out above, what selling restrictions should be included in a
document, offering securities pursuant to an exemption under the Prospectus Directive, published in Spain?

Any offer of Securities within Spain must be in full compliance with Act 24/1988, dated July 28, 1988 on the
securities market (Ley del Mercado de Valores). The offer of securities to the public in Spain requires the approval of
the prospectus by the Spanish Stock Exchange Commission (Comisión Nacional del Mercado de Valores or CNMV).
This document does not constitute a public offer under the Act 24/1988, dated July 28, 1988 on the securities
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<th>Country</th>
<th>Regulator</th>
<th>Website</th>
<th>Address</th>
<th>Tel</th>
<th>Fax</th>
<th>Email</th>
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<td>France</td>
<td>Autorité des Marchés Financiers</td>
<td><a href="http://www.amf-france.org">www.amf-france.org</a></td>
<td>17, place de la Bourse 75082 PARIS CEDEX 02</td>
<td>+33 1 5345-6000</td>
<td>+33 1 5345-6100</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin)</td>
<td><a href="http://www.bafin.de">www.bafin.de</a></td>
<td>Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) Marie-Curie-Straße 24 – 28 60439 Frankfurt</td>
<td>+49 228 / 4108 – 0</td>
<td>+49 228 / 4108 – 1550</td>
<td><a href="mailto:poststelle@bafin.de">poststelle@bafin.de</a></td>
</tr>
<tr>
<td>Italy</td>
<td>Commissione Nazionale per le Società e la Borsa</td>
<td><a href="http://www.consob.it">www.consob.it</a></td>
<td>Via G.B. Martini 3 00198 Roma</td>
<td>+39 06 84771</td>
<td></td>
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<tr>
<td>The Netherlands</td>
<td>Netherlands Authority for the Financial Markets</td>
<td><a href="http://www.afm.nl">www.afm.nl</a></td>
<td>Securities Offerings &amp; Takeover Bids Division Vijzelgracht 50 P.O. Box 11723 1001 GS Amsterdam the Netherlands</td>
<td>+31 (0)20 797 2891</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Portugal</td>
<td>CMVM</td>
<td><a href="http://www.cmvm.pt">www.cmvm.pt</a></td>
<td>Av. Liberdade n.º 252 1056-801 Lisbon</td>
<td>+351 213 177 000</td>
<td>+351 213 537 077</td>
<td><a href="mailto:cmvm@cmvm.pt">cmvm@cmvm.pt</a></td>
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<tr>
<td>Spain</td>
<td>CNMV</td>
<td><a href="http://www.cnmv.es">www.cnmv.es</a></td>
<td>Edison, 4 28006 Madrid</td>
<td>+34 91 585 1500</td>
<td>+34 91 319 33 73</td>
<td></td>
</tr>
</tbody>
</table>
UK:

FCA

www.fca.org.uk

25 The North Colonnade
Canary Wharf
London E14 5HS
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or +44 20 7066 8352 (Listing applications)
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