COMMENTS ON THE COMMON POSITION ADOPTED BY THE COUNCIL WITH A VIEW TO THE ADOPTION OF DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROSPECTUS TO BE PUBLISHED WHEN SECURITIES ARE OFFERED TO THE PUBLIC OR ADMITTED TO TRADING AND AMENDING DIRECTIVE 2001/34/EC

JOINT POSITION PAPER

ABI (Italian Bankers' Association)
ANIA (National Association of Insurance Companies)
ASSOGESTIONI (National Association of Funds and Assets Management Companies)
ASSONIME (Association of Italian Stock-Capital Companies)
ASSORETI (National Association of Financial Products and Investment services placing firms)
ASSOSIM (National Association of Financial Intermediaries)
BORSA ITALIANA (Italian Stock Exchange)

JOINT POSITION PAPER ON THE COMMON POSITION ADOPTED BY THE COUNCIL WITH A VIEW TO THE ADOPTION OF DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROSPECTUS TO BE PUBLISHED WHEN SECURITIES ARE OFFERED TO THE PUBLIC OR ADMITTED TO TRADING AND AMENDING DIRECTIVE 2001/34/EC

Introduction

The purpose of the proposed Directive on the prospectus that must be made public when securities are offered to the public or admitted to trading, modifying Directive 2001/34/EC, and namely introducing the "European passport" for securities issuers, is not open to question. However, from the start this proposal has differed from other proposals for implementation of the Financial Services Action Plan, such as the revised Directive on investment services, by not providing for the consultation process with market operators, and as a result in a good many of the proposal's provisions and more generally in its overall approach it does not always reflect the practices of the markets.

As an example, let us note the distinction that the proposal introduces between equity and non-equity instruments (Article 2), whose enormous breadth appears to be quite out of touch of operational realities, lumping together in a single category (non-equity) financial instruments that differ very substantially in risk, such as floating rate bonds and derivatives. Grouping together such highly diverse instruments, moreover, meant that in a number of passages the introduction of various specific "compensating" measures that does not appear to respond to the "European issuers passport" concept (e.g., the exclusion of Swedish *bostadsobligationer* from the scope of the Directive, in Article 1).

Furthermore, on 27 March the European Council agreed on a text that differs substantially from the previous version of the Commission's proposal (August 2002), on which market participants conducted their studies and submitted their comments.

In the light of the foregoing the associations that have produced the present document, which have followed the course of approval of the proposal for a directive from the outset, consider that at this point in the procedure it will be useful to submit to the European Parliament their comments and suggestions for resolving certain problems and/or dubious questions of interpretation. The areas for improvement are set out below.

Matter and scope

Considering that all countries have financial instruments with special characteristics, the ad hoc exception solely for several specific instruments that exist under Swedish law is hardly warranted. It runs counter to the notion of the level playing field and more generally to the idea of the "European issuers' passport" on which the proposal for a directive is based. It would thus be more appropriate for the exemption to apply not to a specific security but in general to all securities

with the same characteristics and for the Community legislation to leave it to the CESR to draw up a list, for each country, of the types of instrument that have such features.

Definition of non-equity financial instruments

As noted above, the simple distinction of two broad classes of securities, equity and non-equity instruments, does not correspond to the operational realities. It puts together instruments with radically different risk profiles, such as plain vanilla bank bonds and covered warrants.

With a view to favouring debt security investors' immediate perception of the possible risk of non-repayment of the capital, non-equity securities should at least be divided into those with guaranteed capital (bonds) and those without (notes). This distinction has the merit of avoiding the otherwise inescapable necessity of distinguishing between debt instruments with a derivative component and those without.

The "base prospectus"

We definitely endorse the introduction of a "base prospectus" as an alternative to the more complete version. Nevertheless, if (as would appear from a reading of Article 5.4), the issuer is not allowed freedom of choice in using the complete version of the prospectus rather than the "base prospectus", the measure loses all usefulness.

In order to ensure that the "innovation" of the "base prospectus" represents real value added, a real improvement, we consider that the use of this model should not be limited only to mortgage instruments but should be usable for all non-equity financial instruments issued by banks in continuous, repeated manner, or at least to bonds issued by banks.

Minimum information requirement

On the second-level regulations that the CESR will issue on the different kinds of prospectus for financial instruments according to diverse criteria, we consider that these criteria should include the distinction between debt securities with guaranteed capital repayment and those without. It is our opinion that the "guarantee" element must be the basis for differentiating the information requirements.

Approval of the prospectus

We consider that for purposes of certainty of law and proper function of the markets, the procedure for approval of the prospectus by the competent Authority should be modified to provide that after a given period of time has elapsed, non-response by the Authority is treated as tacit approval, not tacit denial.

Article 1.2(i)

Purpose and scope

CURRENT TEXT	PROPOSED AMENDMENT
2. This Directive shall not apply to: (i) "bostadsobligationer" issued repeatedly by credit institutions in Sweden whose main purpose is to grant mortgage loans, provided that (i) the "bostadsobligationer" issued are of the same series; (ii) the "bostadsobligationer" are issued on tap during a specified issuing period; (iii) the terms and conditions of the "bostadsobligationer" are not changed during the issuing period; and (iv) the sums deriving from the issue of the said "bostadsobligationer", in accordance with the articles of association of the issuer, are placed in assets which provide sufficient coverage for the liability deriving from securities,	2. This Directive shall not apply to: (i) "bostadsobligationer" **financial instruments** issued repeatedly by credit institutions in Sweden whose main purpose is to grant mortgage loans, provided that (i) the "bostadsobligationer" **financial instruments** issued are of the same series; (ii) the ~~**"bostadsobligationer"**~~ **financial instruments** are issued on tap during a specified issuing period; (iii) the terms and conditions of the ~~**"bostadsobligationer"**~~ **financial instruments** are not changed during the issuing period; and (iv) the sums deriving from the issue of the said ~~**"bostadsobligationer"**~~ **financial instruments** in accordance with the articles of association of the issuer, are placed in assets which provide sufficient coverage for the liability deriving from securities. **In order to ensure uniform application of this Directive, the Commission shall, in accordance with the procedure set out in Article 24(2), adopt implementing measures singling out, for each Member State, the financial instruments with the aforesaid features.**

Argument

In our view, instituting an exception solely for a specific security that exists under Swedish law is hardly warranted, given that every country in the Union has securities with special features that would justify a comparable exemption. It would thus be more appropriate for the exemption to apply not to a specific security from a specific country but in general to all securities with the same characteristics of the Swedish instrument mentioned. The Community legislation should leave it to the CESR to draw up a list, for each country, of the types of instrument that have such features.

Article 2.1.c

Definitions

CURRENT TEXT	PROPOSED AMENDMENT
1. For the purposes of this Directive, the following definitions shall apply: (c) "non-equity securities" means all securities that are not equity securities,	2. For the purposes of this Directive, the following definitions shall apply: (c) "non-equity securities" means all securities that are not equity securities, **(i) "non-equity" securities with issuer guarantee for the capital complete pay-off ;** **(ii) "non-equity" securities without issuer guarantee for the capital complete pay-off;**

Argument

As it now stands, the only distinction made is between equity and non-equity securities. This puts together instruments with radically different risk profiles, such as plain vanilla bank bonds and covered warrants. To prevent investors from seeing unjustified similarities in terms of risk, we think that within the "genus" of "non-equity instruments" the Community legislator or the CESR should envisage a more detailed description of the several "species".

In particular, with a view to debt security investors' immediate perception of the possible risk of non-repayment of the capital, non-equity debt securities should at least be divided into those with guaranteed capital (bonds) and those without (notes). This distinction has the merit of avoiding the otherwise inescapable necessity of distinguishing between debt instruments with a derivative component and those without.

Article 2.1.e

Definitions

CURRENT TEXT	PROPOSED AMENDMENT
(e) "qualified investors" mean:	(e) "qualified investors" mean:
(i) legal entities which are authorised or regulated to operate in the financial markets, including: credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, commodity dealers, as well as entities not so authorised or regulated whose corporate purpose is solely to invest in securities;	~~(i) legal entities which are authorised or regulated to operate in the financial markets, including: credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, commodity dealers, as well as entities not so authorised or regulated whose corporate purpose is solely to invest in securities;~~
(ii) national and regional governments, central banks, international and supranational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations;	~~(ii) national and regional governments, central banks, international and supranational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations;~~
(iii) other legal entities which do not meet two of the three criteria set out in paragraph (f);	~~(iii) other legal entities which do not meet two of the three criteria set out in paragraph (f);~~
(iv) certain natural persons: subject to mutual recognition, a Member State may choose to authorise natural persons who are resident in the Member State and who expressly ask to be considered as qualified investors if these persons	~~(iv) certain natural persons: subject to mutual recognition, a Member State may choose to authorise natural persons who are resident in the Member State and who~~

meet at least two of the criteria set out in paragraph 2; (v) certain SMEs: subject to mutual recognition, a Member State may choose to authorise SMEs which have their registered office in that Member State and who expressly ask to be considered as qualified investors,	~~expressly ask to be considered as qualified investors if these persons meet at least two of the criteria set out in paragraph 2;~~ ~~(v) certain SMEs: subject to mutual recognition, a Member State may choose to authorise SMEs which have their registered office in that Member State and who expressly ask to be considered as qualified investors,~~ **(i) Entities which are required to be authorised or regulated to operate in the financial markets. The list below should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a European Directive, entities authorised or regulated by a Member State without reference to a European Directive, and entities authorised or regulated by a non-Member State:** **(a) Credit institutions** **(b) Investment firms** **(c) Other authorised or regulated financial institutions** **(d) Insurance companies** **(e) Collective investment schemes and management companies of such schemes** **(f) Pension funds and management companies of such funds** **(g) Commodity dealers.** **(ii) Large companies and other institutional investors:** **(a) large companies and partnerships meeting two of the following size requirements on a company basis:** **– balance sheet total : EUR 20.000.000,** **– net turnover : EUR 40.000.000,** **– own funds: EUR 2.000.000.** **(b) Other institutional investors whose corporate purpose is to invest in financial instruments.** **(iii) National and regional governments, Central Banks, international and**

	supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations. **The entities mentioned above are considered to be professionals. They must however be allowed to request non-professional treatment and investment firms may agree to provide a higher level of protection. Where the client of an investment firm is a company or a partnership referred to above, the investment firm must inform it prior to any provision of services that, on the basis of the information available to the firm, the client is deemed to be professional client, and will be treated as such unless the firm and the client agree otherwise.** **The firm must also inform the customer that he can request a variation of the terms of the agreement in order to secure a higher degree of protection.** **It is the responsibility of the client, considered to be a professional client, to ask for a higher level of protection when it deems it is unable to properly assess or manage the risks involved.** **This higher level of protection will be provided when a client who is considered to be a professional enters into a written agreement with the investment firm to the effect that it shall not be treated as a professional for the purposes of the applicable conduct of business regime.** **Such agreement should specify whether this applies to one or more particular services or transactions, or to one or more types of product or transaction.** **(iv) certain natural persons that have certified adequate competence and professional requirements as provided for by the competent Authorities of the Member States according to implementing measures adopted by the Commission in accordance with the procedure set out by art. 24 (2).**

Argument

The notion of qualified investors – presumably based on that of "accredited investors" found in US law, which introduces criteria for defining this quality in terms of income – needs to be defined with

resort to the standard laid down in the proposed modification of the Investment Services Directive (ISD2). The latter, unlike the proposal under examination here, was the outcome of a lengthy process of consultation with financial market operators.

As to natural persons (letter e (iv)), however, since we consider that the solution proposed in the "ISD2" is not acceptable, in that the terms are designed for the specific purposes of that directive and thus do not respond to the present Proposal, we suggest giving CESR the mandate to define implementing measures that help the competent Authorities to single out sufficient professional standards.

Article 4.1.c

Exemptions from the obligation to publish a prospectus

CURRENT TEXT	PROPOSED AMENDMENT
1. The obligation to publish a prospectus shall not apply to offers of securities to the public of the following types of securities: (c) securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;	1. The obligation to publish a prospectus shall not apply to offers of securities to the public of the following types of securities: (c) securities offered, allotted or to be allotted in connection with a merger **or a joint and proportional splitting,** provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;

Argument

The rule establishes that securities allotted in the event of mergers are exempt from the obligation to publish a prospectus. However, we consider that this exemption should also apply to securities offered or allotted in a one-to-one corporate split with proportional allotment to shareholders, as this type of operation is the inverse of a merger, in which shareholders' rights are treated in totally uniform fashion.

Article 4.2. d

Exemptions from the obligations of publishing a prospectus

CURRENT TEXT	PROPOSED AMENDMENT
2. The obligation to publish a prospectus shall not apply to the admission to trading on a regulated market of the following types of securities: (d) securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;	2. The obligation to publish a prospectus shall not apply to the admission to trading on a regulated market of the following types of securities: (d) securities offered, allotted or to be allotted in connection with a merger **or a joint and proportionate splitting,** provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;

Argument

See Argument given for article 4.1., c.

Article 5.4

The prospectus

CURRENT TEXT	PROPOSED AMENDMENT
4. For the following types of securities, the prospectus shall consist of a base prospectus containing all relevant information concerning the issuer and the securities offered to the public or to be admitted to trading on a regulated market:	4. For the following types of securities, the prospectus **may** ~~**shall**~~ consist **at issuer discretion** of a base prospectus containing all relevant information concerning the issuer and the securities offered to the public or to be admitted to trading on a regulated market:
(a) non-equity securities, including warrants in any form, issued under an offering programme;	(a) non-equity securities, including warrants in any form, issued under an offering programme;
(b) non-equity securities issued in a continuous or repeated manner by credit institutions,	(b) non-equity securities issued in a continuous or repeated manner by credit institutions,
(i) where the sums deriving from the issue of the said securities, under national legislation, are placed in assets which provide sufficient coverage for the liability deriving from securities until their maturity date; and	(i) where the sums deriving from the issue of the said securities, under national legislation, are placed in assets which provide sufficient coverage for the liability deriving from securities until their maturity date; ~~and~~ **or**
(ii) where, in the event of the insolvency of the related credit institution, the said sums are intended, as a priority, to repay the capital and interest falling due, without prejudice to the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions	(ii) where, in the event of the insolvency of the related credit institution, the said sums are intended, as a priority, to repay the capital and interest falling due, without prejudice to the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions

Argument

From the tenor of this article, the issuer does not appear to be free to choose between the full prospectus and the "base prospectus". We propose that issuers should be given this discretion.

Furthermore, the reasons for restricting the scope of the provision to mortgage instruments are not clear, and the restriction does not appear to be functional to investor protection. We accordingly suggest replacing "and" with "or" in order to make the rule applicable to bonds issued by banks.

Article 7.2

Minimum information

CURRENT TEXT	PROPOSED AMENDMENT
2. In particular, for the elaboration of the various models of prospectuses, account shall be taken of the following:	2. In particular, for the elaboration of the various models of prospectuses, account shall be taken of the following: **x) the different "non-equity" securities with issuer guarantee for the capital complete pay-off ;**

Argument

The proposal explicitly mandates the CESR to issue second-level regulations on the different kinds of prospectus for financial instruments according to diverse criteria.

We consider that these criteria should include the distinction between debt securities with issuer guarantee for the capital complete pay-off and those without (as in the discussion of Article 2, above). It is our opinion that from the investor's standpoint the key factor is precisely the "guarantee" of capital repayment, and that this must be the basis for differentiating the information requirements.

Article 11

Incorporation by reference

CURRENT TEXT	PROPOSED AMENDMENT
1. Member States shall allow information to be incorporated in the prospectus by reference to one or more previously published documents that have been approved by the competent authority of the home Member State or filed with it in accordance with this Directive, in particular pursuant to Article 10, or with Titles IV and V of Directive 2001/34/EC. This information shall be the latest available to the issuer. The summary shall not incorporate information by reference.	1. Member States shall allow information to be incorporated in the prospectus by reference to one or more **public and easily accessible or** previously published documents that have been approved by the competent authority of the home Member State or filed with it in accordance with this Directive, in particular pursuant to Article 10, or with Titles IV and V of Directive 2001/34/EC. This information shall be the latest available to the issuer. The summary shall not incorporate information by reference.

Argument

The proposed Directive allows for the incorporation of information in the prospectus by means of reference to earlier documents (incorporation by reference). However, the rule envisaged is disappointing in that it restricts this possibility to documents that have been published, approved or deposited in conformity with the Directive.

To make incorporation by reference truly useful, it should be extended to all documents that have been made public and rendered accessible to the public, provided that second-level norms define the standards for publicity and accessibility.

We accordingly consider that this provision should be so extended.

Article 12.1

Prospectuses consisting of separate documents

CURRENT TEXT	PROPOSED AMENDMENT
1. An issuer which already has a registration document approved by the competent authority shall be required to draw up only the securities note and the summary note when securities are offered to the public or admitted to trading on a regulated market. 2. In this case, the securities note shall provide information that would normally be provided in the registration document if there has been a material change or recent development which could affect investors' assessments since the latest updated registration document or any supplement as provided for in Article 16 was approved. The securities and summary notes shall be subject to a separate approval.	1. An issuer which already has a registration document approved by the competent authority shall be required to draw up only the securities note and the summary note when securities are offered to the public or admitted to trading on a regulated market. 2. **~~In this case, the securities note shall provide information that would normally be provided in the registration document if there has been a material change or recent development which could affect investors' assessments since the latest updated registration document or any supplement as provided for in Article 16 was approved. The securities and summary notes shall be subject to a separate approval.~~ The securities note provide solely information on the financial instruments to be offered to public or on those admitted to trading on a regulated market.** **A specific supplement is required according with article 16, whereby a new fact:** ✍ **may influence the financial instruments assessment;** ✍ **has not been already published according with the current laws and regulations.** ✍ **should occur between the registration document or prospectus approval date and the final offer closing date.**

Argument

The second sub-paragraph of Article 12 provides that the Securities Note, in case of a material change, may give information that would normally be given in the Registration Document. This rule conflicts with that given in the last part of Article 16, which requires that any "new factor must be mentioned in a special supplement to the prospectus" and complicates the Securities Note with information on the issuer. Consistent with Article 5.3, the information given in the Securities Note should concern only the financial instruments being offered.

With this modification, we would simplify and speed up the procedure for approval of the Securities Note, whereas if the current text of the proposal were retained, as we have seen this would be procedurally cumbersome not only for issuers but also for the authorities who must examine the notes.

We think it would be better for updates concerning the issuer not published under the rules or regulations in force, to be given in special supplements or via faster and more effective means at the disposal of the authorities.

Article 13.2

Approval of the prospectus

CURRENT TEXT	PROPOSED AMENDMENT
2. This competent authority shall notify the issuer, the offeror or the person asking for admission to trading on a regulated market, as the case may be, of its decision regarding the approval of the prospectus within 15 working days of the submission of the draft prospectus. If the competent authority fails to give a decision on the prospectus within the time limits laid down in this paragraph and paragraph 3, this shall not be deemed to constitute approval of the application.	2. This competent authority shall notify the issuer, the offeror or the person asking for admission to trading on a regulated market, as the case may be, of its decision regarding the approval of the prospectus within 15 working days of the submission of the draft prospectus. If the competent authority fails to give a decision on the prospectus within the time limits laid down in this paragraph and paragraph 3, this shall ~~**not**~~ be deemed to constitute approval of the application.

Argument

We consider that the procedure for approval of the prospectus by the competent Authority should be modified to provide that after a given period of time has elapsed, non-response by the Authority is treated as tacit approval, not tacit denial.

For reasons of the certainty of law and of proper functioning of the markets, the principle of tacit denial – which incidentally runs counter to the legislation in being in most of the EU member countries – cannot be accepted.

Thus, the article should therefore be modified to introduce the principle of tacit approval.

Article 13.5

Approval of the prospectus

CURRENT TEXT	PROPOSED AMENDMENT
5. The competent authority of the home Member State may transfer the approval of a prospectus to the competent authority of another Member State, subject to the agreement of that authority. Furthermore, this transfer shall be notified to the issuer, the offeror or the person asking for admission to trading on a regulated market within 5 working days from the date of the decision taken by the competent authority of the home Member State. The time limit referred to in paragraph 2 shall apply from that date.	~~**5. The competent authority of the home Member State may transfer the approval of a prospectus to the competent authority of another Member State, subject to the agreement of that authority. Furthermore, this transfer shall be notified to the issuer, the offeror or the person asking for admission to trading on a regulated market within 5 working days from the date of the decision taken by the competent authority of the home Member State. The time limit referred to in paragraph 2 shall apply from that date.**~~

Argument

The provision that the competent home Member State authority, at its discretion, may opt to transfer decision on the prospectus to another Member State authority, notifying the transfer within five days, is a source not only of doubt but of concern, in that the period of 15 days for deciding on the prospectus would have to start over again.

We therefore propose to delete paragraph 5 of this article, in that it runs counter to “freedom of choice”, one of the fundamental elements underpinning the entire concept of the “European passport” for issuers.

Article 16.1

Supplements to the prospectus

CURRENT TEXT	PROPOSED AMENDMENT
1. Every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, shall be mentioned in a supplement to the prospectus. Such a supplement shall be approved in the same way and published in accordance with at least the same arrangements as were applied when the original prospectus was published. The summary, and any translations thereof, shall also be supplemented, if necessary to take into account the new information included in the supplement.	1. Every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, shall be mentioned in a supplement to the prospectus. Such a supplement shall be approved in the same way and published in accordance with at least the same arrangements as were applied when the original prospectus was published. The summary, and any translations thereof, shall also be supplemented, if necessary to take into account the new information included in the supplement.
2. Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within a time-limit which shall not be shorter than two working days after the publication of the supplement, to withdraw their acceptances.	2. Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within a time-limit which shall not be shorter than two working days after the publication of the supplement, to withdraw their acceptances.
	3. Commission, according with the procedure set out by article 24, par. 2, will adopt implementing measures concerning the definition of " significant new factor" mentioned in paragraph 1 of this article.

Argument

In order to delineate the scope of the obligation to issue a supplement to the prospectus, Article 2 ("Definitions") should include a definition of the "new factor" that necessitates a supplement.