

AMF Recommendation 2013-08 Pro forma financial information

Background regulations: Annex II of the Commission Regulation n°809/2004 on information contained in prospectuses, Articles 212-7 and 222-2 of the AMF General Regulation

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Introduction

Pro forma information is designed to provide investors or shareholders with information on the effect that a transaction would have had on historical financial statements had this transaction occurred prior to the date on which it actually occurred. The purpose of such information is to assist readers in analyzing the future prospects of the entity on a constant scope basis and on the basis of the same accounting policies. However, it bears noting that the applicable accounting conventions lead issuers to include non-recurring items in pro forma income statements, which may result in the use of this reformulation for prospective purposes by readers being less easy.

Although pro forma information should always be designed so as to allow readers to compare the current data with those of the next financial year(s), it should not become forward-looking information.

Preparing pro forma information is not merely a mechanical exercise that requires a unique answer for each transaction. It is a complex exercise which requires time and an in-depth analysis of each transaction.

Pro forma information is prepared in accordance with assumptions that must be clear and based on relevant and credible information.

Accordingly, issuers should address the consistency of the assumptions adopted between in other and their consistency with the particular position and characteristics of the entities involved in the transaction. Lastly, the combination of assumptions should not make them unreasonable as a whole.

In practice, the notion of pro forma financial information may also pose problem insofar as it is covered by a great deal of laws and regulations, with some of them being explicit (Prospectus directive, AMF General Regulation, Regulation CRC 99-02 on consolidated statement with regard to the applicable French accounting rules) and some being implicit, such as the IFRS.

The heterogeneity of the wordings used in these laws and regulations make them difficult to read, even if the logic underlying the preparation of pro form information is the same.

Consequently, the AMF has proposed to draft guidelines on key issues that would help issuers compile relevant pro forma information. The ultimate goal is not to impose strict framework, which would be impossible to apply in practice, but to provide issuers with information that would help them better understand this exercise by keeping with best practice, it being understood that it can by no means be considered as an exhaustive list of all the pro forma information-related issues. Indeed, with regard to the characteristics of the issuers' operations, other assumptions may prove to be just as relevant.

Accordingly, issuers should pay particular attention to the main assumptions they adopt in order to help readers understand which line item of pro forma financial information is of importance.

Accordingly, the AMF has decided to propose an approach for certain main assumptions used for compiling pro forma information so as to make the latter more easily readable and, hence, limit the use of divergent practices.

The purpose of this recommendation is to take stock of the disclosure requirements pertaining to pro forma financial information in the event of an acquisition, disposal, spin-off, carve-out, merger or partial merger.

This recommendation deals first with the generally accepted accounting principles, such as defined in the applicable laws and regulations and then casts light on certain technical issues relating to the assumptions to be adopted and the methodologies to be followed by issuers when they make the necessary adjustments or restatements.

This recommendation does not address the issue of changes to the end of the reporting period which leads certain issuers to present pro forma information for the purpose of comparison. This issue is the subject of a separate recommendation¹.

¹ AMF recommendation 2013-01

I - Generally accepted accounting principles for pro forma financial information

Pro forma information should be compiled in the event of an acquisition, disposal, spin-off, carve-out, merger or partial merger when the transactions, either completed or planned, have a material effect on the financial statements of the entities party to the transaction.

All the situations in which issuers are required to provide pro forma information are governed by rules which may originate from different sources, even when they derive from the same logic.

Part I deals with the generally accepted accounting principles for pro forma financial information.

1. A reminder of the criteria triggering the obligation to provide pro forma financial information

1.1. Applicable laws and regulations in relation to pro forma financial information

The regulatory framework for pro forma information is made up of different documents². Indeed, pro forma information may be disclosed in:

- (i) prospectuses,
- (ii) registration documents
- (iii) annual or interim financial statements.

(i) The annexes I³ and XXV of the Commission Regulation n°809/2004 (Prospectus Regulation), implementing the Prospectus Directive, set out the framework for drawing up a prospectus. The annex II² of the same regulation provides for pro forma information disclosure requirements.

(ii) Concurrently, Article 212-7 of the AMF General Regulation on Prospectus content and the AMF instruction 2005-11⁴ reiterate the provisions set out in the Commission Regulation as regards which items of pro forma information should be included in prospectuses. These two regulations provide details of which pro forma information items should be disclosed in a registration document. Still, it bears recalling that the registration document should strictly follow the outline of the prospectus.

(iii) Moreover, the AMF published the instruction 2007-05 in 2007 in order to clarify the procedure for applying Article 222-2 of its General Regulation pertaining to the pro forma information items that needs to be disclosed in the financial statements.

The transposition of the Transparency Directive offered the opportunity to amend Article 222-2 of the AMF General Regulation in order to align its main provisions with the Annex II of the Prospectus Regulation and with the IFRS.

The AMF instruction 2007-05 only covers annual and interim financial statements of issuers whose financial instruments are admitted to trading on a regulated market. Consequently it does not apply to issuers whose financial instruments are admitted to trading on Alternext or on the Free Market.

In addition, one may refer to the Regulation CRC n° 99-02 on consolidated financial statements drawn up by the *Comité de la réglementation comptable* pursuant to the applicable French accounting rules, and in particular according to paragraphs 214 and 423.

The paragraph 214 on which items of pro forma information should be disclosed in the notes to the financial statement states that *“the impact of material changes to any item in the balance sheet, income statements and*

² See the summary table in the annex 1 to this recommendation.

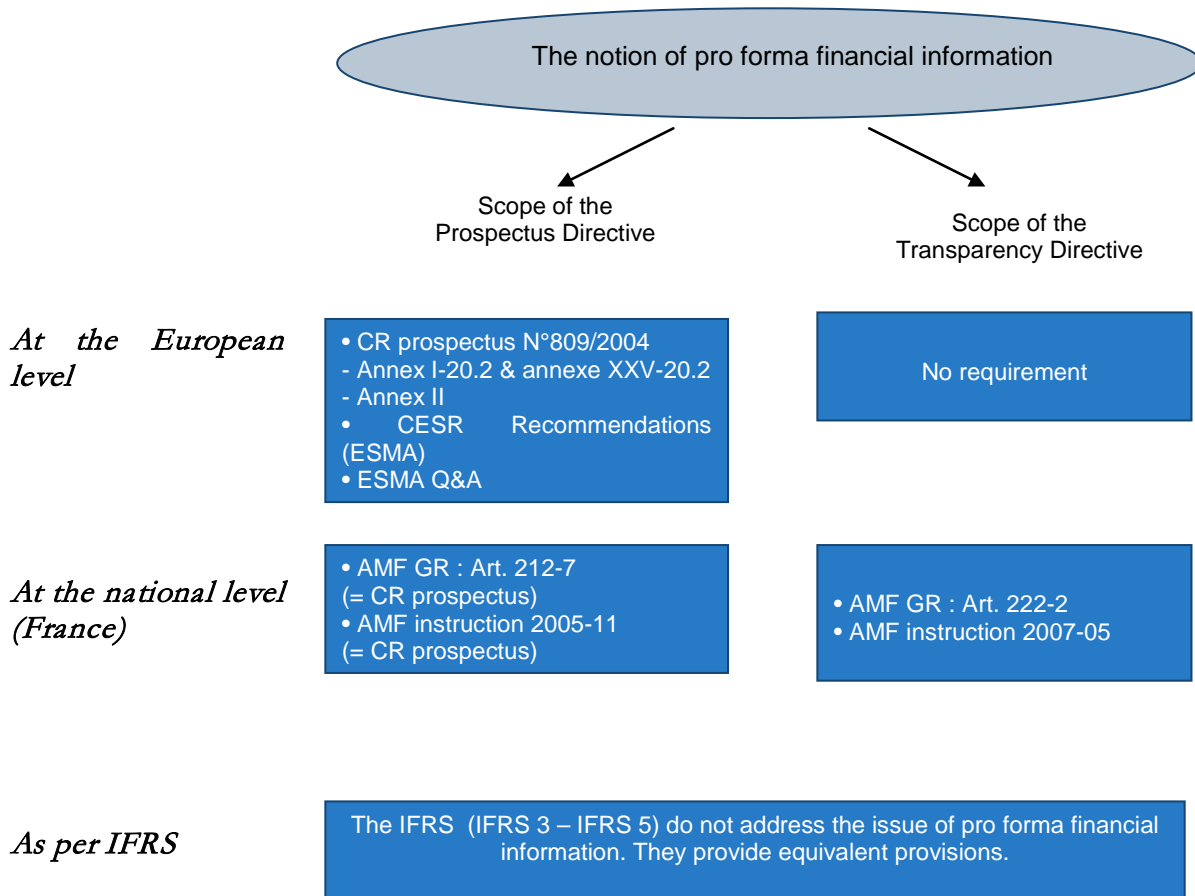
³ See annexe 2. The annex XXV of the Commission Regulation n°809/2004 applies to SMEs and to companies with a low market capitalization.

⁴ The AMF instruction 2005-11 pertains to disclosure requirements for public offerings or financial instruments admitted to trading on a regulated market

cash flow statements” should be mentioned in the notes to the financial statements. The paragraph 423⁵ further stipulates that the comparability of the financial statements should be established through “*pro forma information pertaining to revenues and net earnings [...] for the current financial year as if the change in the scope of consolidation had occurred at the start of the reporting period. This information should take into account goodwill amortization and the financial costs incurred by the acquisition.*”

Lastly, it bears noting that the IFRS do not address the issue of pro forma information but instead require issuers to provide similar information in the event of an acquisition (IFRS 3) or disposal (IFRS 5).

The following diagram provides a reminder of the applicable laws and regulations governing pro forma information disclosure requirements.



In the presentation hereinafter, it bears making a distinction between the transactions presented in annual or interim financial reports and those presented in a prospectus, it being understood that the rules set out in the prospectus will apply to the registration document insofar as the latter is articulated on the basis of the prospectus.

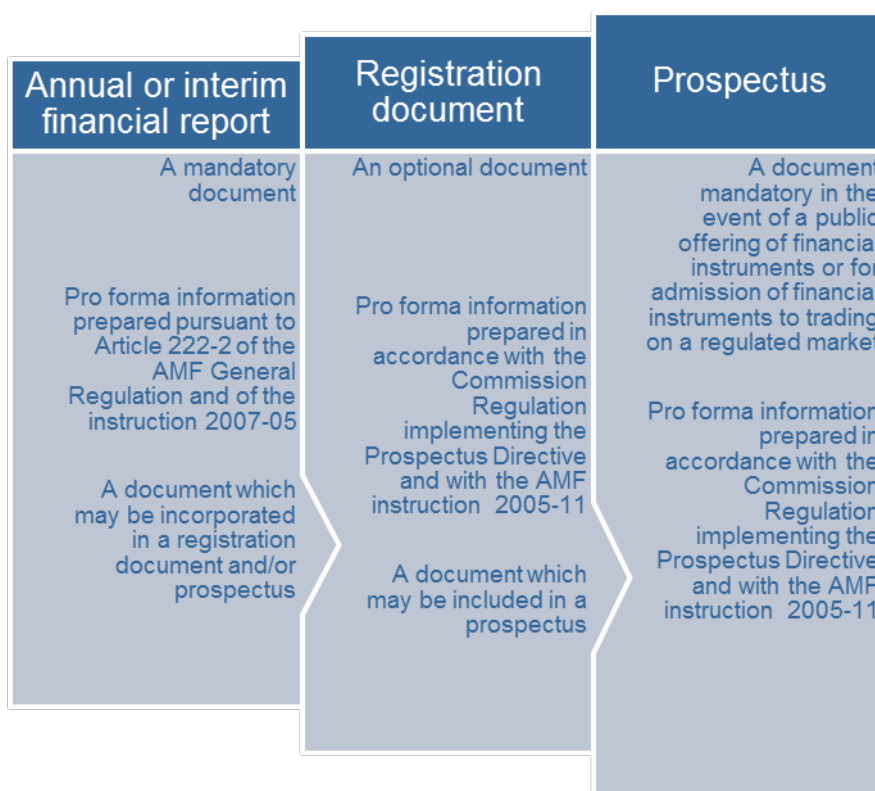
Insofar as the annex XXV of the Prospectus Regulation strictly reiterates the wording of the annex I in the paragraph 20.2, SMEs⁶ or companies with a low market capitalization should refer to the annex XXV each time reference is made to the annex I in this recommendation.

⁵ The paragraph 423 was amended by the Regulation n° 2008-10 of 3 April 2008 pertaining to the pro forma information disclosure requirements amending the Regulation N°99-02 (Article 5).

⁶ Within the meaning of the criteria set forth in the Prospectus Directive

- **A reminder of the linkage of the documents**

For the record, financial statements, registration documents and prospectuses may be articulated as follows:



In practice, the persons responsible for preparing the financial documentation should think about what pro forma information should be included in the first news release and in the different financial disclosures as of the launch of a proposed acquisition. Moreover, they should wonder about how the production of pro forma information, which is both costly and time-consuming, may be optimised over time.

The AMF instruction 2007-05 serves the same objective of aligning disclosure requirements, to the extent possible, with those provided for under IFRS and in the annex II of the Prospectus Regulation. Thus, the instruction requires that issuers provide additional information to that required under IFRS 3 in a format compatible with that provided for in the annex II. Compliance with the provisions of this instruction allows issuers, in some cases⁷, to reuse pro forma information already disclosed.

1.2. Common criteria

Pro forma information shall be provided either when a specific financial transaction gives rise to drawing up a prospectus⁸ or when annual/interim financial statements or periodic disclosures are being published. Although the two aforementioned texts each provide for a different method for drawing up a prospectus and an annual (or interim) financial report, it must be noted that they nevertheless set out common criteria.

⁷ See the summary table in the annex 1 to this recommendation.

⁸ Commission Regulation n°809/2004 (annex I, paragraph 20.2 and annex II) and the associated regulatory texts such as the CESR recommendations.

1.2.1. Factors giving rise to the obligation to provide pro forma financial information

The factors triggering the obligation to provide pro forma financial information are fundamentally the same in the two aforementioned texts although the terminology used in each may differ.

As regards issuers drawing up a prospectus⁹, it is the significant gross change in the assets and liabilities and earnings of the issuer that gives rise to the obligation to disclose pro forma information.

Article 222-2 of the AMF General Regulation stipulates that this should be understood as a “change in the scope of consolidation” when reported in the annual or interim financial statements. The notion of “change in the scope of consolidation” was defined in the instruction implementing the AMF General Regulation as being one or more acquisition(s) or disposal(s)¹⁰ of assets, of a group of assets and liabilities or of an entity, with the aim of covering the same scope of consolidation as that defined under IFRS 3¹¹ and IFRS 5¹².

1.2.2. The procedure for assessing the 25% threshold

Beyond the aforementioned situations in which pro forma information should be disclosed, issuers are required to compile pro forma information only when the 25% threshold is exceeded or undershot, it being understood that this threshold should be assessed on the basis of a set of criteria and on a per transaction basis¹³. The 25% threshold is provided for in the Commission Regulation n°809/2004 and is reiterated in Article 222-2 of the AMF General Regulation.

The paragraphs 91 and seq of the ESMA (ex CESR) Guidelines¹⁴ published on March 2013 specifies that size indicators may be used for the purpose of assessing the 25% threshold. Size indicators comprise in particular the revenues, earnings and total assets. Thus, a transaction should be deemed to constitute a gross change when at least one of the size indicators is varying by more than 25%. ESMA hints at the possibility of using other size indicators if the indicators used give an abnormal outcome or are not suited to the issuer. In such cases, the issuer should choose its size indicators in agreement with the competent authority.

1.2.3. Dates of the transactions likely to give rise to the obligation to provide pro forma financial information

Article 222-2 of the AMF General Regulation provides that pro forma financial information should be disclosed in annual or interim financial statements only when the transaction that gives rise to the obligation to compile pro forma information has been conducted in the course of the current financial year or reporting period.

As regards the prospectus, the Prospectus Directive provides for a longer reporting period, which extends from the first day of the latest financial year to the day on which the prospectus is published. In practice, it means that where a company completes a transaction or where it has made a significant financial commitment (see

⁹ Supra.

¹⁰ It bears noting that the AMF instruction 2007-05 requires no extra pro forma information in case of a disposal conducted in the course of the current financial year compared to IFRS 5. If the issuer wants to incorporate its financial report in a registration document and/or prospectus, pro forma information should be completed in accordance with the annex II of the Commission Regulation n°809/2004. See paragraph 2.2.2 hereinafter.

¹¹ IFRS 3 defines “a business combination as the bringing together of separate entities or businesses into one reporting entity. Definition of a business: an integrated set of activities and assets that is capable of being conducted and managed for the purpose of providing a) a return in the form of dividends, b) lower costs or other economic benefits directly to investors or other owners, members or participants. A business generally consists of inputs, processes applied to those inputs and resulting outputs that are, or will be, used to generate revenues. If goodwill is present in a transferred set of activities and assets, the transferred set shall be presumed to be a business.”

¹² IFRS 5 defines “a disposal group is defined as a group of assets to be disposed of, by sale or otherwise, together as a group in a single transaction, and liabilities directly associated with those assets that will be transferred in the transaction.” A discontinued operation “is a component of an entity that either has been disposed of or is classified as held for sale, and a) represents a separate major line of business or a geographical area of operations, b) is part of a single co-ordinated plan to dispose of a separate major line of business or geographical area of operations, or c) is a subsidiary acquired exclusively with a view to resale.”

¹³ See also paragraph 1.3 “Specific situations” hereinafter.

¹⁴ These guidelines published in 2005 (updated in March 2013) have been completed by a Frequently asked questions (“FAQ”) (the 18th updated version was published in December 2012).

paragraphs 1.3.4 hereinafter) after the end of its reporting period but ahead of the publication of its prospectus, it should include pro forma information that reflects the effects of this transaction on its accounts.

1.3. Specific situations

Beyond these core principles, there are circumstances under which it may seem to be more difficult to determine which items should be disclosed under pro forma information and whether disclosing such information is actually required.

1.3.1. Difficulties in assessing the 25% criterion

ESMA addressed some of the most frequently encountered specific situations.

Three specific situations may prove to be difficult to assess:

- a) situations where an issuer has completed several transactions, with only one of them being of material importance within the meaning of the Prospectus Directive,
- b) situations where an issuer has completed several transactions, with none of them being individually of material importance within the meaning of the Prospectus Directive but which are of material importance when taken together, and,
- c) situations where an issuer has already published information in a previous prospectus.

a) situations where an issuer has completed several transactions, with only one of them being of material importance within the meaning of the Prospectus Directive

When an issuer has completed several transactions but only one is of material importance within the meaning of the Commission Regulation, ESMA considers that the items to be disclosed under pro forma information should reflect the effect of the material transaction.

In practice, it means that only the transaction of material importance is deemed to have been completed on the very first day of the financial year under pro forma information¹⁵. Should the issuer complete other acquisitions in the course of the current financial year, these transactions should not be restated to be retroactive back to the first day of the financial year.

That is the reason why ESMA specifies that such situations should be analysed on a case-by-case basis in order to avoid giving misleading information.

b) situations where an issuer has completed several transactions, with none of them being individually of material importance within the meaning of the Prospectus Directive but which are of material importance when taken together

In such situations, ESMA considers that issuers are not required to release pro forma financial information. However, it stipulates that such situations should be assessed on a case-by-case basis in order to avoid that issuers provide misleading information. It also adds that it is possible for issuers to regroup the transactions if it makes the information more relevant.

Accordingly, the AMF recommends that an issuer provides pro forma information when it has completed several transactions, with all of them being non-material individually but exceeding the 25% threshold when taken together. For instance, it would not be possible for an issuer which would have acquired five companies each accounting for 20% of its size not to provide pro forma information while the acquisitions completed result in the issuer's scope of consolidation doubling.

¹⁵ It should be noted that IFRS 3 does not provide for any threshold criterion (25%) and it does not seem to exclude certain acquisitions in the cases where companies have completed several acquisition over the course of the reporting period.

Generally speaking, when the transactions taken together exceed the 25% threshold, the AMF recommends that issuers analyse precisely their situation and ensure that pro forma information that they're considering disclosing reflects the material effect of these transactions.

c) situations where an issuer has already published information in a previous prospectus

ESMA considers the case of an issuer which has published pro forma information in a previous prospectus and wonders about which financial information should be taken into account to assess whether the second transaction completed during the same reporting period represents a material change.

ESMA uses the following examples to substantiate its analysis:

- Historical financial information: 100 (base)
- Transaction 1: 40 => pro forma information is required in a prospectus insofar as this transaction accounts for 40% (pursuant to the Annex II of the Commission Regulation)
- Transaction 2: 30 => Is pro forma information required in the second prospectus? If so, which items of pro forma information?

ESMA analyses two options for the second prospectus¹⁶:

- Approach 1: Issuers are not required to provide further pro forma information insofar as the second transaction results in a variation that stands below the threshold required by the new structure of the group, which now has a size of 140 ($30/140 = 21\%$).

- Approach 2: pro forma information should be disclosed insofar as the second transaction has a material effect on the initial size of the company, which was 100 as reported in the historical financial information ($30/100 = 30\%$).

ESMA ruled that the second approach was to be adopted insofar as it provides readers with more accurate financial information. Indeed, the third paragraph of the annex II specifies that the basis for drawing up pro forma information is "unadjusted historical financial information". That's the reason why it is therefore considered to be more appropriate to use the initial size of the company rather than the size of the new group. Accordingly, issuers should document the two transactions under pro forma financial information.

1.3.2. Assessing the 25% criterion over a full financial year

Where an issuer makes an acquisition in the course of a financial year, it is important to understand on which basis the 25% threshold should be assessed. Should the 25% threshold pertaining to the main aggregates be assessed on the basis of a full year, including the acquisition?

The AMF recommends that the 25% threshold be assessed on the basis of a full year, whether it be the aggregates of the target company or those of the offeror. Besides, in order to provide a more accurate basis for comparison with the former scope of consolidation, the AMF recommends that the target company be not included in the denominator, which means that the 25% threshold should be assessed in relation to the situation of the offeror before the new acquisition.

1.3.3. The acquisition of an additional interest in a company of the group

When an issuer acquires an additional interest in another entity, this transaction may lead the issuer to change the consolidation method that applies to this entity. For instance, the issuer may switch from the equity method to the full consolidation method.

¹⁶ See ESMA's answer to the question 53 of the FAQ published in December 2012.

Insofar as this additional interest produces similar effects to those produced by a new acquisition – it has a material effect on certain line items of the financial statements (after the 25% threshold has been assessed) – the AMF recommends that issuers provide pro forma information in the event of such a transaction.

1.3.4. The case of significant financial commitments

The notion of significant financial commitments was introduced by the Commission Regulation n°211/2007 of 27 February 2007, amending the Commission Regulation N° 809/2009 implementing the Prospectus Directive.

An issuer should be treated as *“having made a significant financial commitment where it has entered into a binding agreement¹⁷ (which is not yet completed at the date of the approval of the prospectus) to undertake a transaction which, on completion, is likely to give rise to a significant gross change.”*

In practice, making a significant financial commitment leads to preparing pro forma information, even though the transaction has not been recognised in the financial statements presented in the prospectus. This significant financial commitment is considered to be all the more significant, and should thereby be documented in the prospectus, when the prospectus is intended to finance that committed acquisition.

Pro forma information should accordingly be prepared on the basis of the company's historical financial statements, along with additional information to reflect the expected effect of the soon-to-be-completed transaction (post agreement of the prospectus).

For instance, should an issuer draft a prospectus for the first six months of the year N and provided that as at that date, it has already planned to finalise the acquisition of the Company S in September of year N, it should assume in its prospectus that it has made a significant financial commitment within the meaning of the Commission Regulation n°211/2007. Accordingly, the issuer will be required to prepare pro forma information that includes the future acquisition of the company S. It bears noting that this commitment may as well deal with a binding disposal agreement.

1.3.5. The acquisition of individual assets

Although it occurs most frequently in real estate companies, this situation may be encountered by other issuers.

The AMF recommends that issuers take into account any acquisition of individual assets that exceeds the 25% threshold when they compile pro forma information in their prospectus. It bears assessing whether the lack of information is not misleading as in the situation where an issuer has completed several transactions, with none being individually of material importance within the meaning of the Prospectus Directive, but which are of material importance when taken together. As such, the AMF may ask that transactions be aggregated if that makes the information more relevant.

Conversely, the AMF does not require that issuers disclose pro forma information on transactions relating to individual assets in their annual or interim financial report. Indeed, the AMF has wished to keep in line with IFRS 3 in its instruction 2007-05, which does not cover the acquisitions of individual assets, whether these acquisitions occur before or after the end of the reporting period.

However, should an issuer use its annual or interim financial report to draw up a prospectus or a registration document, it will be required to complete pro forma information in order to be compliant with the annex II of the Prospectus Regulation.

¹⁷ Commission Regulation (EC) No 211/2007 (Article 1, paragraph 5): *“an agreement shall be treated as binding where it makes the completion of the transaction conditional on the outcome of the offer of the securities that are the subject matter of the prospectus or, in the case of a proposed takeover, if the offer of securities that are the subject matter of the prospectus has the objective of funding that takeover.”*

1.3.6. Complex Financial Histories

Issuers sometimes compile historical financial information that fails to reflect their operations in their entirety and their activities are instead reflected by financial information compiled by another entity. This may occur (i) when the issuer is a newly incorporated holding, (ii) when the issuer consists of companies operating under its common control but which, legally speaking, do not constitute a group or (iii) when the issuer has been incorporated in the form of a separate legal entity born of the spin-off of an existing company. In such cases, all or part of the issuer's operations has been performed by another company during the period for which the issuer is required to provide historical financial information.

The issue of complex financial histories requires including, in the prospectus, certain data relating to an entity other than the issuer itself and which usually constitute historical information.

In that respect, issuers should have the information they plan to use approved by the AMF.

1.3.7. Combined financial statements

Some issuers sometimes present combined financial statements in their prospectus¹⁸. These are generally used for transactions involving a large number of companies in order to give an overall picture of these companies, had they formed a group ahead of the planned merger. Even though combined financial statements pursue the same goal as pro forma information, i.e. showing the effects of an event before it actually occurs, they should not be confused with pro formation information.

In practice, one can notice that in the case of spin-offs or carve-outs, issuers present occasionally both combined financial statements and pro forma information compiled on the basis of these combined financial statements.

The AMF considers that it is useful to present combined financial statements in certain situations and specifies that, should an issuer present combined financial statements, it is not always required to present also pro formation information. It should also be noted that combined financial statements should be audited by statutory auditors and not be the subject of an ad hoc report as it is the case for pro forma information.

In that respect, issuers should have the information they plan to use approved by the AMF.

2. Presentation of pro forma financial information

Pro forma information presentational requirements require that the notes to pro forma information (i) present the context for publishing or presenting pro forma information, (ii) specify that such information is not relevant if the underlying transaction or event does not take place and (iii) recall that pro forma information is not necessarily representative of the company's financial position or performances that would have been reported had the transaction or event occurred prior to the date on which it actually occurred or prior to the planned transaction date.

2.1. Pro forma financial information presentational requirements

2.1.1. Pro forma financial statements versus pro forma financial information

The Prospectus directive, the AMF General Regulation and instructions require that pro forma information be presented in the form of a prospectus or annual or interim financial report.

Issuers are not required to prepare full pro forma financial statements. They should instead present at least most relevant pro forma information. Such information generally consists of the main financial aggregates that issuers usually communicate to the market.

¹⁸ It bears noting that issuers use combined financial statements in situations where there is no control relationships between the issuer and the other involved entities and where therefore they cannot prepare consolidated financial statements.

In certain cases, issuers may wish to present pro forma financial statements in order to make it easier to communicate on their position to their shareholders or investors. As a consequence, pro forma information should be presented in the form of “a balance sheet, income statement and explanatory notes.”¹⁹

2.1.2. Pro forma information to be disclosed

In a prospectus, pro forma financial information should usually be presented in a columnar format, composed of²⁰:

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

This presentation applies to both newly consolidated companies and deconsolidated entities.

For its part, the AMF instruction 2007-05 on annual and interim financial reports provides that “*pro forma information is usually presented in columnar format composed of the historical unadjusted information, the pro forma adjustments and the resulting pro forma financial information.*” In addition, it is recalled that “*the issuer [shall specify] whether historical information has been subject to a limited review or audited by the company’s statutory auditors.*”

Beyond meeting presentational requirements, such information should be compiled so as to be relevant to the market and it should be in line with the indicators on the basis of which the issuer usually communicates. Issuers should not use new and non-recurring indicators in pro forma information.

Essentially, the AMF instruction 2007-05 states that “*pro forma information shall include, in addition to the revenues and net income for the reporting period, the main interim balances reflecting the activity and funding, usually presented in the income statement.*” The issue is then to disclose the interim sub-totals of the income statement in addition to the information required under IFRS 3 as if the acquisition had occurred at the very beginning of the reporting period. In the event of a disposal recognised as a discontinued operation in the financial statements for the last reporting period, the AMF considers that the information presented pursuant to IFRS 5 is sufficient. Hence, the instruction does not require providing other pro forma information.

2.1.3. Descriptions and characteristics of the assumptions adopted

It is important to describe clearly the assumptions underlying the preparation of pro forma information, whether it be a prospectus indicating²¹ “*the basis upon which it (pro forma information) is prepared*” and “*the source of each item of information and adjustment,*” or the AMF instruction 2007-05 on annual or interim financial reports which states that “*pro forma information shall include a description of the main assumptions assumed for compiling it.*”

Pro forma information should include an introduction reflecting the context in which they have been prepared and their goal. As a consequence, pro forma information should include in the prospectus²² a description of the transaction, the businesses or entities involved and the period to which it refers. The following information should also be provided:

- the purpose to which it has been prepared,
- the fact that it has been prepared for illustrative purposes only, and
- the fact that because of its nature, pro forma financial information addresses a hypothetical situation and, therefore, does not represent the company’s actual financial position or results.

¹⁹ Annex II, paragraph 2 of the Prospectus Regulation n°809/2004

²⁰ Annex II, paragraph 3 of the Prospectus Regulation n°809/2004 and question 50 of the ESMA’s FAQ published in December 2012.

²¹ Annex II, paragraph 4 of the Prospectus Regulation n°809/2004

²² Annex II, paragraph 1 of the Prospectus Regulation n°809/2004

As regards the annual or interim financial reports, they should comprise a description of the main assumptions adopted.

Pro forma information should be prepared in accordance with the company's history. Restatements resulting from the assumptions adopted should not take into account the future effects of the entity's strategy. Consequently, the history of the company cannot be modified upon compilation of pro forma information on the grounds that strategic changes are expected to take place in the future (for instance, right after the transaction). The procedures for adopting the assumptions and for compiling pro forma information must be based on the real history of the company, not on anticipated data, insofar as this would lead the issuer to prepare 'forward-looking pro forma information', which is a notion that does not exist.

Concurrently, pro forma information should be presented in a format compatible with the accounting policies adopted by the issuer in its last or next financial statements.

The AMF recommends that the assumptions adopted be clear and based on relevant and credible information. Companies should address the consistency of the assumptions between each other and the overall consistency of the assumptions, taking into consideration the context and the characteristics of the entities concerned. Concurrently, issuers should ensure that the combination of the assumptions does not make them unreasonable when taken together.

2.1.4. The characteristics of the adjustments

All the laws and regulations relating to pro forma information refer to the characteristics and presentational rules that must be complied with by issuers as regards pro forma adjustments.

Accordingly, the annex II of the Prospectus Regulation provides that pro forma adjustments must be: "*(a) clearly shown and explained, (b) directly attributable to the transaction, (c) factually supportable.*"

These characteristics have been specified in the ESMA Guidelines²³. These guidelines reiterate that adjustments should strictly be attributable to the transaction and that they should not reflect the expected impact of future measures, even when these measures are paramount in the eyes of the offeror (see part II.2 hereinafter).

In practice, restatements should be supported by evidence (merger or partial merger agreement, assessment report, securities acquisition/sale agreement, harmonization of the accounting policies...). They should reflect the assumptions adopted and the effects of the underlying transaction or event.

The paragraph 6 of the annex II of the Prospectus Regulation requires that issuers make a clear distinction between the adjustments expected to have a continuing impact on their financial position and other restatements in their pro forma income statement and statement of cash flows.

These principles also apply to annual or interim financial reports.

2.1.5. Date of the data that may be used to develop pro forma information

On a preliminary basis, it bears recalling that pro forma information is required for one reporting period only, i.e. the restatement of historical financial statements covering one financial year only²⁴. However, an issuer may wish to present pro forma information in respect of several financial years.

As regards annual or interim financial reports, the AMF instruction 2007-05 provides that "*pro forma information shall be provided for the last period covered by the financial statements presented in the financial report as if the changes in the scope of consolidation had occurred at the beginning of the reporting period.*" Accordingly, the transaction needs to be completed during the period covered (either a six-month or twelve-month period) so that the issuer can prepare pro forma information.

²³ ESMA recommendations (87 and seq), updated in March 2013

²⁴ Before it was amended back in 2008, the Regulation CRC 99-02 required that issuers produce two years of pro forma financial statements (the current financial year and the year before).

As regards the prospectus, point 5 of the Annex II of the Prospectus Regulation gives companies a wider choice, stipulating that pro forma information may be published in respect of three periods:

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

These three periods shall be understood as follows²⁵:

- Paragraph (a) refers to any interim period (different from statutory interim information) for which interim information is prepared by the company, i.e. the period covering the first four months of the financial year if the company has a year end of 31 December and published interim financial statements as of 30 April. The current financial period shall be understood as the financial year in the course of which the prospectus has been drawn up.
- Paragraph (b) refers to the last full financial year, and
- Paragraph (c) refers normally to the last statutory half-yearly financial information (or quarterly).

Concurrently, ESMA presented practical cases for illustrative purposes²⁶. Generally speaking, these four examples always comply with the two same principles:

- If the effect of the transactions causing the significant change in the scope of consolidation (or significant gross change) has already been reflected in the most recent financial statements included in the prospectus, the issuer is not required to provide additional pro forma information ; and
- conversely, if the income statement reflects only partially the effect of the change, additional pro forma information is required.

2.1.6. The statutory auditors' report

Pursuant to Article 20.2 of the Annex I of the Prospectus Regulation, the prospectus should include a specific report prepared by independent accountants or auditors when pro forma information is presented, in addition to historical financial statements.

The statutory auditor's report should state that in their opinion, pro forma financial information has been properly compiled on the basis stated and that this basis is consistent with the accounting policies of the issuer.

It bears recalling that, just like for the other statutory auditors' report, this ad hoc report should not provide other information than the information already presented in the explanatory notes to pro forma information²⁷.

2.2. Specific situations

Certain specific situations call for specific answers.

2.2.1. Compiling pro forma information on a voluntary basis

Certain issuers sometimes wish to publish pro forma information even though no regulation or law requires them to do so. In such cases, ESMA²⁸ considers that issuers who wish to include pro forma information in the prospectus on a voluntary basis should comply with the requirements provided for in the Annex II of the Prospectus Regulation and they should anticipate that such information needs to be the subject of an ad hoc report by the statutory auditors.

Consequently, ESMA confirmed that the production of pro forma information on a voluntary basis does not exempt issuers from the regulatory requirements.

²⁵ See question 50 of the ESMA's FAQ of December 2012

²⁶ See annex 3 to this recommendation

²⁷ It bears recalling that ESMA in its answer to the question 55 of its FAQ relating to Prospectus Regulation has reiterated that the auditor's statement is required to not be modified and to include the exact wording as set out in paragraph 7 of Annex II of the Prospectus Regulation..

²⁸ See the question 54 of the ESMA's FAQ published in December 2012

The Prospectus Regulation does not require that a statutory auditors' report be provided for all types of transactions. The report should only be required where pro forma information is published on a voluntary basis as a part of a transaction requiring that such type of report be disclosed.

2.2.2. Disposals and application of IFRS 5

The application of IFRS 5 pertaining to "Non-current Assets Held for Sale and Discontinued Operations" requires that issuers:

- present separately the assets and liabilities attributable to the transaction, and
- in the event of discontinued operations (within the meaning of IFRS 5) and as of the end of the last reporting period, segregate the cash flows attributable to these operations in a specific heading in the income statement (including the gains on disposal).

Certain issuers consider that such information make the requests for pro forma information obsolete insofar as historical information have already been restated for the effect of the disposal and, as such, should be easily comparable to future financial information (post disposal).

The answer to this question is different according to whether required pro forma information is communicated through a prospectus (or in a registration document) or through annual or interim financial reports.

Indeed, while the AMF instruction 2007-05 on annual or interim financial reports clearly stipulates that a disposal occurring in the course of a financial year does not require that issuers publish other information than that required under IFRS 5, no similar exemption is provided for regarding prospectuses. As a result, issuers should provide the items of pro forma information required under the Prospectus Regulation when they complete a disposal that is deemed to be of material importance (see paragraph 1.2.2). Pro forma information helps show the effects that the disposal would have had on the issuers' financial statements, had it occurred prior to the date on which it actually occurred.

If an issuer uses its annual or interim financial report to prepare a prospectus or a registration document, pro forma information should be completed in order to be compliant with the Annex II of the Prospectus Regulation²⁹.

Pro forma information should in particular help users of financial statements to have a direct access to the issuer's net income, excluding the effects of disposals realized or to be realized. The request for pro forma information should only cover the income statement since, by construction, and in the event of a disposal completed during the period, the closing balance does not longer show the assets and liabilities disposed.

²⁹ See the summary table in the annex 1 to this recommendation

II- The preparation of pro forma financial information

The preparation of pro forma information is framed by rules and should accordingly meet the requirements provided for in the applicable regulations.

It may prove to be a complex task and the entity concerned may face practical and technical difficulties.

The AMF calls on issuers to think about this task as far upstream as possible in order to identify promptly the potential difficulties associated with it. It also calls on issuers to share their views on this issue with their statutory auditors and with the concerned AMF departments. Anticipation allows issuers to validate the main options and structuring assumptions adopted before addressing the issue of compiling pro forma information.

The following part of the recommendation deals with the most frequently encountered practical and technical difficulties in producing pro formation information, either through recommendations or through reminders of the applicable regulations.

1. Practical difficulties

Producing pro forma information may sometimes raise purely practical difficulties. These difficulties usually involve a lack of time to collect and compile required pro forma information, a limited access or a poor quality of the information available. Concurrently, the differences in the information frameworks and information systems may also give rise to other practical difficulties.

Even though some difficulties may prove to be quite difficult to handle, issuers should provide the most relevant and most useful items of pro forma information and they should be as transparent as possible as regards the basis upon which such information has been prepared.

Generally speaking, restatements should be carried out to the best of the issuer's knowledge and to the extent that they can be carried out within the set time limits and in a manner not disproportionate.

1.1. Using pro forma information in financial disclosures

Some issuers are sometimes called upon to provide pro forma financial information about planned transactions or transactions in the process of being completed in their news releases, in their presentations to analysts or investors or in any other financial disclosure statement.

Even if this type of communication does not fall directly within the scope of the European Commission regulation (Prospectus or registration document) or within the scope of the AMF General Regulation, the AMF calls on issuers to specify the basis upon which pro forma information has been prepared.

Two situations should be distinguished according to whether such pro forma financial information was communicated ahead or after the issuance of the prospectus (registration document or annual/interim financial report).

- If such information was communicated before the issuance of the prospectus, the AMF recommends that issuers provide pro forma information that may constitute the main financial aggregates upon which the issuer communicates to the market. It also calls on issuers to take great care to describe all the assumptions necessary for a good understanding of these assumptions.
Should pro forma financial information be changed in the prospectus (or in the registration document or annual/interim financial report), the AMF calls on issuers to document such changes.
- If such information was communicated after the issuance of the prospectus, the AMF recommends that issuers communicate on the basis of the same pro forma information and ensure if they use summarized pro forma information that they do not make any omission likely to make such information misleading.

1.2. Transactions completed at a date close to the end of the reporting period

Certain transactions are completed at a date close to the end of the reporting period. Accordingly, the AMF wishes to recall that issuers should make every effort to obtain the data needed for preparing pro forma information. The lack of time may account for the fact that the issuer publishes less detailed pro forma information. Issuers should nevertheless communicate at least, to the best of its knowledge, the most useful and relevant items of pro forma information to the person using this information.

In such cases, the AMF recommends that issuers specify the context and circumstances under which pro forma information was produced in the explanatory notes.

It does not seem appropriate that an issuer fails to produce pro forma information, even under a tight schedule. Issuers should ensure the consistency of the information required under IFRS 3 in the event of business combinations.

In all cases, issuers should contact the AMF to explain their position in such circumstances.

1.3. Hostile takeovers: limited access to information about the target company

In the event of hostile takeovers, the target company often prevents the acquiring company from having access to its information. In such cases, issuers may lack part of the information they need to develop pro forma information (Annex I of the AMF instruction 2005-11).

Accordingly, in the very specific cases where issuers are given only limited access to the information about the target company, the AMF recommends that they use the information they might possess to the best of their knowledge. In practice, such information may consist of public information such as the last published financial statements.

The AMF recommends that issuers specify the nature of the information used in their explanatory notes, along with the source of information, in order to help readers understand how pro forma information was prepared.

In all cases, issuers should contact the AMF to explain their position in such circumstances.

1.4. Cases where the target company's financial statements contain a qualified opinion or emphasis of matter paragraphs or where they have not been inspected by the statutory auditors

In certain cases, the target company may present unaudited financial information or information for which the statutory auditors have expressed a qualified opinion or emphasis of matter paragraphs in their audit report.

Insofar as the data relating to the target company are used to prepare pro forma information, the AMF calls on issuers to be as transparent as one can be and to indicate that the data obtained from the target company have not been audited or were the subject of a qualified opinion or emphasis of matter paragraphs expressed by the statutory auditors of the target company.

As regards the existence of a qualified opinion in the historical financial statements, the AMF recommends that issuers indicate in their notes on pro forma information assumptions whether restatements allow lifting the emphasis of matter paragraphs or not.

Even though pro forma information is by nature compiled for illustrative purposes, the AMF calls on issuers to be as transparent as possible about the sources used³⁰.

³⁰ The accounting standard ISAE 3420 on "Assurance Engagements to Report on the Compilation of Pro Forma Financial Information Included in the Prospectus" published in December 2011 recalls that in the two aforementioned situations, the statutory auditor should reflect on the appropriateness of the data used. He should assess the potential consequences of such situations on its own opinion and must perform due diligence for each situation.

1.5. Reporting dates and/or accounting policies adopted by the target company that differ from those used by the acquiring company

In certain cases, the available information about the target company is prepared:

- at a reporting date that differs from that of the acquiring company, or
- using different accounting policies.

As regards reporting dates, the AMF calls on issuers to look for internal information (monthly reporting, consolidation package...) which could help restating the information in line with the issuer's reporting date. If this is not possible, issuers are invited to follow the applicable rules set forth in the paragraph 27 of IAS 27³¹.

By analogy with the accounting standard, a time lag of at most three months between the issuer's year-end and that of the target company may be accepted, provided that the effects of the material transactions or events which occurred between the reporting date and the date on which the issuer's financial statements are released are properly taken into account through specific restatements.

Restating such information as at the issuer's year-end should be performed to the extent possible and in consideration of the information available. Should it be impossible to do so, issuers should contact the AMF to explain their position in such circumstances.

When they acquire a target company, issuers should not use other accounting policies to present pro forma information than those they usually use. Where the accounting standards allow choosing between various accounting policies³², issuers should make the adjustments necessary, if they are of material importance, in the financial statements of the target company in order to restate them according to their own accounting policies.

1.6. Waiting for prior approval and conditions precedent

In certain cases, some transactions require prior approval (competition authority...) or are subject to suspensive conditions.

The Commission Regulation No 211/2007 (Article 1st, paragraph 5), amending the Prospectus Directive, provides that *"the fact that an agreement makes completion of the transaction subject to conditions, including approval by a regulatory authority, shall not prevent that agreement from being treated as binding³³ if it is reasonably certain that those conditions will be fulfilled."*

Consequently, when they draw up a prospectus, issuers should analyze the planned transactions so as to determine the likelihood of these transactions being approved.

- If the likelihood of the transaction being approved is quite strong, the wait for prior approval should not challenge the binding nature of the commitment within the meaning of the Commission Regulation 211/2007, and pro forma information should be provided nevertheless.
- Conversely, where there is high level of uncertainty surrounding whether such transactions will be approved, the binding nature of the commitment may be called into question and issuers should not be required to prepare pro forma information.

Even though it may be prove difficult to assess the likelihood of a transaction being approved, the AMF wishes to recall that whether a transaction is reasonably certain to occur should be assessed in accordance with the

³¹ IAS 27, paragraph 27: *"When, in accordance with paragraph 26, the financial statements of a subsidiary used in the preparation of consolidated financial statements are prepared as of a reporting date different from that of the parent, adjustments shall be made for the effects of significant transactions or events that occur between that date and the date of the parent's financial statements. In any case, the difference between the reporting date of the subsidiary and that of the parent shall be no more than three months. The length of the reporting periods and any difference in the reporting dates shall be the same from period to period."*

³² As regards investment properties, the IFRS allow issuers to choose either the fair value measurement or the cost measurement.

³³ Commission Regulation (EC) No 211/2007 (Article 1, paragraph 5): *"an agreement shall be treated as binding where it makes the completion of the transaction conditional on the outcome of the offer of the securities that are the subject matter of the prospectus or, in the case of a proposed takeover, if the offer of securities that are the subject matter of the prospectus has the objective of funding that takeover."*

information previously communicated by the issuer about the planned transaction and about its likelihood of completion. If the likelihood of a transaction being completed is deemed to be high by the issuer, the latter should prepare pro forma information and indicate in the explanatory notes the assumptions adopted.

The AMF calls on issuers to be as transparent as possible as regards this issue in the explanatory notes to pro forma information.

The AMF recommends that issuers apply the same reasoning to suspensive conditions. The mere fact that a transaction comes to a vote of the general meeting should not lead issuers to conclude that the condition precedent will not be waived in reasonably certain manner, barring exceptional cases.

As regards the annual or interim financial report, the AMF recommends that issuers apply the same principles as those required for a prospectus, both as regards the need to secure prior approval and the suspensive conditions.

2. The main technical difficulties

Compiling pro forma information also raises technical questions as regards the assumptions and accounting policies to be adopted for making the necessary adjustments or restatements. The information stated hereinafter is not intended to answer all the questions that issuers may ask themselves. Indeed, since each situation is different, it is quite difficult to standardize a practice.

However, the AMF considers it useful to assist issuers in preparing pro forma information in accordance with the main standards agreed upon in order to make such information more legible and, thereby, to limit the use of diverging practices.

By convention, pro forma adjustments to the balance sheet are made on the assumption that transactions were completed on the very last day of the current financial year while transactions are supposed to be reported as having taken place on the very first day of the financial year in the income statement.

Concurrently, the adjustments described hereinafter should be considered in light of their materiality in respect of each particular situation.

2.1. Business combinations

One of the most encountered technical difficulties pertains to the recognition of acquisitions. Indeed, issuers ask themselves about the data that should be used when compiling pro forma information, it being understood that the transaction may have already occurred, may occur soon or may only be the subject of a firm commitment.

Insofar as pro forma information is compiled for illustrative purposes and on the basis of assumptions, it bears being as transparent as possible about the basis adopted in the explanatory notes. Indeed, users of pro forma information should be able to understand properly how pro forma information was prepared and which assumptions were endorsed.

The main issues raised are the following:

Where the transaction has already been completed:

- should goodwill be recalculated on the first day of the financial year or should the actual values considered applicable retrospectively as of the transaction date?
- what to do when the purchase price is still on the process of being allocated?
- what to do when the transfer price is not final as at the transaction date (how to recognize the adjustments to the business combination's cost, which depends on future events)?

Where the transaction has not been completed yet:

- Which values should be considered in respect of the price to be paid and in respect of the assets and liabilities acquired?

If the transaction has already been completed, the issuer may decide to have the values associated with the purchase price, assets and liabilities and goodwill in respect of the purchase price allocation apply retrospectively as of the transaction date.

Where the purchase price allocation is still provisional, it is useful to specify that fact in the explanatory notes and to indicate clearly which information should be disclosed. Similarly, if the purchase price is not final, in particular in the event of an earn-out clause, issuers should stipulate that fact and specify the assumptions adopted and, where appropriate, provide information about the sensitivity of the estimated purchase price to the main assumptions adopted.

Where the transaction has not been completed yet, it is useful that issuers provide details about the basis on which pro forma information has been prepared and in particular how the values associated with the purchase price and with the net asset value have been set. This task requires that issuers adopt the most relevant assumptions, in consideration of the information available.

For instance, one may notice that companies, in the event of a merger, sometimes use the stock price and the number of existing shares as at the date the agreement has been signed in pro forma information and specify that such information will be recalculated based on actual figures at the time the transaction is actually completed.

Other issuers measure goodwill on the very first day of the financial year³⁴, without recalculating the associated fair values and without allocating goodwill to the identifiable assets and liabilities, and they specify in the explanatory notes that such goodwill will not be, by construction, the one that will be reported in the first financial statements post transaction.

Given the importance of measuring goodwill and the purchase price allocation, the AMF recommends that issuer provide clear information in their explanatory notes, which helps understand the values adopted (nature and amount) to measure pro forma goodwill. Since the information available does not necessarily allow issuers to adopt the most relevant assumptions, they may specify the assumptions adopted in the explanatory notes, along with a sensitivity analysis (see paragraph 2.9 hereinafter).

Another business combination-related issue deals with the purchase costs. The AMF recommends that, where such costs are of material importance, issuers should take these costs into account in pro forma information and indicate in the explanatory notes that they will have no lasting effect on the issuer's accounts. (see part I - 2.1.4 above).

2.2. Financing and related costs

The issue of financing usually leads companies to restate several items under pro forma information. Indeed, insofar as the purchase is deemed to have been completed on the very first day of the financial year, companies should also have the financing scheme retroact as of the first day of the financial year, as if it had been implemented at that date.

For instance, where an issuer funds a transaction with a floating-rate loan, the AMF recommends that the issuer specify the procedures for measuring the associated debt and to estimate the theoretical interest expense for a twelve-month period. In the case of spin-offs, it is useful that the issuer recognizes the additional recurring costs that it would have incurred, had he operated as a separate entity (cost of debt after the reallocation of the debt previously recognised in the parent company's accounts).

Where a transaction is paid in cash, the AMF recommends that issuers restate historical financial statements in order to reflect the effects of the investment of cash received under pro forma information, provided that such investment has been formally agreed upon. More generally, issuers should analyze how they plan to use such

³⁴ Goodwill is measured, for instance, by the difference between the net financial position of the target company on the first day of the financial year and the purchase price provisionally estimated on the basis of the target company's stock price on the day of the general meeting that approved the transfer of assets.

cash. For instance, it may have been decided that cash would be used to reduce debt and, as such, that the issuer would report a reduction in financial expenses under pro forma information. If no decision has been made yet as regards how to use such cash, issuers should not restate any items for that purpose. Similarly, unless a decision has already been made, issuers should not recognize interest income in respect of the investment of cash received.

2.3. “New expenses”

The notion of “new expenses” is often referred to when it comes to preparing pro forma information.

Insofar as pro forma information is prepared, by construction, by restating historical information and insofar as it is not intended to be forward-looking information, great attention should be paid to this notion.

Indeed, two kinds of expenses may be distinguished:

- The expenses that may be documented under pro forma information and which help users analyze future prospects, and
- The expenses exclusively due to the upcoming changes (changes in the strategy or organization) and which, since they do not reflect the current position of the company subject to the transaction, should be excluded from pro forma information.

It may be difficult to distinguish these two types of expenses. The list of items mentioned hereinafter is not exhaustive and it includes the expenses most frequently reported by the persons responsible for compiling pro forma information in order to specify with concrete examples the nature of the expenses that should or should not be recognized.

2.3.1. Expected cost savings on previously non-allocated costs (in the event of a spin-off or disposal)

Such cost savings often arise out of disposals of spin-offs. They usually relate to expenses which were centrally managed and which were not reallocated to subsidiaries that generate costs (for instance: financial costs associated with debt repayment or with stock option programs).

The AMF recommends that expected savings on previously non-allocated costs be documented under pro forma information, it being understood that these items differ from synergy effects in that they constitute a mechanical effect of disposals or spin-offs.

2.3.2. Costs which would have been incurred had the entity operated as a separate entity (in the event of a spin-off)

Such costs may be for instance:

- Costs associated with support services,
- Costs associated with the setting up of new functions (for instance the setting up of a board of directors),
or
- Royalties and rebilled expenses expected from the services provision agreement entered into (for instance, royalties expenses arising out of license agreements providing for the use of certain know-how).

Insofar as these expenses already existed prior to the transaction (for instance, support services expenses, financial and management expenses of the board of director), even where borne by another entity (the group before the spin-off), the AMF recommends that issuers recognize such expenses under pro forma information, provided that the explanatory notes indicate clearly how such expenses have been estimated. These expenses are usually either assessed on the basis of the cost accounting data or by using a distribution key.

Royalties expenses are apparently less easy to deal with in that they are linked to services provision agreements that may not have been implemented yet or, at least, that may not have come into effect at the level of the company subject to the spin-off. In such cases, it is important that issuers verify the purpose of the agreements that must be implemented. Insofar as they cover items that were already recognized by the company prior to the spin-off, the AMF considers that these are not effects of new strategies. As such, these expenses may be included in pro forma information.

2.3.3. Synergies and economies of scale

Even though synergies and economies of scale are usually one of the key arguments to justify certain transactions, the AMF recommends that issuers do not document them under pro forma information. Indeed, they directly result from upcoming changes and, as such, they are considered as forward-looking data. In practice, one may note that such items are quite difficult to measure and, consequently, that they are not always precisely communicated.

The fact that such synergies may not be accounted for in pro forma restatements does not prevent issuers from mentioning them in their explanatory notes, while specifying that these items are not accounted for in pro forma information. Issuers may, in their financial disclosures, insist on the expected effects of such synergies.

2.3.4. Expected restructuring expenses after the transaction

Insofar as these expenses are associated with upcoming restructurings, the AMF recommends that issuers do not include such items in pro forma information. However, such information may be provided in the explanatory notes to pro forma information.

2.4. Corporate taxes

Companies should at least present the tax effects of the pro forma restatements in pro forma information. Even though pro forma information is prepared a posteriori, the AMF recommends that, generally, issuers use the same tax rate as those used in the historical financial statements of the restated periods. Where companies use other rates, they shall justify this decision in the explanatory notes. This may be the case for an acquisition of material importance in a country where the tax rate is different from that used in the historical financial statements.

Moreover, the AMF considers it useful not to include the future effects of exits from a favourable tax consolidation regime insofar as, pursuant to the applicable agreements, the potential tax losses previously recognized usually remain the property of the parent company and should be accounted for under the parent's company tax regime. However, in practice, the variety of situations may result in other assessments. For instance, as regards the acquisition of a loss-making company, taking into consideration the fact that such a company is structurally making losses is consistent with the analysis of the future prospects of the new entity. Conversely, a company exit from the tax consolidation group should logically result in the parent company recognizing a special tax expense, even where the tax was mutualized in respect of the tax consolidation regime.

In the end, issuers should recognize the direct and mechanical effects of the acquisition, and not the future effects of the strategy of the acquiring entity, or provisional data (synergies or economies of scale).

Moreover, where companies wish to proceed with tax-related restatements (recognition of additional deferred tax assets...), they should describe them and justify their decision as precisely as possible in the explanatory notes. The AMF recalls that issuers may add any information that may help readers better understand pro forma information in the explanatory notes.

2.5. Disputes and contingent liabilities

As part of a continuous effort to promote transparency, the AMF recommends that issuers present in the explanatory notes to pro forma information any relevant information relating to disputes and contingent liabilities and attributable to the transactions subject to pro forma restatements.

Pursuant to the revised IFRS 3, it may be useful for instance to describe the contingent liabilities of the target company. Indeed, the revised IFRS 3 allows recognizing the liabilities associated with present obligations, which may be reliably measured even if the likelihood of them occurring is lower than 50%³⁵.

This issue should be assessed in conjunction with potential collateral for liabilities posted by the ceding company. Moreover, the AMF recommends that issuers describe the adjustments made in respect of a revaluation³⁶ of the amounts provisioned for disputes by the acquired company.

2.6. Back-to-back transactions

If the companies party to the transaction have entered into a business relationship prior to the effective completion of the transaction, the AMF recommends that issuers restate what has mechanically become back-to-back transactions in pro forma information.

The same reasoning should apply without distinction to all back-to-back transactions, whether it be ordinary transactions (sales/purchases) or dividends payments between two companies.

2.7. Seasonality effects

The AMF recommends that issuers take into consideration the seasonality of the operations when they choose the period for which they will prepare pro forma information. Insofar as the purpose of pro forma information is to help better evaluate future prospects, it appears to be useful to choose a basis for comparison which is not affected by seasonality effects.

2.8. Investment property

Investment property particularly concerns property companies but they may also concern other issuers. It should be noted that the acquisition of investment property, pursuant to IFRS, may take the form of an acquisition of individual³⁷ assets or of a business combination comprising investment property (this transaction is covered by IFRS 3).

Whatever the accounting policy adopted, the AMF recommends that issuers consider in the description of the assumptions that:

- The buildings not yet built as at the transaction date are not reported in pro forma information, and,
- The newly built buildings are supposed to generate income only as of the date on which they will be put into use.

Concurrently, the AMF calls on issuers to specify in the explanatory notes which assumptions have been adopted, in particular:

- the nature of the buildings included in pro forma information,
- the vacancy rate assumptions,
- the rental rate assumptions, and,

³⁵ This accounting recognition differs from what is required under IAS 37 "Provisions, Contingent Liabilities and Contingent Assets" which takes into account the likelihood of occurrence and labels only the liabilities which are very unlikely to result in an outflow of resources as "contingent liabilities" (not recorded).

³⁶ This revaluation is usually due to either a better knowledge or a different assessment of the risk by the acquirer

³⁷ See part I 1.3.5 above

- the method used to measure the change in the fair value³⁸ recognized in the income statement (provided that the issuer uses the fair value method set forth in IAS 40).

2.9. Other matter paragraphs & accounting policies

Whilst the following does not claim to provide a comprehensive list of all the situations that issuers may be confronted with when it comes to compiling pro forma information, it includes other generally accepted conventions in this area:

- **Takeovers in court**

Given the financial difficulties of companies which are being taken over in court, certain issuers claim that the historical data of the companies taken over are data of ailing companies which, as such, cannot possibly be used to compile relevant pro forma information.

The AMF wishes to recall that only historical data may serve as a basis for compiling pro forma information and that the items of pro forma information required should not be confused with forward-looking information. Accordingly, when they compile pro forma information, issuers should not restate the item relating to the effects of the target company's financial difficulties by replacing it with the item relating to the expected effects of the future management.

Conversely, in such highly specific situations, consideration should be given that issuers do not provide pro forma information and instead provide forward-looking information that is similar to that required for new companies³⁹ (i.e. without historical financial data).

In such cases, issuers should justify their decision not to compile pro forma information and they should clearly document the financial historical data of the companies taken over.

- **Post-reporting period events**

The AMF recommends that no adjustment be made to the financial historical data used for compiling pro forma information in respect of post-reporting period events. These events should be mentioned in the explanatory notes in the description of the assumptions adopted.

- **Sensitivity analysis**

The AMF recommends that, in certain situations, issuers present a sensitivity analysis in the explanatory notes, in particular when the structure of the transaction or certain assumptions have a material impact on pro forma information. This analysis may be conducted, for instance, when the purchase price is not final or when a merger leads the issuer to simulate a stock price so as to set a final purchase price (see part II – 2.1 above)

- **Foreign currency effects**

The AMF recommends that issuers specify the foreign exchange rates used for pro forma adjustments compared with those used in historical data.

- **Comments on pro forma information in the management report**

Pursuant to Articles L. 225-100 and L. 225-100-2 of the French Commercial Code, issuers are required to provide an objective and comprehensive analysis of the business, results and financial position of the company in the management report. The AMF notes that some issuers use pro forma information in their management reports in order to complement the analysis of historical data.

This practice is authorized insofar as it allows complementing historical information and is useful to readers. However, this description shall not result in issuers removing narrative information on historical financial statements required under the Commercial Code.

³⁸ This line item recognizes in the income statement the annual cumulative change in the fair value of all investment properties (see IAS 40 « *Investment property* », paragraph 33 and seq).

³⁹ ESMA Guideline (n°135 and seq), updated in March 2013

List of annexes

Annex 1: Summary tables on pro forma information

Annex 2: Commission Regulation n°809/2004 : annex I (paragraph 20.2), annex II and annex XXV (paragraph 20.2)

Annex 3: Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members (Updated Version – December 2012) – Question n°51

Annex 1: Summary tables on pro forma information

	Link to this recommendation	Prospectus	Registration document	Annual report	Interim report
Background regulations	Part I - 1.1	(EC) 809/2004 (Annex I paragraph 20.2, annex II & annex XXV paragraph 20.2)	(EC) 809/2004 (Annex I, paragraph 20.2, annex II & annex XXV, paragraph 20.2) and AMF instruction 2005-11 of 13 December 2005 (Article 9)	Article 222-2 of the AMF General Regulation and AMF instruction 2007-05	Article 222-2 of the AMF General Regulation and AMF instruction 2007-05
Triggering factors	Part I - 1.2.1 and part II – 1.5 Part I - 1.3.5 Part I - 2.2.2 Part I - 1.3.4	Significant gross change: - Acquisition of one or several assets or liabilities OR group of assets or group of liabilities - Acquisition of individual assets (or liabilities) - Disposal of one or several asset(s), group(s) of assets or individual assets (or liabilities, group of liabilities or individual liabilities) - Significant financial commitments	Change in the scope of consolidation: - Acquisition of one or several assets or liabilities OR group of assets or group liabilities (IFRS 3) - - -	Change in the scope of consolidation: - Acquisition of one or several assets or liabilities OR group of assets or group liabilities (IFRS 3) - - -	
Threshold	Part I - 1.2.2 & 1.3.2 Part I - 1.3.1	Effect > 25% <i>The threshold should be assessed on a per transaction basis</i>	Effect > 25% <i>The threshold should be assessed taking into account all the transactions</i>	Effect > 25% <i>The threshold should be assessed taking into account all the transactions</i>	
Date of the triggering factor	Part I - 1.2.3	Transaction completed in the course or after the financial year	Transaction completed in the course of the financial year	Transaction completed in the course of the financial year	
Period for presenting pro forma information	Parts I - 2.1.2 & 2.1.5	a) current financial year b) most recently completed financial period AND/OR c) the most recent interim period	At least the current financial year	At least the current financial year	



	Link to this recommendation	Prospectus	Registration document	Annual report	Interim report
Nature of the required pro forma information items	Part I - 2.1.1	No definition		<i>Provide main interim balances on the income statement in addition to the items required under IFRS 3 (ex : Operating result) as if the acquisition had taken place at the beginning of the period.</i>	<i>Provide main interim balances on the income statement in addition to the items required under IFRS 3 (ex : Operating result) as if the acquisition had taken place at the beginning of the period.</i>
Special report of the statutory auditors	Part I - 2.1.6	Yes		Such information is provided in the disclosures and thereby is covered by the statutory auditor's report.	Such information is provided in the disclosures and thereby is covered by the statutory auditor's report.

Pro forma information & linkage of the documents

The graph below sums up the linkage of the different documents (annual or interim financial report, registration document, Prospectus) and the consequences in terms of documenting pro forma financial information.

	Annual or interim financial report	Registration document	Prospectus
Background regulations	Article 222-2 of the AMF General Regulation and AMF instruction 2007-05	(EC) 809/2004 (Annex I, paragraph 20.2, annex II & annex XXV paragraph 20.2) and AMF instruction 2005-11 of 13 December 2005 (Article 9)	(EC) 809/2004 (Annex I paragraph 20.2, annex II & annex XXV paragraph 20.2)
Transaction completed in the course of the financial period	Provide main interim balances on the income statement, either in addition to the items required under the accounting policies or not.	Information pro forma compiled in the financial report is relevant: No additional items of pro forma information should be provided, except in the event of the acquisition/sale of individual assets (or liabilities), or a significant financial commitment	
Transaction completed after the financial period	∅	Provide the items of pro forma information set out in the annex II of the (EC) 809/2004	Provide the items of pro forma information set out in the annex II of the (EC) 809/2004

Annex 2:

Commission Regulation n°809/2004: annex I (paragraph 20.2), annex II and annex XXV (paragraph 20.2)

Annex I – paragraph 20.2 Pro forma financial information

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

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

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

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

Annex II : Pro forma financial information building block

1. The pro forma information must include a description of the transaction, the businesses or entities involved and the period to which it refers, and must clearly state the following:

- a) the purpose to which it has been prepared;
- b) the fact that it has been prepared for illustrative purposes only;
- c) the fact that because of its nature, the pro forma financial information addresses a hypothetical situation and, therefore does not represent the company's actual financial position or results.

2. In order to present pro forma financial information, a balance sheet and profit and loss account, and accompanying explanatory notes, depending on the circumstances may be included.

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

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

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

4. The pro forma information must be prepared in a manner consistent with the accounting policies adopted by the issuer in its last or next financial statements and shall identify the following:

- a) the basis upon which it is prepared;
- b) the source of each item of information and adjustment.

5. Pro forma information may only be published in respect of:

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

6. Pro forma adjustments related to the pro forma financial information must be:

- a) clearly shown and explained;
- b) directly attributable to the transaction;
- c) factually supportable.

In addition, in respect of a pro forma profit and loss or cash flow statement, they must be clearly identified as to those expected to have a continuing impact on the issuer and those which are not.

7. The report prepared by the independent accountants or auditors must state that in their opinion:



- a) the pro forma financial information has been properly compiled on the basis stated;
- b) that basis is consistent with the accounting policies of the issuer.

Annex XXV – paragraph 20.2 Pro forma financial information

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

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

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

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

**Annexe 3: Frequently asked questions regarding Prospectuses:
Common positions agreed by CESR Members (18th Updated Version - December 2012) – Question n°51**

51: Pro forma financial information: illustrative examples of the application of the requirements on pro forma (special reference to item 5 of Annex II – letters (a) to (c)-) September 2007

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

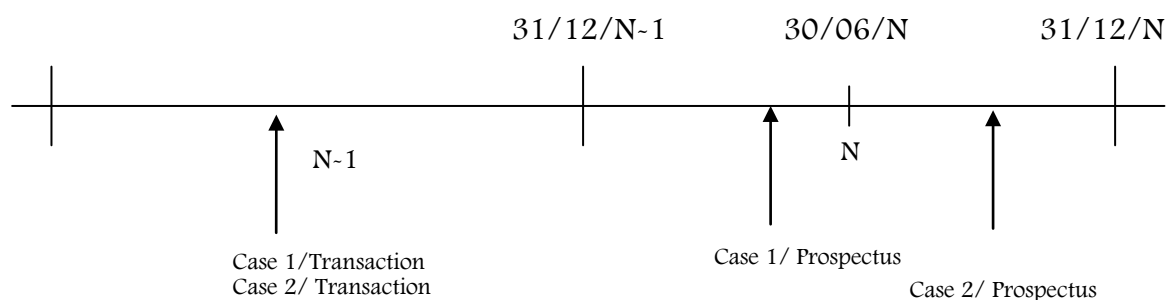
A) CESR provides below an analysis of 4 typical cases where issuers may be confronted with the need to provide pro forma information in a prospectus and some views on how item 5 of Annex II (letters a to c) could be applied in these cases.

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

The following hypotheses are applicable in all cases:

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

Diagram for cases 1 and 2



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

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

Balance sheet

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

Profit and loss account

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

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

All members agree that letters a) and c) of item 5 of Annex II are not applicable in this case.

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

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

Balance sheet

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

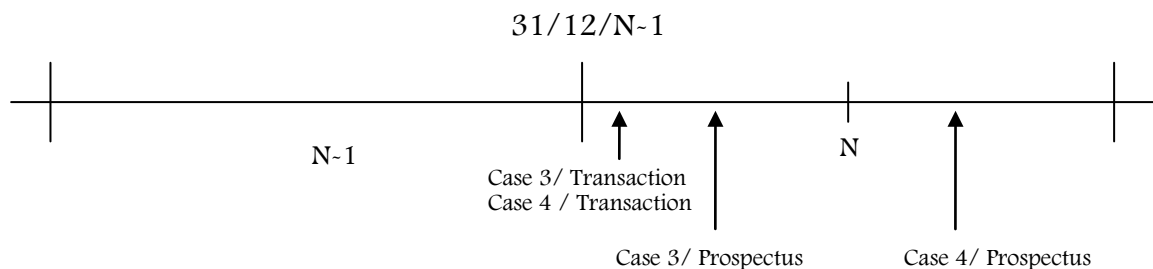
Profit and loss account

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

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

All members agree that letters a) and c) of item 5 of Annex II are not applicable in this case.

Diagram for cases 3 and 4



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

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

Balance sheet

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

All members agree that letter c) of item 5 of Annex II is not applicable in this case.

Profit and loss account

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

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

All members agree that letter c) of item 5 of Annex II is not applicable in this case.

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

Balance sheet

The transaction is already reflected in the balance sheet of the half-year information (as of 30/06/N).

Therefore, no pro forma information is required on the balance sheet.

Profit and loss account

Regarding the pro forma P&L there are divergent practices among CESR members:

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

The reasoning of these competent authorities is broadly the same reasoning as in Case 1.

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