A F E P

October 18th, 2004

Dear Mr Secretary General,

Please find enclosed our comments drawn up in response to the CESR consultation on its level 3 draft recommendations on the prospectus.

We consider that the required equality of treatment between European companies is achieved through coherent application of the Prospectus Regulation in different Member States and are therefore in favour of any initiative aimed at achieving this goal.

Specify the status of the CESR recommendations

In this sense, the CESR recommendations could comprise useful *indications for issuers*. However, in practice they should not comprise new obligations for them, either at European level or at national level.

When added to the obligations defined by European directives and regulations, the recommendations made at level 3 therefore should not form a whole that is difficult to apply and slow to adapt to market developments.

Moreover, *while we consider it useful for regulators to stipulate their joint expectations and to communicate them to issuers, it is nonetheless important for the future recommendations to indicate explicitly that they are primarily intended for regulators, that they cannot be integrated into national texts (laws, regulations, instructions, etc.) and therefore are not capable of being enforceable against issuers.* Otherwise, the recommendations would not facilitate the harmonisation of practices at European level.

Mr Fabrice DEMARIGNY
CESR Secretary General
11-13 Avenue de Friedland
75008 PARIS

Do not prescribe the publication of quantitative prospective information

The European regulation on the prospectus allows issuers the choice to include profit forecasts or estimates in the registration document and does not make it necessary to supply other quantitative prospective information.
However, the CESR consultation paper goes further than the regulation and stipulates the publication of such information notably 'a *prospective review* of the issuer's performance and financial condition' (§ 31), short and long-term funding plans ('Capital resources'; § 38), and a net working capital statement for a 12-month period (§ 115).

We consider that the CESR recommendations should not lead to the compulsory publication of quantitative prospective information. Due to its uncertain nature, such information if required would often be likely to mislead the public.

In this respect, a distinction should be made between the information required by the regulation on situations and elements that exist at the date of the prospectus (short and long-term resources, ability to meet its cash obligations on that date) from prospective information, which the regulation does not make compulsory.

We hold the view that the current system that involves the provision of information on existing elements and its extension where applicable on the basis of a permanent information obligation appears appropriate for maintaining investor confidence and not creating expectations that would be refuted later.

Ensure that the information is relevant and do not harm companies' interests

To ensure that the information remains relevant, the published elements should remain significant and not be overly detailed. In the context of applying the regulation on the prospectus, the *general reference to a materiality threshold and the deletion of many details* should facilitate the understanding of essential company information, and make it possible to avoid including information in the prospectus whose public usefulness is not demonstrated.
In particular, many details requested under certain headings (working capital ; property, plant and equipment; contracts ; covenants) should be deleted.

Moreover, it is necessary to avoid the dissemination of information likely to harm companies' interests. In certain cases (notably the latter three above), the degree of detail of the information requested, its quantification and/or systematic publication could prove harmful to companies, moreover without facilitating the understanding of essential information.

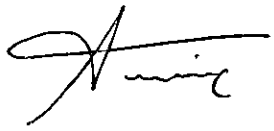
Process: ensure a large representation of the interested parties

We appreciate that a Consultative Working Group was formed to provide technical advice to the CESR expert group.

However, we note that this group comprises only a few members with a current professional background within companies.
Therefore we believe that *a group's composition should be adapted to the subject addressed and ensure a large representation of the interested parties. With regard to such matters as prospectus, nearly half of the consultative group should be composed of members working with companies or companies' organisations.*

Thank you for your attention to these issues. We remain at your disposal to discuss them further if you wish.

Yours sincerely,



Alexandre TESSIER
Director General

CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses nº 809/2004 Consultation Paper

GENERAL COMMENTS

Status of CESR recommendations: clarify that they constitute a non-binding framework

Paragraphs 5 and 7 of the consultation paper indicate that the purpose of CESR recommendations is 'to *help issuers and their advisers to make (…) judgements'* 'about the extent of information to be supplied under a certain item (…)'. *They 'do not constitute European Union legislation* and will not require national legislative action, as in particular the provisions of the level 2 Commission's regulation on prospectuses are directly applicable. CESR members will introduce these recommendations in their day-to-day *practices* on a voluntary basis.'

We believe it necessary to further clarify that such recommendations constitute a *non-binding framework* that can be used when producing or a prospectus and *are not meant to form part of national regulations or legislations.*

In fact, we believe that Level 3 cannot produce mandatory rules neither at EU level nor at Member States level. This could not occur in the form of Commission recommendation either. CESR has no rule-making authority and, therefore, implementation of CESR standards at level 3 could never be mandatory. A change of this type would deprive the texts drawn up by CESR of the flexibility required for an adaptation to the market development and would risk making the regulations substantially more cumbersome.

In this sense, the terms used to clarify certain items (Point IV, 2. 'Clarification of items') should be unambiguous and, whatever these terms, without an effect on the indicative nature of these recommendations.

Yet the consultation document contains phrases as 'issuers are normally expected to bear in mind….', 2.a, 2.g, or 'issuers are expected to refer to… (2.b, 2.d, 2.e), to mention that… (2.c), to indicate that…(2.h)…'

Application date: European coordination should precede implementation of the texts by national regulators

We believe desirable for CESR to ensure the harmonisation of the dates of application in the European Union. European coordination should precede implementation of the texts by national regulators.

The Commission Regulation of 29 April 2004 shall apply from 1 July 2005 directly in all Member States.

In the consultation paper, CESR indicates that it will publish the recommendations no later than 1 July 2005, but does not clarify how CESR members may apply the regulation in practical situations, such as the following:

- Submission of the draft prospectus for approval by the competent authority before 1 July 2005;

- Prospectus composed of separate documents, some of which may be published after 1 July 2005. Those cases include:
  . Registration document filed with or approved by the competent authority before 1 July 2005 and securities and summary notes submitted for approval after 1 July 2005;
  . Base prospectus approved by the competent authority before 1 July 2005 and final terms published after 1 July 2005.

Avoid duplication of information between the prospectus and financial documents

Some recommendations would lead to the inclusion of information available in other documents, notably financial statements and their notes, in the prospectus. This is the case, for example, under the heading 'operating result' (point 9.2 of Annex I), where certain information is included in the management report, and 'capital resources' (point 10 of Annex I), where the majority of the data is given in the cash flow statement.
In order to avoid information redundancy, we recommend that cross-references to financial statements can be made in the appropriate sections of the prospectus.

Moreover, as the prospectus regulation (Article 28.1) provides for the possibility of incorporating items by reference in the prospectus (memorandum, articles of association, financial statements, etc.), we believe that it is not necessary to summarise this information in the prospectus.

Ensure the relevance and understandability of information

Publication of relevant information notably assumes that it is material and is not excessively detailed.

In this respect, the *general application of a materiality threshold and the abolition of many details* should facilitate the understanding of essential company information by avoiding the inclusion in the prospectus of information whose usefulness for the public is not established;
- the concept of materiality, used in the European regulation ('principal' markets, trends, shareholders ; 'significant' changes or tangible fixed assets) should also be used in its application ;
- Many details requested under certain headings (working capital ; property, plant and equipment; contracts ; covenants) should be abolished (see more detailed comments under these headings).

Do not harm companies' interests

The publication of information should not harm companies' interests.

It is necessary to avoid the dissemination of sensitive information which can be exploited later to the company's detriment. In certain cases, the degree of detail of the information requested and its quantification and/or systematic publication are likely to harm companies' interests, moreover without necessarily facilitating the understanding of essential information or being very relevant. This occurs within the context of a competitive world where some information is strategic and should not be revealed.

As an illustration, in contrast to the CESR proposal (§ 273, b), there can be no contemplation of providing the names of parties to the contract. Such publicity would harm the company's interests and moreover in this regard would frequently breach contract clauses.

DETAILED RESPONSES AND COMMENTS

The references used are those of the consultation paper.

III FINANCIAL INFORMATION ISSUES

1. SELECTED FINANCIAL INFORMATION

30. ***Q: Do you agree with this proposal ? If not, please state your reasons.***

Regulation

Paragraph 20.1 of annex I of the regulation states that the issuer should provide 'Audited historical financial information covering the latest 3 financial years (…) and the audit report in respect of each year. Such information must be prepared according to Regulation (EC) N°

1606/2002 or, if not applicable, to a Member State national accounting standards for issuers of the Community.'

The second § of item 20.1 further indicates that 'The last two years audited historical financial information must be presented and prepared in a form consistent with that which will be adopted in the issuer's next published annual financial statements (…).'

Response and comments

We note in § 53 of the consultation paper, and agree, that the second paragraph of item 20.1 addresses the specific situation of new applicants offering securities to the market for the first time.
Regarding item 20.1 audited historical information covering the last two preceding years generally can be prepared according to the same set of accounting standards. In contrast, we believe that requiring three comparative periods would pose many practical difficulties, due in particular to frequent changes in accounting standards.

In this context, it would be helpful that the future CESR recommendation clarify that the phrase 'the latest three financial years' in § 20.1 refers to the current financial year and the two preceding financial years.

Moreover it would be appropriate to highlight that the transition to IFRS is specifically addressed by the 30 December 2003 CESR recommendation. Like the IASB standard on transition, that recommendation recognises that only one period of comparative information can be prepared and presented according to the same set of accounting standards (e.g. 2004, for the 2005 annual financial statements).

The 2003 recommendation accepts a specific format ('the bridge approach') for the presentation of the comparative figures. Under this approach, the issuer presents the middle period only (e.g. 2004) under both IFRS and national standards (in this sense § 77 of the consultation paper). Hence, for the 2005 annual financial statements only, the last year (e.g. 2004), rather than the last two years (e.g. 2003 and 2004), audited historical financial information should be presented according to the same set of accounting standard.

2. OPERATING AND FINANCIAL REVIEW

37. Q: Do you consider that it is appropriate to include key performance indicators about past performance?

Regulation

The regulation 809/2004 requests the issuer to provide a *description* of its financial condition, changes in financial condition and results of operations for each year and interim period, for which historical financial information is required; the causes of *material* changes from year to year in the financial information should be included *to extent necessary for an understanding of the issuer's business as a whole.*

Concerning the operating results, *the OFR should focus on those issues which the issuer considers to be significant* in the circumstances of their business as a whole. According to the circumstances materiality applies to income, changes in net sales or revenues or operations.

On this overall condition of materiality, the issuer should *provide information* regarding the causes of (material) changes from year to year in the financial information, the factors (materially) affecting the issuer's income or the policies or factors (materially) affecting its operations. Where the financial statements disclose material changes in net sales or revenues, the issuer should *provide a narrative discussion* of the reasons for such changes.

The information to be provided mainly provides investors with an overall *historical* review of the issuer's financial condition and performance 'through the eyes of management'.
The provision of prospective information is limited to information about any external policies or factors that *could materially affect* the issuer's operations. For this purpose 'external' means 'governmental, economic, fiscal, monetary or political'.

Response and comments

CESR envisages requesting issuers to provide key performance indicators in respect of the operating and financial review (OFR).

We are not opposed to the principle of ***issuers choosing to include*** *in their Operating and financial review (OFR) key performance indicators about* ***past operating*** *performance.*
In other words, it may be appropriate to include key performance indicators in the OFR as long as they relate to past operating performance and are selected by the issuer.

While they are aware of the usefulness of such information, issuers consider that it is for them to select the key elements that are best suited to their situation for a given period.
It would not be appropriate for CESR to stipulate or establish a list of 'key performance indicators' or 'key value drivers' (§ 32 of the consultation paper) or specify 'measures drivers for sales' (§ 33 of the consultation paper). As systematically publishing such elements or indicators may lack relevance.

For the purpose of compiling the OFR, we believe that the following principles should be given prominence:

- *Relevance to the particular business, as assessed by the issuer*: The description of the issuer's financial condition and operating results should focus on those issues that the issuer considers to be significant in the circumstances of their business as a whole. It *may* include key performance elements *relevant to the particular business, as assessed by the issuer.* As those elements may vary from an issuer to another, comparability between issuers should not necessarily be regarded as an overarching principle.

- *Materiality*: The relevance of information is affected by its materiality. Therefore the disclosure of certain information should be envisaged only after taking into account the materiality of the changes, factors or effects mentioned in the regulation. More specifically, based on the regulation, *key* performance elements should be understood as meaning 'Elements that describe the *material effects of significant or external factors* on the issuer's past operations, revenues or income'.

- *Relationship to past performance:* In accordance with the regulation, the OFR should focus on *historical* financial information and provide a description of the issuer's *current* financial condition and operating results.

  The information published *should not be prospective*, with the exception set out in the regulation of the 'information regarding any governmental, economic, fiscal, monetary or political policies or factors *that (...) could materially affect*, directly or indirectly, *the issuer's operations*'. As such, being uncertain by nature, prospective information could put information users' judgement onto the wrong track.

  Similarly as for profit forecasts or estimates, prospective information should not be required; it is provided only if the issuer so chooses. Therefore *issuers generally should not be required to provide investors with a prospective analysis* or *prospective review* of their performance and financial condition (§ 31 of the consultation paper). Similarly *performance should not necessarily* 'be *discussed* in the context of the long-term objectives of the business and related measures drivers for sales (…), for instance price / volume sales analysis, market share or revenues / square metres, backlog' (§ 33 of the consultation paper).
  Also, we do not believe that the OFR should necessarily provide information about the *extent to which the different components* of earnings and cash flow *are recurring.* This would go beyond the regulation, which requires issuers to provide 'Information regarding significant factors, including unusual or infrequent events or new developments, materially affecting the issuer's income from operations, indicating the *extent to which income was* so *affected.*'

- *Understandability*: Key indicators may be included to the *extent necessary for an understanding of the company's past condition and results of operations* (as mentioned in the regulation and in § 32 of the consultation paper). Therefore the level of details and the quantity of information provided should not be detrimental to the quality of the information delivered to the public (as under §§ 33 and 35 of the consultation paper).
  In this respect, the OFR should *provide a narrative discussion, or comment, on the major events relevant to the assessment of the past financial condition and operating results*, rather

than'' duplicate information presented or required to be presented elsewhere in the prospectus, on the financial statements or in the notes to the financial statements (such as information about the different components of earnings and cash flow in § 35 of the consultation paper; comment on the impact on future operations of significant post-balance sheets events in § 36 of the consultation paper), in particular according to IAS / IFRS standards (IAS 1 *Presentation of Financial Statements*, IAS 7 *Cash Flow Statements*, IAS 10 *Events after the Balance Sheet Date*, …).

- *Confidentiality*: the disclosure of certain information may be detrimental to the issuer, while its omission would not be likely to mislead the public.

3. CAPITAL RESOURCES

42. ***Q: Do you agree with this proposal? If not, please state your reasons and please provide alternative information.***

In respect of information on Capital Resources, CESR proposes publishing information that is prospective, detailed and/or already included in financial statements.

Response and comments

We do not agree with the proposal in §§ 38-41 of the consultation paper.
We believe that no prospective information should be required. The information should focus on relevant and material elements and be less detailed.
Finally, the redundancies existing with the information required under IAS/IFRS could be avoided by specifying that the information in question may not be provided, if presented on the financial statements or in the notes to the financial statements.

Do not require prospective information, in particular short and long term funding plans

The regulation set outs that issuers should provide information concerning its capital resources – both short and long term- (§ 10.1) and information on its borrowing requirements and funding structure (§ 10.3). Information regarding the anticipated sources of funds are mentioned only as concerns principal future investments on which management bodies have already made firm commitments and material tangible fixed assets (§ 10.5).

Under these requirements, it would be appropriate to provide information on the long term capital resources and funding structure *existing at the reporting date, i.e.* on the issuer's *current* situation, and therefore *not on* its *funding plans*.
With the limited exception set out in § 10.5 of the regulation, the information published *should not be prospective; as such information, which is uncertain by nature, is likely to mislead the users of information. It would be even more so with regard to long term elements, including long term funding plans.*

Similarly as for profit forecasts or estimates, *prospective information should not be required; it is provided only if the issuer so chooses.*

Avoid the redundancies existing with the information required under IAS/IFRS

We note that the majority of the items requested by CESR in paragraphs 38 and 39 of the consultation paper are given in the cash flow statement, as defined by IAS 7 or in the notes to financial statements (see concordance table below). Companies applying IAS/IFRS standards should therefore not be bound to provide this information as well.

- As regards § 39, information on *risk management methods* is already published in the notes on the basis of standard IAS 32 (§§ 56-66 relating to the information to be provided on risk management objectives and policies; hedging instruments; terms, conditions and methods; § 67 to 75 on the interest rate risk).
  Information on the analysis of the *sources and amounts of cash flows* and *subsidiaries' ability to transfer funds* already provided for in IAS 7, should therefore not be supplied in the prospectus.
  A sensitivity analysis by risk type and information on the liquidity risk are also provided for in the revision of IAS 32 underway on information to be supplied on financial instruments.

- We do not consider it useful to supply the information stipulated in § 40 of the consultation paper which is already substantially described in the notes to the financial statements. As regards financial liabilities, IAS 32 § 60 provides for the disclosure of information about the extent and nature of financial instruments including the major terms and conditions that may affect the amount, timing and certainty of future cash flows.
  Moreover, information on *liquidity risks* will be supplemented within the context of the review of the IAS 32 standard (ED7 exposure draft).

TABLE OF CONCORDANCE BETWEEN THE REGULATION ON PROSPECTUS AND IAS PROVISIONS

Prospectus Regulation	**Information mentioned in the CESR consultation paper**	**IAS** ***IAS 7 – Cash Flow Statements*** ***IAS 32 – Financial Instruments : Disclosure and Presentation*** ***ED 7 – Financial Instruments: Disclosures***
3. CAPITAL RESOURCES		
10.1 Information concerning the issuer's capital resources (both short and long term);	§ 38 Capital structure of the business	***ED 7 - § 46-48 Capital*** ***IAS 7 -§ 10*** "The cash flow statement shall report cash flows during the period classified by operating, investing and financing activities."
10.2 An explanation of the sources and amounts of and a narrative description of the issuer's cash flows;	§ 39. Cash inflows and outflows should be described, with brief discussion of any material unused sources of liquidity. Should cover: - analysis of the sources and amounts of the issuer's cash flows, … - funding and treasury policies and objectives in terms of the manner in which treasury activities are controlled	***IAS 7 –In particular § 10 (above)*** ***IAS 32 – § 56*** Financial risk management objectives and policies
	- Currencies in which cash and cash equivalents are held, - Extent to which borrowings are at fixed rates,	***ED 7 -§ 43 to 45 Market risk*** 'An entity shall disclose a sensitive analysis for each type of market risk (…)' (§ 43);
	- Use of financial instruments for hedging purposes.	***IAS 32 –§ 58*** Description of: (a) the hedge; (b) the financial instruments designated as hedging instruments (Similar provisions under ***ED 7 -§ 24 and 25*** Hedge accounting)
10.3 Information on the	§ 40. Level of borrowings, seasonality of	***IAS 32 –§ 60 a)***

Prospectus Regulation	**Information mentioned in the CESR consultation paper**	**IAS** ***IAS 7 – Cash Flow Statements*** ***IAS 32 – Financial Instruments : Disclosure and Presentation*** ***ED 7 – Financial Instruments: Disclosures***
borrowing requirements and funding structure of the issuer;	borrowing requirements and maturity profile of both borrowings and undrawn committed borrowing facilities.	*" (...)* an entity shall disclose information about the extent and nature of the financial instruments, significant terms and conditions that may affect the amount, timing and certainty of future cash flows; (…)". ***ED 7 § 42 Liquidity risk*** " An entity shall disclose (…) a maturity analysis (…) and a description of how it manages the liquidity risk (…)."
10.4 Information regarding any restrictions on the use of capital resources that have materially affected, or could materially affect, directly or indirectly, the issuer's operations.	§ 39 Should cover …. (nature and extent of any legal or economic restrictions on the ability of subsidiaries to transfer funds to the company in the form of cash dividends, loans or advances), - impact of such restrictions on the ability of the company to meet its cash obligations. - exchange controls and taxation consequences of transfers,	***IAS 7 § 48 and 52*** " An entity shall disclose, together with a commentary by management, the amount of significant cash and cash equivalent balances held by the entity that are not available for use by group (…)"(§ 48) ***ED 7 § 42 Liquidity risk*** " An entity shall disclose (…) a maturity analysis (…) and a description of how it manages the liquidity risk (…)."

Focus on relevant and material elements.

As regards § 41 on covenants we consider that information on the existence and nature of such clauses can only be relevant if the *probability of occurrence of the triggering events is high and their possible impact is significant.*
It appears difficult to supply *details on the measures taken or proposed* to palliate the effects of the application of a covenant, as these measures depend on both the issuer and lenders. Moreover, detailed compulsory publications would be likely to damage the issuer, notably in its relationships or negotiations with third parties.

In the event of implementing significant banking covenants for the company, we propose that the issuer provide information instead on how it intends to remedy the situation, with this last phrase then being drawn up as follows:
'Where a breach of covenant has occurred…., *the issuer should mention how he intends to remedy the situation*'.

4. PROFIT FORECASTS OR ESTIMATES

50. ***Q: Do you agree with the above approach in relation to profit forecasts and estimates? If not, please state which particular aspects you do not agree with and give you reasons***

CESR supplies indications on the elements that have to be published when the issuer chooses to include a profit forecast or estimate in the registration document.

In particular, according to § 44 forecasts or estimates must be provided on a timely basis, notably to confirm or correct evaluations made.

Response and comments

We are in favour of the option left to the issuer in § 43 to publish information on forecasts or estimated results.

In response to question 50, we nonetheless consider that the modalities of application relating to the wording of the principle of relevance (§ 44 of the consultation document) must be modified. We consider it essential to distinguish forecasts and estimated results from ongoing information. When the issuer opts to communicate forecasts or estimates these should not necessarily have to be published regularly. Moreover, when clarifications prove to be necessary, it should be possible to give them in accordance with the forms used to ensure ongoing information for the market. This does not justify the publication of new forecasts.

5. HISTORICAL FINANCIAL INFORMATION

Historical financial information : clarify the number of exercises presented in the IAS/IFRS standard

75. Q: Do you agree with the conclusion stated in the previous paragraph? If not, please state your reasons.
85. Q: Do you agree with this proposal? If not, please state your reasons.

According to paragraph 74 of the consultation paper, when a prospectus for admission to trading of securities contains historical financial information prepared on the basis of national GAAP only, issuers might consider giving additional IAS/IFRS based financial information (in a condensed form or not), so as to provide investors with information comparable on an ongoing basis (once admitted to trading).

Response and comments

We consider that it is helpful to clarify that the phrase 'the latest three financial years' (Regulation Annex 1 item 20.1) refers to the current financial year and the two preceding financial years.

Generally audited historical information for the last two years are capable of being drawn up and presented in a form consistent with that which will be adopted in the issuer's next published financial statements.

However the situation differs in the context of the transition to IFRS, which is specifically addressed by CESR former recommendation of 30 December 2003
The future recommendation CESR should clarify that the transition to IFRS is addressed by the December recommendation, which indicates that the 2004 annual financial statements

CESR does not expect to go beyond the existing IAS requirement that only one year of comparatives (e.g. 2004, for the 2005 annual financial statements) be prepared and presented under IAS / IFRS, and accepts a format ('the bridge approach') for the presentation of the comparative figures. Under this approach, the issuer presents the middle period only (e.g. 2004) under the two sets of accounting standards (in this sense § 77 of the consultation document).

Hence, for the 2005 *annual* financial statements only, the last year (e.g. 2004), rather than the last two years (e.g. 2003 and 2004), audited historical financial information will be capable of being presented in a form consistent with that which is adopted for the 2005 financial year.

6. PRO FORMA FINANCIAL INFORMATION

98. ***Q: Please provide examples of indicators of size which you consider appropriate.***

99. ***Q: CESR members had a discussion on appropriate definitions of indicators of size. Should they refer to IAS/IFRS figures, local GAAP figures, other definitions or not defined at all?. If you provided examples of indicators of size in response to the preceding question, please explain your preferences on definitions of the proposed indicators.***

CESR wonders about the indicators of size that could be considered appropriate when determining whether pro forma information should be included in a prospectus.

Response and comments

Beyond the details set out in the Commission regulation (recital 9), *we support CESR specifying size indicators that should be retained to qualify a significant gross change.*

In response to question 98 and the subsequent question in § 99, we propose to retain a change of at least 25% of the issuer's consolidated total assets, turnover or operating result.

Those indicators respectively reflect three characteristics relevant to an issuer : size, activity and performance.

9. WORKING CAPITAL STATEMENTS

134. ***Q: Do you agree with this proposal? If not, please state your reasons.***

Background

Paragraph 3.1 of annex III of the regulation requires the issuer to state 'that, *in its opinion*, the working capital is sufficient for the issuer's *present* requirements or, if not, how it proposes to provide the additional working capital needed.'

As for CESR (§ 115 of the consultation paper), the working capital statement should provide *forward looking comfort* by the issuer that it has sufficient cash flow *for a period of at least 12 months*, taking into account a wide range of variables and sensitivities. According to § 114, a twelve month period is consistent both with the period of validity of a prospectus and the period used to assess the company's going concern.

Also § 118 indicates that the working capital statement should be clear and unambiguous leaving *no doubt* in the investors mind as to whether there is, or is not, sufficient working capital.

Response and comments

While recognising the importance to meet the investors' expectations, we disagree with a mandatory forward-looking approach and the related proposal.

The reference to a twelve month period would not be compatible with the specific requirement laid down in the Commission regulation, the principle that prospective information is optional and the existing requirements regarding the public disclosure of price sensitive information (see details below).

As an alternative solution, we propose that the issuer's statement reflects the knowledge by the issuer of the circumstances existing at the date of the prospectus. The statement should then read as follows :
'To the best of our knowledge, we confirm that, under the current circumstances, the company has access to sufficient liquid resources to meet its liabilities existing at the date of the prospectus.'
Moreover, once its situation required this in respect of continuous information, the issuer would have to communicate any change of opinion in this domain to the market.

This statement and, where applicable, the supplementary information delivered to the market on a timely basis enable to maintain investors' confidence and reduce the risks of creating ill founded expectations and of subsequently calling into question the issuer's statement.

Do not extend the scope of the Commission's regulation

Firstly, we consider that level 3 recommendations should not set demands greater than those of a European regulation.
In this instance, the Commission Regulation stipulates that the issuer must indicate whether, *in its opinion*, the working capital is sufficient for the issuer's *present* requirements. The *statement mentioned at level 2 therefore relates to the situation* existing at the date of the prospectus. *Accordingly therefore the terms 'present requirements' used in the regulation cannot 'be considered to be a minimum of 12 months from the date of the prospectus', as suggested in § 114 of the consultation paper.*

Moreover, as it results from the regulation, the issuer's statement should be regarded as an opinion of the issuer, rather than a firm commitment.

Do not require a prospective approach

Forecast relies on a wide range of variables, many of them are external (beyond the management's control) and interrelate. In an international environment characterised by high volatility and uncertainties, *it is reasonable not to require forecasts, or public use of prospective financial information, and to recognise that a degree of doubt about a future period cannot be avoided, even in the short term.*

Forward looking working capital statements cannot thus be distinguished from other forms of prospective financial information and form the subject of an issuer's commitment or a 'binary' statement.

Take into account the existing requirements regarding public disclosure of price sensitive information

Under existing requirements (see details below), *issuers should disclose all ex ante available information a reasonable investor would be likely to use as part of the basis of his investment decisions.*
In this respect working capital shortfalls are most likely to be used in an investor's decision-making process and will then give rise to public disclosure by issuers.

Under article 1 § 1) and 6 of Directive2003 / 6 / EC on market abuses, issuers should inform the public as soon as possible of information which is likely to have a significant effect on the prices of financial instruments or related derivative financial instruments.'
The Commission Directive 2003 /124 /EC (implementing Directive 2003 /6) indicates, in article 1, that such information shall be understood as meaning 'information a reasonable investor would be likely to use as part of the basis of his investment decisions.' and, in recital (1), 'Reasonable investors base their investment decisions on information already available to them, that is to say, on *ex ante* available information.'

IV NON FINANCIAL INFORMATION ITEMS

2. CLARIFICATION OF ITEMS

2a PRINCIPAL INVESTMENTS

219. ***Q: Do you think recommendations are needed on this matter? If not, please state your reasons***

220. ***Q: Do you agree with the proposed recommendations? If not, please state your reasons***

221. ***Q: Would you prefer a stricter and more objective approach to determine whether an investment should be regarded as a 'principal investment', such as a numeric one? Which level would you choose and why?***

CESR expects issuers to take account of a certain number of criteria that make it possible to determine a 'principal investment'.

We are not opposed to the CESR providing indicative elements to issuers. Nonetheless, we consider that issuers should not in any case be bound to supply detailed quantitative information such as the 'estimated amount [...] in the issuer's assets'(§ 218 a) or 'expected returns of the investments' (§ 218 b).
In a highly competitive environment, these items could be sensitive for companies.

Finally we believe that reference should be made only to principal existing investments and to principal investments on which firm commitments have been made.

2b – PROPERTY, PLANTS AND EQUIPMENT

224. ***Q: Do you agree with the usefulness of the proposed recommendations and the level of detail provided for? If not, please state your reasons***

CESR wonders about the usefulness of having such a degree of detail for information on property, plant and equipment.

In response to question 224, we do not agree with the proposed recommendation.
In practice, we believe that some of the information envisaged (§ 223) is too detailed and / or harms company's interests.
This notably includes the following information:

- extent of utilization of the issuer's facilities (a);
- its productive capacity (a);

- as regards to any material plans to construct, expand or improve facilities, the nature and reason for the plan, an estimate of the amount of expenditures already paid (c).

Also we believe that reference should be made only to material existing property, plant and equipment and to material tangible fixed assets on which firm commitments have been made.

2e NATURE OF CONTROL AND MEASURES IN PLACE TO AVOID IT BEING ABUSED

238. ***Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.***

239 ***Q: Do you think other information is needed to clarify the nature of control or mechanisms in place to avoid control being abused? Please state your reasons.***

The regulation stipulates that items must be supplied 'to the extent known to the issuer' (§18.3). For its part, CESR proposes in § 237 that publication of mechanisms ensuring that control is not abused of and that is should be based on an exhaustive ('*all* transactions and relationships') and prospective control ('are and *will be…*').

Response and comments

In response to question 238, we consider that the level of detail requested in § 237 is inappropriate.

We consider that CESR is going beyond the provisions of the regulation which stipulates that the assessment required of the issuer is to be carried out 'to the extent known to the issuer'.
The issuer does not necessarily know all transactions which are not concluded subject to normal conditions ('at arm's length and on a normal commercial basis'). Moreover, it cannot ensure that future transactions will be concluded on this basis either.

We therefore recommend taking account of the knowledge that the issuer may have on the one hand of the existence and nature of the control, and on the other of the measures adopted, to ensure that control is not abused.

2g LEGAL AND ARBITRATION PROCEEDINGS

247. Q: Do you agree with the level of detail being provided? If not, please state your reasons

248 Q: Do you agree with the proposed recommendations? If not, please state your reasons

CESR envisages publishing detailed information on legal and arbitration proceedings.

We believe that the principle stated in § 20.8 of Annex I makes it possible to inform the reader adequately and that it therefore does not require the developments proposed by CESR.

2k RULES IN RESPECT OF ADMINISTRATIVE, MANAGEMENT AND SUPERVISORY BODIES

265. Q Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.

CESR envisages issuers summarising a certain number of points contained in legislative deeds such as articles of association, statutes, charter or bylaws references.

In response to question 265, we do not agree with the usefulness of the proposed recommendations.
This information is of no interest when the different texts are already published elsewhere (e.g., articles of association deposited with Commercial Court registry),.

Moreover, the prospectus regulation (Article 28 1. 4) provides for the possibility of incorporating the memorandum and articles of association in the prospectus by reference, *making the summary envisaged by CESR unnecessary in that case.*

2m – MATERIAL CONTRACTS

274. ***Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.***

The regulation indicates that the issuer should provide ' A *summary* of any other contract (not being a contract entered into in the ordinary course of business) entered into by any member of the group which contains any provision under which any member of the group has any obligation or entitlement which is material to the group as at the date of the registration document.' (Annex 1, item 22).

Response and comments

CESR proposes the inclusion of summaries of material contracts, in compliance with the provisions of the 'Prospectus' Regulation.

We believe that such publication can only be envisaged if it does not harm companies' interests. *Thus, there can be no question of supplying any information on parties to the contract (273- b). Also publicity is frequently in breach of contract law.*

Moreover, we consider that attestations signed by the company's persons responsible for the information, auditors and, where applicable, financial intermediaries make it possible to offer the public an appropriate level of comfort as regards the published information, while ensuring business continues to run smoothly.

2p – INTERESTS OF NATURAL AND LEGAL PERSONS INVOLVED IN THE ISSUE/OFFER

295. ***Q: Do you agree with the level of detail provided for? If not, please provide reasons for your answer.***

CESR notably envisages the issuers considering whether the persons involved in an issue or an offer have a 'a direct or indirect economic interest that depends on the success of the offer issue' (§ 294, Paragraph 2).

We believe that the formulation selected does not allow the issuer to identify persons likely to be concerned by these provisions. The concept of 'indirect' is actually very vague and through it could involve persons such as shareholders, account holders, etc. without this reflecting a relevant economic reality.

Moreover, in this context, it would also be difficult for the issuer to assess the economic interests 'that depend on the success of the offer/issue'.

We therefore recommend the following wording: '…or have a direct economic interest, or have any……'.