Mouvement des Entreprises de France
MEDEF

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Division for Economic,Financial and Fiscal Affairs *Division for Legal Affairs*

CESR's recommendation for the consistent implementation of the EC Regulation on Prospectus number 809/2004
Ref: CESR/04 – 225b

MEDEF's position

General comments

- level 3 regulations, like the legislation at levels 1 and 2 must avoid any inappropriate burden

When the level 1 and 2 rules were drawn up, MEDEF constantly pleaded in favour of finding relevant information to include in the prospectus and therefore for the removal of any inappropriate burden. A significant amount of work was conducted at level 2 to make the European Regulation as concise as possible. However, level 3 recommendations, although not mandatory, in practice add a further stratum of principles. In so doing they make the Prospectus regulations considerably more burdensome and should be strictly limited to the necessary explanations. In its detailed comments, MEDEF draws CESR's attention to the little value added by some of the proposed developments in the consultation document. MEDEF wishes to see these paragraphs which are of little use deleted.

- the balance found at a level 2 should not be jeopardised by the content of level 3

MEDEF is opposed to a design of European legislation which makes IOSCO standards a minimum and has contested some points on the content during the level 2 consultations. Some level 3 proposals reintroduce IOSCO standards and therefore call into question the compromise positions found at level 2. MEDEF is strongly opposed to this process. The unrestrictive nature of level 3 regulations does not in any way change the analysis of the relevance of the information required and we know that regulators will apply a lot of pressure to make issuers comply with level 3 recommendations.

- level 3 regulations should not interfere with the other FSAP texts

MEDEF requests that the CESR remove any level 3 measure interfering with the rules of other texts, notably the Transparency Directive, the regulations on IFRS or the draft directive modifying accounting directives.

Detailed comments

FINANCIAL INFORMATION ISSUES

1. SELECTED FINANCIAL INFORMATION

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

Yes, we agree.

2. OPERATING AND FINANCIAL REVIEW

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

No, we take the view that issuers should be free to choose whether or not to include indicators such as those proposed by CESR and that new requirements on the subject should not be added at level 3 (sections 31 to 33). In particular, reference to forecast information on performance should be removed because it goes beyond the recommendations of level 2. However, it would be useful to point out the principles shown in paragraph 36 to the issuer.

3. CAPITAL RESOURCES

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

No comment

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 your reasons

During discussions on level 2 work, MEDEF stressed that the obligation to audit profit forecasts would be too much of a burden. The European regulation sets the requirement to audit profit forecasts whilst giving the issuer the choice of whether or not to include them in the prospectus

MEDEF, in agreement with the CESR, takes the view that the system of publishing the profit forecast, in a press release and not in the prospectus, does not justify different treatment because when it is included in the prospectus, the information can be used by the investor as a basis for decision-making. Also, it is not appropriate to demand an audit in one case and not in another. However, MEDEF takes the view that this requirement is only practicable when accompanied by a restrictive concept of the idea of a profit forecast included in a press release. Furthermore, MEDEF is strongly opposed to the CESR assertion in section 46 stating that all profit forecasts published outside the prospectus constitute material information which needs to be repeated in the prospectus. There is nothing to confirm this. The assessment of the materiality of the information must remain the responsibility of the issuer. Lastly, MEDEF thinks

that the compulsory auditing of profit forecasts gives rise to major implementation issues which need to be examined.

51. Q: Do you consider that it is appropriate to provide examples of what may or may not constitute a profit forecast or estimate? If so, could you please provide some examples?

No, we think it appropriate to remain with principles.

5. HISTORICAL FINANCIAL INFORMATION

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

During the October 2003 consultation on the subject, MEDEF said that it was in favour of a solution which included two years presented in IFRS format in the prospectus to provide investors with a satisfactory view of the company's accounts. We are, however, concerned by CESR's developments at level 3 because they are more restrictive than regulation 1606/2002 and contradict the contents of IFRS1. It should be noted that they are also more constrictive than the conditions for listed European companies when switching to IFRS in 2005.

Also, the risk engendered by this position, which is undoubtedly satisfactory from a theoretical point of view, is that it will cost companies too much and thereby become an obstacle to obtaining a listing. To avoid compromising the dynamism of the European financial markets, which is one of the major objectives of the Financial Services Action Plan , MEDEF takes the view that the subject deserves further consideration in light of the experience of the transition to IFRS by mid-caps in 2005 in order to establish whether it is legitimate to use the solution envisaged by the CESR and to provide a better estimate of the cost for a medium-sized company.

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

Yes, we agree with it.

6. PRO FORMA FINANCIAL INFORMATION

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

We think the most appropriate indicators are the balance sheet total and the operating profit. In addition, we think these balances need to have been determined in the system of reference used by the issuer for its accounts. It is not actually important to establish the impact that a switch to IFRS would have had if the issuer used local standards or conversely, the most important thing is the variation found in the reference system used by the issuer.

7. FINANCIAL DATA NOT EXTRACTED FROM THE ISSUER'S AUDITED FINANCIAL STATEMENTS.

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

MEDEF is not opposed to the proposed text at level 3 but considers that the name of the regulation is sufficient in itself. It would therefore be preferable to remove it for the sake of greater clarity and simplicity in the texts.

8. INTERIM FINANCIAL INFORMATION

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

From MEDEF's point of view, the proposed text at level 3 is a maximalist interpretation of level 2. It is necessary to provide greater flexibility for new listings and to review the linkage with the Transparency Directive, which could pose a problem with the transition measures. It is important to make sure that we retain proportionate obligations in order to avoid discouraging new listings.Some recommendations require anticipating the recommendations set by the Transparency Directive and the IFRS regulation by one year (or by two years due to the requirement to have comparative figures) which can be very constrictive for first-time listings.

9. WORKING CAPITAL STATEMENTS

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

MEDEF does not in any way share CESR approach on this point. It has too much of a black-and-white view of the company's working capital which could be counterproductive by pushing issuers into excessively simplifying their views on the subject. In addition, the wording suggested by CESR raises a problem of responsibility which we feel is difficult to overcome given the state of the CESR recommendations whereas the regulation requires a subjective assessment: "A declaration by the that in its opinion …" From a practical point of view, the requirement for insurance over a 12-month period, which will furthermore need to take account of a wide range of variables and sensitivity factors, represents an excessive cost. The risk is that issuers will be required to "overfinance" operations which would be extremely cumbersome particularly for start-ups. We therefore think that the CESR text should be broadly reviewed so that it is both closer to reality and the spirit of the regulation.

10. CAPITALISATION AND INDEBTEDNESS

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

MEDEF considers that the requirement to have a statement which is less than 90 days old is highly restrictive. Also, the date of the document which is referred to in the regulation should be the date the prospectus is filed. In fact, this is the only parameter that is fully controlled by the issuer.

NON FINANCIAL INFORMATION ITEMS

1. SPECIALIST ISSUERS

142. Q: Recital 22 of the Prospectus Regulation invites CESR to produce recommendations on the adapted information that competent authorities might require to the categories of issuers set out in Annex XIX of the Regulation. Do you think detailed recommendations are needed for specialist issuers or do you think the special features of these issuers could be addressed mainly by the disclosure requirements set out in the schedules and building blocks of the Regulation?

The various types of specialised blocks being considered by the CESR do not create any difficulties in MEDEF's view. An application could be useful provided it is sufficiently flexible. As regards the content, we think the “mineral companies” and “scientific research based companies” blocks are satisfactory. We have not received any comments on the “shipping companies” and “investment companies” blocks. However, we think that the “property companies” and “start-up companies” blocks are too constrictive at this stage and should be reviewed.

1a PROPERTY COMPANIES

150. Q: Do you agree with the usefulness of requesting a valuation report in general? Please state your reasons.

Valuation report is useful if it provides sufficient simple and readable information so that it can be really used by the investor whilst not resulting in a disproportionate cost for the issuer.

151. Q: What rules do you think the report should comply with (such as those of the country of the competent authority that approves the prospectus or other different rules)? Please state your reasons.

MEDEF takes the view that the choice of the expert and the form of the report should be left up to the issuer who is responsible for this information in the same way as all the information contained in the prospectus. It is not appropriate to apply specific rules in this area even less so if they were to emanate from an authority different to the one responsible for approving the prospectus.

152. Q: Do you think that the condensed report should be allowed if the company holds more than 60 properties or would you choose another figure? Please state your reasons.
153. Q: Do you think a valuation report is needed with respect to each property or do you consider a condensed report as sufficient? Please state your reasons.

The criteria creating the option of drawing up a condensed report should not be connected to the number of properties owned by the company. In fact, to satisfy the objective described above of readability of the information, MEDEF considers that a condensed report could offer information which is more easily understandable by the investor even for a relatively limited number of properties. We feel the priority is to

define homogeneous categories of properties in order to obtain condensed reports which make sense.

154. Q: Considering the objective of the report, do you think it can be older than 60 days?

MEDEF is strongly opposed to including a period of 60 days which would create an excessive cost and does not take account of the material contingencies connected with drawing up such reports. In addition, it totally conceals the differences in terms of the volatility of the market values according to the category of properties and is based uniformly on a supposition of maximal risk which we do not feel reflects the reality of property companies. On the contrary, we think that few property valuations can be so sensitive to justify the 60-day period. MEDEF is wondering what the reasons are that made the CESR totally exclude cases of updating of existing rapports, notably for prospectuses other than for an initial listing. Also, MEDEF recommends extending the minimum period to 90 days and giving the issuer the option to extend this period if it is in a position to make an undertaking in return regarding the absence of significant impact of a longer period on the appropriateness of the valuation. By way of comparison, for SCPIs, the AMF requires expert reports which are less than 5 years old to be updated on an annual basis.

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

In view of the opposition expressed in the previous point, we do not agree with the CESR proposal on this subject.

1b MINERAL COMPANIES

We think this block is satisfactory.

1c INVESTMENT COMPANIES

MEDEF does not have any comments on this block.

1d SCIENTIFIC RESEARCH BASED COMPANIES

We think this block is satisfactory.

1e START-UP COMPANIES

187. Q: Do you agree with the specific disclosure requirements set out for start-up companies? If not, please state your reasons and refer to the additional information you think should be required

We do not agree with the CESR proposal for start-up companies. We do not consider the compulsory inclusion of a business plan to be appropriate because its usefulness cannot be proved. French experience of compulsory inclusion of a business plan is not really conclusive. Drawing up a business plan is a delicate exercise which is not required for all listed companies, so we feel this is all more risky for companies with less history as they often have less visibility than others. In addition, the usage of this information by the investor raises a question.

However, we consider the information proposed in paragraph 186 to be relevant for start-ups.

188. Q: Do you agree with the proposed definition of start-up companies? Would you instead prefer that these companies be defined as those that have less than three years of existence? Please state your reasons.

The CESR definition is satisfactory.

189. Q: CESR may recommend to its members one of the following four options. Please state your preference and reasons for your answer: (i) the issuer should always provide an expert's report on the services/products of the issuer; (ii) the issuer should provide an expert's report on the services/products when these are unproven (iii) the expert's report on the services/products of the issuer should be provided unless a very good reason is presented to the competent authority that would impede the report from being provided; (iv) the report would not be mandatory but the issuer would be free to include it.

From MEDEF's point of view, it is inconceivable to make the inclusion of an expert report on products and services supplied by a start-up compulsory. Issuers should continue to be able to choose whether or not to commission an expert report which they may in some cases have difficulty finding. The value of such an expert report could be called into question for an investor's decision. In addition, such a report could be counterproductive by giving a feeling of security to investors when in fact they should not lose sight of the fact that they have invested in a start-up. Also, MEDEF considers that it is vital to keep proposal (iv).

190. Q: When considering whether the report should be mandatory or not, CESR also considered its content and, if required, CESR is proposing that the expert assesses and concludes on: (i) the merits of the issuer's products and/or services; (ii) the issuer's business plan including the critical path and timescale to commercial exploitation and any projections of the market potential for the issuer's products and/or services; (iii) the risk factors which might affect the issuer's business plan. The report should be prepared by an individual or organisation independent of the issuer and of demonstrable high standing, repute and expertise in the field concerned and should confine the opinions expressed to matters within such expertises. Q: Do you agree with the content of the report? If not, please state your reasons and indicate what additional information you would require or delete.

See previous answers.

1f SHIPPING COMPANIES

MEDEF has not received any comments on this block.

2. CLARIFICATION OF ITEMS

2a – Principal investments

Q 219. Q: Do you think recommendations are needed on this matter? If not, please state your reasons
Q 220. Q: Do you agree with the proposed recommendations? If not, please state your reasons

MEDEF does not oppose the proposed text at level 3 but thinks that the description of the regulation was sufficient in itself. It would therefore be preferable to remove it for the sake of greater clarity and simplicity in the text.

221Q 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?

No, we do not think that a quantified threshold is appropriate in view of the diversity of profiles of the companies in question.

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

These aspects which were proposed at level 3 were strongly contested at level 2. MEDEF is opposed to the reintroduction of IOSCO standards at level 3 which seems to suggest once again that the CESR considered these international standards as a minimum basis which the legislator can quite rightly demand be followed. However, the criticisms aimed at the CESR when drawing up the level 2 text were based on the genuine concerns of the issuers. These concerns are still fully present at level 3. By way of example, publishing the production capacity of a production site raises a confidentiality problem and could constitute strategic information for the issuer's competitors.

2c – Compensation

229. 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.
230. Q: Do you think additional information is required? Which one?
231. Do you think information on compensation could be presented in another way? If yes, please provide examples.

IFRS requires much information on this point. Mere referral to IFRS standards for the companies in question would be wiser.

2d – Arrangements for involvement of employees

234. Q: Do you agree with the usefulness of the proposed recommendations and with their content? If not, please state your reasons.

See answer to point 2c.

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.

This point is dealt with in the accounting directives and is contained in a draft directive currently being examined by the Council. So we think it would be totally inappropriate for the CESR to deal with these points through its level 3 text.

2f – Related party transactions

243. Q: Do you think recommendations are needed on this matter? If not, please state your reasons 244. Q: Do you agree with the proposed recommendations? If not, please provide examples of what other definitions of who can be considered related party to an issuer could be followed.

MEDEF does not think that the proposed text brings an improvement, the text of the regulation being sufficient.

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

These aspects are particularly sensitive and require finding the best balance between transparency and business secrecy. From MEDEF's point of view, level 2 is a compromise and should not be called into question. Once again, MEDEF is opposed to the reintroduction of IOSCO standards at level 3 and thinks that at the very minimum the sentence *"any settlement agreement the issuer is aware of is also expected to be disclosed"* should be deleted. See answer to section 2b.

2h – Acquisition rights and undertakings to increase capital

52. 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.

No particular comment to make on this point.

2i – Options agreements

257. 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 information requested is very detailed and we think that section 255 c) is contestable as it gives a maximalist vision of the text of the corresponding regulation.

2j – History of share capital

261. 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.

No comment.

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.

Level 3 recommendations on this point should more clearly establish that it is necessary to supply these information only if the issuer's Articles of Association differ from the rules provided for under national law.

2l – Description of the rights attaching to shares of the issuer

268. 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.
269. Q: Do you see other ways of presenting the information required by the Regulation?

Same answer as for section 2k.

2m – Material contracts

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.

This extremely sensitive point gave rise to extensive debate at level 2. MEDEF is vigorously opposed to including the proposed text in level 3 which breaches business secrecy. Summarising a contract does not necessarily mean revealing the signatories or the exact terms. It is up to issuers, under the supervision of the regulator, to determine the adequate level of detail to supply satisfactory information on the contract without undermining their legitimate interests and therefore those of the shareholders.

2n – Statements by experts

280Q: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.
281. Q: Are there other circumstances that would qualify as "material interest" in the issuer? Which ones?

The draft text is satisfactory from MEDEF's viewpoint.

2o – Information on holdings

291. 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 and propose the details

The exceptions stated under sections 288 and 289 should be set at level 3 and not left up to the regulators. MEDEF thinks it necessary to establish the same exceptions for issuers regardless of the regulator to which they are subject, particularly since the level of information requested is only justified for non-consolidated subsidiaries. The exception stated under section 298 should be generalised. Consequently, either CESR's members need to agree on level 3 treatment including its expectations, or they should not set any stipulation under point 2o in the absence of consensus.

2p – Interest 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. 296. Q: Do you agree with the proposed recommendations? If not, please state your reasons.

No comment.

2q – Clarification of the terminology used in the collective investment undertakings of the closed-end type schedule

305. Q: What are your views on the proposed recommendations for closed ended investment funds? Please state reasons for your answer.

No opinion.

3. RECOMMENDATIONS ON ISSUES NOT RELATED TO THE SCHEDULES

a – Recommendations for documents containing information on the number and nature of the securities and the reasons for and details of the offer, mentioned in art. 4 of the prospectus directive

310. Q: Do you think recommendations are needed on this matter? If not, please state your reasons. 311. Q: Do you agree with the level of detail provided for? If not, please provide reasons for your answer. 312. Q: Do you think that CESR should issue recommendations on the language regime applicable to the document referred to in article 4.1.d and e and 4.2.e and f of the Prospectus Directive and on its modalities of publication (i.e. when and by which means should it be made available)? If not, please state your reasons. If so, which language regime would you deem applicable and which modalities of publication would you choose? 313. Q: Do you agree with the proposed recommendations? If not, please state your reasons.

MEDEF takes the view that the proposed information is satisfactory provided it is drawn up as an exhaustive list. The directive actually introduces exemptions to the requirement to issue a prospectus so it is not admissible to refer back to the schemes introduced for the prospectus. Also MEDEF requests the deletion under 309 d) of the content of the first bracket "*(for instance, those referred to in the related items of the securities note schedules)"*.

As regards the language regime, as the directive has not set any constraints, the choice should be left up to the issuer.

3b – Identification of the competent authority for the approval of base prospectuses compiled in a single document and base prospectus comprising different securities

328Q: Do you agree with the proposed recommendations for the base prospectus relating to different securities? If not, please state your reasons.
329. Q: Do you agree with the proposed recommendations for the single document compiling more than one base prospectus? If not, please state your reasons.

No opinion.

3c – Content of a disclaimer when prospectus is published in an electronic format

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

The principles are satisfactory.

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