

Date

Le Président

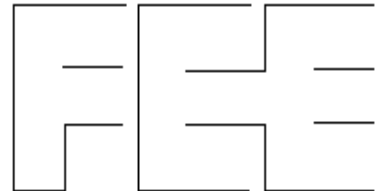
14 April 2004

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Dear Sir,

Re: Call for evidence on CESR guidelines for the consistent implementation of the proposed Regulation on prospectuses

We welcome the opportunity afforded by the call for evidence to provide you with our thoughts as to the issues arising from the proposed Regulation on prospectuses that in our view merit the development of guidance in order to facilitate the consistent implementation of the Regulation across the European Union. Indeed the necessity for such guidance has been highlighted in our responses to your consultations in connection with your Level 2 mandates to provide the Commission with advice as to the content of the Regulation.

#### *Timetable*

We are concerned that the timetable you have set both specifically in calling for evidence and more generally in seeking to issue Level 3 guidance is challenging particularly given the complex and technical nature of the subject matter under consideration. In that light we have sought in this letter to highlight only those issues which we believe are critical to successful implementation of the Prospectus Directive. However, you should note that we also hope to develop possible solutions for the issues we have identified and hope to make these available to you in due course.

#### *Detailed Comments*

Our detailed comments on the issues arising from the proposed Regulation are set out in the attached appendix. We have based our comments on the draft of the proposed Regulation submitted to the European Securities Committee on 30 March 2004, as published on the European Commission's website.

We have structured our comments reflecting the order of the detailed requirements in the proposed regulation as follows.

1. Profit forecasts or estimates;
2. Historical financial information;
3. Pro forma financial information;

4. Age of latest financial information;
5. Interim and other financial information;
6. Significant change in the issuer's financial or trading position;
7. Working capital statement; and
8. Capitalization and indebtedness;

We have concentrated our comments on those areas where auditors or independent accountants are likely to have direct involvement either through meeting reporting obligations imposed on them by the Regulation or through experience of providing due diligence in the areas concerned.

In addition we have identified in our comments those areas where the Regulation, in our view, either necessitates definitions, such as working capital or indebtedness, or where explanation is necessary in order to address practical difficulties that our experience in capital market transactions indicates will arise.

#### *Guidance for auditors*

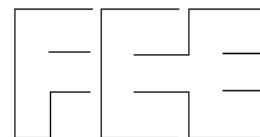
It is also clearly important that guidance should be provided for auditors or independent accountants as to the work they are expected to perform and as to the form of their report. We believe that the appropriate auditing standards setters should issue such guidance. We encourage you to work with those bodies in ensuring that such guidance is provided.

#### *Definition of "auditor" and "independent accountant"*

One particular question that arises throughout the implementing Regulation is the use of the term "independent accountant" linked with that of auditor. It is our understanding that the reason for introducing this term was to allow issuers the option of not appointing their statutory auditor to execute the reporting requirements under the Regulation, or cater for situations where issuers may have changed their statutory auditor and wish to use their new auditor. We believe that an "independent accountant" should be defined as a person or firm qualified to be appointed as statutory auditor of the issuer who, in addition, meets the requirements, such as in respect of independence, that would be imposed were the individual or firm to be the issuer's statutory auditor. Further, we believe "auditor" should be defined as the statutory auditor as appointed under the issuer's relevant national company law. The implementation guidelines should further clarify that it is the issuer's choice either to use its statutory auditor or an independent accountant for the required assurance.

#### *Liability problem*

We continue to be concerned as to the practical liability consequences on auditors or independent accountants of the requirements imposed on them by the Regulation. A solution for the liability problem should be found in order to achieve the full benefits of the single European prospectus.



In conclusion, we would be delighted to discuss with you in detail any of our points we have raised.

Yours sincerely,

David Devlin  
President

Encl:

## Appendix

### 1 Profit forecasts or estimates (Recital 8, Articles 3(10) and (11) and Annex I Item 13)

- 1.1 We note that in its working document 03/208, CESR acknowledges that the subject of profit forecasts in prospectuses is an important issue: “On the one hand, if prepared with due diligence and on a well-founded basis, these forecasts and prospects may help investors to make a reasoned assessment on the issuer and the expected economic profit relating to it. On the other hand, the profit forecasts may, in the worst case, be misleading.” We agree with the sentiment of this position and support the conclusion that profit forecasts may be included at the choice of the issuer.
- 1.2 Our position is that the inclusion of profit forecasts together with auditor’s or independent accountant’s reports thereon is tenable only if an acceptable framework as to the principles that should be adopted in making forecasts for issuers is prepared. We believe that detailed guidance should be made available so as to clarify, including by means of illustrations and examples, which statements constitute a profit forecast as defined by Article 3(10) of the Regulation. This is necessary so as to harmonise the application of this requirement across jurisdictions.
- 1.3 Accordingly, we believe that in addition to the disclosure requirements set out in the Regulation, profit forecasts should be prepared in accordance with pre-established criteria setting out principles which should underlie the preparation of profit forecasts to be included in a prospectus. We note that there is very little guidance available anywhere as to the principles to be used when preparing prospective financial information or more specifically profit forecasts. However, we draw your attention to the paper published in September 2003 by the Institute of Chartered Accountants In England and Wales entitled “Prospective Financial Information – Guidance for UK Directors” that might form a basis for formulating pan-European guidance in this area.
- 1.4 The Regulation requires that when the issuer has published a profit forecast in a prospectus which is still outstanding then it should provide a statement setting out whether or not that forecast is still correct as at the time of the registration document, and an explanation of why such forecast is no longer valid if that is the case. This leads to a number of questions. In particular, does it only apply, as it is expressly written, when a profit forecast has been included in an earlier prospectus or does it in effect capture all extant profit forecasts wherever published? We also believe that detailed guidance should be available on what is meant by a forecast still being “correct” or “no longer valid” and on the level and type of explanations that are required to be provided.

### 2 Historical financial information (Annex I Item 20.1)

#### *Use of historical audit reports*

- 2.1 We are concerned that the requirement of item 20.1 to Annex I to include the audit report in respect of each year of historical financial information will give rise to some serious practical difficulties. We have not addressed the work that auditors would be expected normally to undertake when their audit reports are reproduced in a prospectus as this is a matter for auditing standard setters and effectively, reflects the liability regime applicable to the prospectus.
- 2.2 These difficulties are most evident where the historical financial information is or has been required to be restated, whether as a result of the adoption of new accounting standards in the periods presented, other changes in accounting policies or the correction of errors. Such circumstances will arise more often than not. Thus requiring the audit report on the previously published financial statements to be reproduced would often be misleading for the investing public, in that they are not related to the figures published in the prospectus, and the figures published in the prospectus are not related to the audit report included therein.

- 2.3 To require the inclusion of the audit report for each year in effect requires that the previously published financial statements are also reproduced. This conclusion is supported by European Company Law (Fourth and Seventh Directives) which requires that an audit report cannot be presented without the financial statements to which it relates. This would involve the presentation of an additional period of historical financial information, if a tabulation or extraction approach to presentation were to be adopted, being the comparative amounts to the first period's statutory financial statements.
- 2.4 The question of whether an auditor is to be required to consent to the inclusion of a previously published audit report needs to be addressed. We note that existing rules and practice in this regard vary. In some countries a "consent" to the inclusion of a previously published audit report is not mandatory. The implications of requiring consent when there has been a change of auditor or the auditor is no longer able to consent also need to be considered.

#### *Additional information*

- 2.5 There are a number of ways in which the financial information as published in an issuer's annual statutory financial statements may need to be augmented for the purposes of a prospectus including:
- comparative information in one of the last two years' statutory financial statements may have been restated for changes in GAAP, other changes in accounting policies or correction of errors
  - disclosures, such as a cash flow statement or earnings per share, being required to be made in the next financial statements that may have been properly omitted
  - accounting reference dates may have changed leading to non-12 month financial years.

These areas all require guidance as to how they should be addressed. In addition, the impact of changes to previously published financial information on the reproduction of previously published audit reports should be addressed.

#### *Impact of future changes in accounting policies*

- 2.7 The second paragraph of Annex I item 20.1 requires the last two years to be presented "in a form consistent with that which will be adopted in the issuer's next published annual financial statements". Is this intended to capture a change from one accounting regime to another, such as from national GAAP to IFRS where an EU issuer seeks admission to trading on a regulated market for the first time, or to capture any change in a specific standard within a set of accounting principles or intended adoption of a different accounting policy by the company? If either of the latter two possibilities, this will be burdensome for companies when issuing a prospectus, in that they will have to restate for the historical period for every new standard and have the restated figures audited also for the two years of comparative figures. For the financial statement purposes only one year of comparatives in general needs to be restated (and audited).
- 2.8 This can be illustrated by reference to an example, where a prospectus is being issued during the year 2010 with the historical financial information being for the three financial years 2007, 2008 and 2009. The question arises whether or not the existence of a new financial reporting standard applicable for the first time in the 2010 financial statements means that the 2008 and 2009 amounts have to be restated, and reaudited, when a prospectus is issued during 2010 and before the 2010 year end.
- 2.9 We believe that the cost of preparing restated accounts and having them audited far exceeds the benefit to investors that might arise. Our view is that the intended effect of this requirement should be to address the question of a change from one accounting regime to another and that it should not capture specific changes in accounting standards.
- 2.10 We believe that Level 3 guidance is essential, in the absence of any amendment to the text of the Regulation, in order to avoid any unnecessary confusion as to the application of the provision.
- 2.11 Guidance as to the provisions on making the transition from one GAAP to another also needs to be provided. We note that the discussion of the "four column" disclosure model in the commentary accompanying CESR's advice, 03-399, to the Commission as to the content of the implementing

Regulation could usefully be issued as guidance. But other disclosure models should also be taken into account, e.g. Deutsche Börse AG/Frankfurter Wertpapierbörse: Circular concerning listing 03/2004: Requirements regarding the application of International Financial Reporting Standards (IFRS) in listing documents and in ongoing mandatory publications, 4 February 2004.

*Issuers operating for less than one year*

2.12 Issues that, in our view, require guidance in applying the third paragraph of Annex I item 20.1, which sets out a specific requirement for issuers for operating less than one year to include historical financial information in a prospectus, include:

- the meaning of “current sphere of economic activity”;
- to what date should the required financial information be drawn up;
- on what basis is the financial information to be prepared as it will not be drawn up as at the issuer's statutory accounting reference date; and
- the form in which the financial information is to be presented.

*Complex financial histories*

2.13 We are aware that existing market practice in addressing what might be described as complex financial histories is quite diverse and interacts with the requirements in some member states concerning pro forma financial information. Scenarios that might come under this heading are where:

- A holding company may not have previously prepared consolidated financial statements;
- A new holding company is established immediately prior to the public offer or admission to trading going effective;
- The business of the issuer whilst having operated throughout the past three years has been the subject of a change in legal form such as a demutualization or privatisation of a government controlled entity;
- The business of the issuer whilst having operated for three years has been the subject of a change in ownership or financial structure such as might occur in a management buy-out (“MBO”);
- More than one business or entity not previously under common control are brought together for the purposes of the public offer or admission to trading; or
- The business to be offered or admitted to trading have been part of a larger group and separated or carved out for that purpose, for example by way of demerger from an existing listed group.

2.14 We would encourage you to consider developing guidance in these areas. Such guidance might be illustrated by reference to specific examples.

### 3 Pro forma financial information (Recital 9, Annex I Item 20.2 and Annex II)

3.1 Recital 9 to the implementing Regulation sets the scene by stating: “pro forma financial information is needed in the case of a significant gross change in the situation of an issuer due to a particular transaction”.

3.2 A key issue for issuers is in obtaining an understanding as to which type of transactions need to be considered for a description of its impact in the prospectus.

- 3.3 Once transactions have been defined, it is necessary to consider what is meant by “significant gross change”, noting that Recital 9 to the Regulation refers to “a variation of more than 25% relative to one or more indicators of the size of the issuer’s business” and against which indicators such change is to be measured.
- 3.4 Whilst pro forma financial information is not unusual in prospectuses, relatively few regulators have guidance or rules governing when it might be required. However, chapter 10 of the UK FSA’s Listing Rules provide some classification tests as does the United States of America’s SEC in Article 11 of its Regulation S-X. In addition, the German Institut der Wirtschaftsprüfer (IDW) IDW Accounting Practice Statement: Preparation of Pro Forma Information (IDW AcPS HFA 1.004) published in July 2002 should also be referred to.
- 3.5 We also note that the term “pro forma financial information” has a varied use and meaning across Europe today. We would also note that GAAP in some jurisdictions requires disclosure of pro forma financial information in an issuer’s statutory financial statements on a basis that may not be consistent with the requirements of Annex II. We would encourage you to clarify that, for the purpose of a prospectus it has a specific meaning and that, in effect, other non-GAAP information must be differently described.
- 3.6 Guidance is also required as to the interpretation of some of the terms used in Annex II such as “directly attributable”, “factually supportable”, and “having a continuing impact”. It would be helpful if the application of these terms were to be illustrated by reference to examples of adjustments.

#### *Standalone financial statements of acquired businesses*

- 3.7 Further, it is noted, under the rules set out in Annex II, that, if applicable, the financial statements of an acquired businesses or entities must be included in the prospectus. Guidance should be given on the application of the requirements concerning these financial statements, eg:
- what form the financial statements should take;
  - how many years information to present;
  - what action is required if they are not prepared on the same accounting policies as those of the issuer of the prospectus; and
  - to what date should they be drawn up.

#### 4 Age of latest financial information (Annex I Item 20.5)

- 4.1 Annex I item 20.5 provides time limits as to the maximum age of audited historical financial information in a prospectus and provides that past these limits additional “interim financial statements” must be included, unaudited after 15 months, and audited, after 18 months. Clarity as to how these time limits are expected to apply in practice is needed. Some examples would be useful in this regard.
- 4.2 In addition, it is essential to define what is meant by the term “interim financial statements” in this context. For example are they intended to be financial statements drawn up as if at the issuer’s statutory accounting reference date ie as if they were annual financial statements albeit for an interim period or are condensed financial statements as described in IAS 34 to be acceptable. In addition, to what date should these financial statements be drawn up?

#### 5 Interim and other financial information (Annex I Item 20.6)

- 5.1 For issuers traded on a regulated market, we presume that the current interim reporting requirements reflecting those in the Combined Admission and Reporting Directive, as applied in the relevant member state and in due course be adopted under the Transparency Obligations Directive, will provide the

necessary template for compliance with the disclosures required in a prospectus, such as presenting condensed financial statements in compliance with IAS 34 for half-yearly reporting. However, it would be useful if this were to be made clear.

- 5.2 Particular guidance is required where issuers are either seeking admission to trading on a regulated market for the first time or are making a public offer but not seeking admission to trading. Guidance is required here on both the minimum content of interim financial information and on the basis on which it should be prepared. We note that many member states do not have a local accounting standard or guidance equivalent to IAS 34 and thus have no local rules on which to fall back.

## 6 Significant change in the issuer's financial or trading position (Annex I Item 20.9)

- 6.1 Whilst this disclosure has been required for many years in the Listing Particulars Directive, now in the Combined Admission and Reporting Directive, there has never been any guidance or common understanding as to how this requirement is to be interpreted whether as to the meaning of “financial position” or “trading position”, or what constitutes a significant change therein. We believe that such guidance would be of use to issuers and investors in reducing any expectation gap as to the quality of this disclosure requirement.

## 7 Working capital statement (Annex III Item 3.1)

- 7.1 The Regulation requires disclosure of a statement as to the sufficiency of an issuer's working capital in equity securities prospectuses or securities notes. It is clearly important that issuers have a common understanding of what is meant by working capital in the context of it being sufficient for their present requirements.
- 7.2 It also important to consider the length of the future period from the date of the prospectus issuers should be expected to consider, when determining the sufficiency of their working capital.
- 7.4 We believe it would be useful if principles underlying the determination of an issuer's working capital requirements were to be provided particularly as regards any forecasts that may be prepared by issuers in support of the statement. These principles should be, in our view, consistent with those underlying profit forecasts.

## 8 Capitalization and indebtedness (Annex III Item 3.2)

- 8.1 A statement of capitalization and indebtedness as of a date no earlier than 90 days prior to the date of the document is required in a securities note or prospectus.
- 8.2 In practice today, capitalization is defined differently in different markets. This can range from the issued share capital of the issuer through to the total shareholders' funds including retained profits. The driver for these differing approaches is the quality of the information to be presented and is effected by regulatory and practical considerations.
- 8.3 Clarity as to what is meant by both “capitalization” and “indebtedness” and how they are to be measured in compliance with the 90 day time limit is needed.