



RESPONSE

CESR'S RECOMMENDATIONS FOR THE CONSISTENT IMPLEMENTATION OF THE EUROPEAN COMMISSION'S REGULATION ON PROSPECTUSES N° 809/2004 CONSULTATION PAPER - Ref: CESR/04-225b

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I. INTRODUCTION

1. The European Banking Federation¹ (FBE) welcomes the opportunity to comment on the Consultation Paper issued by CESR. The FBE has been a strong supporter of the objectives of the Prospectus Directive from the start, and is glad to see the progress made in implementing this important legislation.
2. We would like to thank the CESR Expert Group for the high quality work produced as well as the flexibility shown in restructuring the consultation to allow the market participants more time to review the document before the Open Hearing. The FBE and several of its members were present at the Open Hearing on 7 September 2004. We believe that the discussion in this event was very useful.
3. In this response, we will provide a summary of our key observations (Section II.), followed by our detailed remarks (Section III.) and a Conclusion (Section IV.).

II. EXECUTIVE SUMMARY

4. In principle, we welcome the CP and the issues which CESR is proposing to deal with. We have several observations on the specific proposals of CESR, which we will get into in more detail in Section II. At the same, we believe that there is a list of additional topics which CESR may have usefully tackled in its Level 3 capacity. These issues are either absent from the CESR document, or are mentioned but not fully elaborated on. We provide a list of these subjects in the Annex. Just to name a few of the most important ones:
 - How the competent authorities are going to cooperate, e.g. in the case of notification or transfer of approval authority.
 - How Article 13.2 is going to be implemented in different jurisdictions with varying approaches to what silence from the authority means.
 - Whether there is a limit to the number of possible requests for subsequent information pursuant to Article 13(4). We firmly believe that CESR should stipulate in its Guidelines that the respective competent authority shall confine itself to *one* subsequent request for missing information.
 - How Article 14.1 will be interpreted.

¹ Set up in 1960, the European Banking Federation (FBE) is the voice of the European banking sector. It represents the interests of over 4,500 European banks, large and small, with total assets of more than EUR 20,000 billion and over 2.3 million employees.

5. We believe that it would be useful for CESR to start working on these subjects as soon as possible.
6. Regarding the issues dealt with in the CP, we believe the following:
 - There is not sufficient consistency with other EU legislation, for example financial information matters, and in some cases the Level 3 measures clearly go beyond and contradict EU legislation;
 - By requiring profit forecasts for all issuers who have made a public reference to a profit forecast, CESR is taking back a very important part of the flexible regime introduced at Level 2;
 - It would be useful for CESR to clarify that the specialist issuer schedule for investment companies does not apply to credit institutions, investment firms or UCITS;
 - No Level 3 recommendation is needed on disclaimers;
 - There are significant uncertainties regarding the identification of the competent authority for the approval of base prospectuses compiled in a single document and base prospectus comprising different securities which need to be resolved;
 - Many issuers, in particular start-up companies, would be disadvantaged because of the mandatory 12-month duration for working capital;
 - Unclear use of the term “date of the document” in Box 3.2 could lead to significant costs for companies who would have to re-do the valuation reports pursuant to the specialist issuer schedules.

III. DETAILED COMMENTS

Consistency with Other EU Legislation

7. On Page 12 (« Section III. Financial Information Issues »), CESR states: « Unless specifically stated, the references and the recommendations below relate mainly to the disclosure requirements in the share registration document (Annex I of Regulation 809/2004) but should be adapted for the other registration documents, as appropriate.”
8. We are concerned about this statement firstly because it is not clear who will be responsible for the adapting that is mentioned: the issuers, the national authorities, or CESR? From the perspective of an effective passport, it has to be very clear who will be in charge of this. Secondly, a lot of the items contained in this section are not relevant at all for the non-share Registration Documents. This makes it all the more important to ensure that the approach in this section is duly adjusted for the other securities.
9. In several parts, we find that the CESR paper tends to duplicate and to interpret what is in the IAS Regulation. This is not only inefficient, but also risky, since the IAS regulation itself is subject to change in the future, which would lead to discrepancies in the regime applicable to issuers. Furthermore, in some cases, the CESR paper actually goes beyond the IAS regulation. For example, the re-stating obligations for the issuers using non-IAS accounts and the first-time application obligations go beyond the IAS Regulation.

10. On a similar note, on page 15 (Paragraph 37), while we could see, in certain cases, the usefulness of including key performance indicators about past performance, we firmly believe that it should not be an indispensable requirement here. Furthermore, such information is already covered by the Directive on Modernization of Accounts.² Paragraph 37 creates a danger of duplication and inconsistency with this framework.
11. The general concern about consistency also applies to the Transparency Directive. Paragraph 107 (page 32) states: "Issuers listed on a regulated market shall include in the prospectus the condensed set of financial statement included in the half-yearly financial report covering the first six months of the financial year stated by the article 5 of the agreed Transparency Directive." However, this approach would lead to a discrepancy with the transitional measure applied in the Transparency Directive (Article 35). Furthermore, given that the Transparency Directive is not yet in force, whereas the Prospectus Directive and its implementing measures will be by July 2005, during the period until the Transparency Directive enters into force, issuers will not be able to benefit from the transitional measures allowed by this Directive. Hence, it should be deleted.

Capital Resources

12. Regarding Paragraph 39, we once again note that this issue is dealt with by the IAS Regulation. In any event, the proposed requirements are overwhelming and could lead to very lengthy prospectuses. It is self-evident that a prospectus should allow one to understand the basis of its conclusions, but it seems to us that the kind of lengthy discussions proposed in this paragraph are outside the scope of what is necessary.

Profit Forecasts

13. We understand from the Open Hearing that CESR believes that if the issuer has referred to a profit forecast publicly, then the forecast has to be in the prospectus (Paragraph 46). (We also recognize that there is some uncertainty regarding what exactly is required by the CP itself, and would in any event welcome clarification).
14. Like many participants who argued in the Open Hearing along the same lines, we also believe that this approach takes away a very useful feature of the Prospectus Regulation, which clearly states that the profit forecasts are voluntary. We supported this flexibility, since it is in the interest of the market for issuers to be encouraged to make public information about their expected profits and the Regulation made it clear that such information is of a nature that requires voluntary disclosure. Creating an obligation to insert this in the prospectus would lead companies to stay away from such disclosure, which would not be in the interest of the investors. It is particularly problematic that profit forecast or estimates must be reported by independent accountants or auditors. The practical problem created by this approach is that issuers issuing on tap would find it prohibitively difficult to make any public statements at all that might be taken as a profit forecast in fear of triggering an obligation to include a formal profit forecast in their upcoming prospectus or a supplement to their prospectuses. The result would be less information being made to the market, not more.
15. If, after consideration of these drawbacks, CESR decides to retain the obligation, we believe that the very least that needs to be changed in this obligation is to allow a

² DIRECTIVE 2003/51/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings.

'lighter' version of the profit forecast for those issuers who fall in this category (e.g. without the need for an expert certification).

16. Furthermore, the terminology used in this section should be clearer: For example, in Paragraph 46, what is meant by "outstanding" in relation to the statement still being outstanding at the time of publication of the prospectus?

Issuers applying the same set of standards in the last and next published financial statements

17. In response to question 75 (page 25), we agree with the conclusion in principle, but once again believe that the issue should be dealt with by the ISS Regulation, as acknowledged by CESR in Paragraph 69.

Working Capital

18. Paragraph 114 (page 33) states the reason why the present requirements for which the working capital must be sufficient are defined as based on a 12 month period: "A prospectus may be valid for up to 12 months and therefore present requirements should be considered to be a minimum of 12 months from the date of the prospectus. A twelve month period is also consistent with the period that directors will be familiar with assessing when considering the applicability of going concern in annual financial statements."
19. Coupled with the fact that the issuer must say definitively whether or not the working capital is sufficient (Paragraph 123), this obligation will be onerous on a lot of issuers, especially start-up companies, and will have a discriminatory effect on many types business for which the 12-month horizon is not appropriate.
20. Another problem is liability. By requiring issuers to make definitive statements about working capital, which is after all subject to factors not fully under the control of the issuers, this new proposal would subject issuers to potentially significant claims from investors.

Capitalization and Indebtedness

21. We are not sure what is meant by the term "date of the document" used in Box 3.2 and Paragraph 135, subparagraph 1. Is it the date of asking for approval for the first time? Is it the date at which the authority grants approval? When this part is read in conjunction with the specialist issuers, the valuation report, which can only be 60 days old, it becomes clear that what date is chosen makes a very big difference. In particular, it could be a problem for the issuers to have a date that is not under their control: e.g., if the approval process is delayed, with the result that the report ends up being older than 60 days, this would increase costs for the issuer in an unjustified way.
22. As a solution, we would suggest specifying it as "the date of filing" because this would be under the control of the issuer.

Investment Companies

23. Concerning pages 39-40, Paragraph 140, 1c, we believe that it would be useful for CESR to indicate clearly that this item is not intended to be used for credit institutions, investment firms or UCITS. Level 1 makes it clear that UCITS are outside the scope, while Level 2 has introduced a specific schedule for credit institutions. We believe it

would be useful for CESR to clear statement that this is not the case to avoid confusion.

Disclaimer

24. We believe that the disclaimer obligation suggested on page 83 should be up to national law; issuer should be allowed to decide on the disclaimer, because disclaimers are subject to factors linked to national law and the national market. No Level 3 recommendation is needed on this. Furthermore, one needs to keep in mind that an issuer cannot be held accountable for controlling the ultimate distribution.

Identification of the competent authority for the approval of base prospectuses compiled in a single document and base prospectus comprising different securities (322 -329); questions 328 and 329

25. First of all, as stated previously, we believe that it would have been important for Level 3 to address how the transfer mechanism will work in practice in these cases. Paragraph 320 is silent on the issue of transfer. The paragraph is also not exactly correct because the base prospectus can be used for different denominations. In practice, what is most important is for the issuers to be able to draw up a separate base prospectus for those with the higher denominations benefiting from choice.

26. Paragraph 325 is the same as Recital 27 of the Regulation and therefore not really a clarification or help.

27. Paragraphs 316 onwards deal with the problem of different home Member State being competent in the case of different kinds of securities which are covered by one base prospectus.

28. CESR recommends allowing just one competent authority per base prospectus. CESR justifies it by pointing out that “a multiple products base prospectus cannot be divided for the purpose of its approval since the approval has to encompass the base prospectus as a whole” (Paragraph 320).

29. We could imagine some valid reasons for considering such an approach (e.g. to avoid a situation whereby one home MS approves the base prospectus for low denominated non-equity securities while the chosen home Member State does not approve the same base prospectus with reference to high denominated non-equity securities). At first sight such situation would cause a conflict of approval. On the other hand, any divergence in the approval decision would not create a practical problem since the approval would not be relating to the same securities.

30. With all these considerations in mind, we believe that the same base prospectus should be valid for different securities even in the case of different competent authorities because an approval is always related to a specific issue of securities. Therefore no conflict of approval would result if the issuer filed the (same) base prospectus twice with different authorities.

IV. CONCLUSION

31. In conclusion, we would welcome consideration of our views with respect to several parts of the CP, with the objective of:

- creating greater consistency with other EU legislation and avoiding contradictions with EU legislation;

- encouraging companies to continue to make information about profit forecasts available without undue increases in issuance costs;
- clarifying that the specialist issuer schedule for investment companies does not apply to credit institutions, investment firms or UCITS;
- continuing to leave disclaimers to be subject to national law and preventing significant liability problems;
- clarifying the identification of the competent authority for the approval of base prospectuses compiled in a single document and base prospectus comprising different securities;
- allowing start-up companies and others to assess their working capital based on their specific business structure; and
- preventing unclear dates from causing significant costs for companies who would have to re-do the valuation reports pursuant to the specialist issuer schedules.

32. Equally, we would urge CESR to continue to work on other issues that need to be addressed for consistent implementation of the Level 1 and Level 2, of which we give some examples in this paper.

33. We would be happy to assist CESR with any further inquiries on any issue raised in this response.

ANNEX: LIST OF ADDITIONAL ISSUES THAT COULD BE ADDRESSED AT LEVEL 3

Publication of the prospectus

Art 14 paragraph 1 sentence 2 of the Directive constitutes an additional publication obligation in the case of an offer of new security classes, whereby a prospectus shall be available at least 6 working days before the end of the offer.

In the course of a public offer, issuers normally do not know when exactly their securities will entirely be placed. Consequently, they do not know the exact end of the offer in advance.

We would like to obtain information about CESR's interpretation as regards this Article.

Information pursuant to Article 10

Article 10 of the Directive imposes the obligation on issuers to submit to the Home Member State authority once a year a document which lists all publications in relation to capital markets over the past 12 months. This begs the question as to whether an issuer with several Home Member States (due to several issues) would have to submit such a document to each competent authority in every individual Home Member State. Should this not be the case, then the question remains as to the competent Home Member State authority to which the document shall be submitted or, moreover, whether the choice of such authority is left to the issuers' discretion. Should the issuer be obliged to submit the document to each of his competent authorities, then this gives rise to the question as to the respective language. In other words: would, for instance, the French authority have to accept a German issuer's document as contemplated by Article 10, if such a document is written in English, or would the German issuer have to translate this document into French?

Transitional deadlines

For cross-border issues, the way in which the competent authorities handle the first-time application of both the Directive and the Regulation is of fundamental importance. This problem arises particularly with regard to offering programmes which were approved before the 1 July 2005 and under which tranches are to be issued after 1 July 2005. For these issues, could there also be made reference to the offering programme which was authorised before July 2005 and which may still be geared to the old legal regime? For practical reasons, we would very much favour such a solution.

Cooperation between authorities

There are many areas where the Directive requires cooperation between competent authorities. At an early point in time, CESR should investigate implementing a regime that facilitates the smooth operation of such cooperation. In addition to this, a system should be established in due course creating the mechanisms mentioned under Art. 2 Paragraph 3 of the Directive which are necessary for recognition of SMEs and private individuals. As we argued in the past, consistency on this point is critical to the functioning of the passport.

In addition to this, CESR should address the following individual issues in its guidelines:

Calculation of the EUR 1,000 – threshold

Pursuant to Article 2 Paragraph 1 lit. m) ii), the right of an issuer of non-equities to elect its Home Member State also applies to securities in a different currency, if these securities

have a minimum denomination of almost EUR 1,000. This gives rise to the question concerning the underlying exchange rate for such calculation. Should this, for instance, be based on the exchange rate on the date on which the approval request was filed or should this be based on the date on which the prospectus was approved? In our view, the date on which the application for approval was filed would be preferable because it provides the issuer with the necessary comfort that he has addressed the correct competent authority.

Working day

Neither the Directive nor the Regulation contains any definition of the term “working day”. Here, as far as cross-border issues are concerned, it is important that this term will not be interpreted differently in different Member States (TARGET, working day pursuant to the national Civil Codes, banking day).

Deadlines for Reviews

- It is not at all clear to us as to how Article 13 Paragraph 2 is going to be implemented in different jurisdictions with varying approaches to what silence from the authority means. This could create significant problems for cross-border issues.
- Neither Article 13 Paragraph 4 of the Directive nor the Regulation contains any provision on whether there is a limit to the number of possible requests for subsequent information. CESR should therefore stipulate in its guidelines that the respective competent authority shall confine itself to **one** request for missing information.
- In addition to this, the competent authorities should undertake to deliver to the petitioner a confirmation of receipt with regard to the submitted prospectus documents.
- Article 13 Paragraph 4 does not contain any 'hard' deadline for notifying the petitioner of a case of incompleteness ("should"). In this instance, there should be a clear self commitment of the competent authorities that they regard the 10-day deadline envisaged under Article 13 paragraph 4 as binding for themselves.
- Article 13 Paragraph 5 lacks any deadline for the transfer of approval of a prospectus from the competent authority of the Home Member State to the authority of another Member State. Here, the competent authorities should also adopt a self-binding agreement stipulating the deadline within which a decision on a possible transfer shall be taken.