FEDERATION
BANCAIRE
FRANCAISE

February 2nd 2007

CESR's Call for evidence on the supervisory functioning of the Prospectus Directive and Regulation

FBF's response

I GENERAL COMMENTS

1. The French Banking Federation (FBF) is the professional body representing over 500 commercial, cooperative and mutual banks operating in France. It includes both French and foreign-based organizations.

2. As universal banks, FBF members act as issuers and as intermediaries which place some securities for the account of issuers during public offerings. Thus the Prospectus Directive is a key directive of the FSAP. The evaluation of the first experiences with the application of the Prospectus Directive and Regulation is still early as the Directive came into force in only July 2005. In France the Directive was implemented through amendments to the General Regulation of AMF which came into force on 9 September 2005.

The first general comment the FBF would like to highlight is the mixed feelings of the banks about the application of the Directive:

- On the first hand, the implementation has in many respects worked well, especially about the definitions of the public offerings with a clear definition of the professional investors, and of the exemption to write a prospectus, and about the implementation of a real European passport for issuers;
- On the other hand, a number of difficulties have been encountered in some jurisdictions, especially regarding the acceptance of the passport.

That's why the two messages the FBF brings to CESR are the following: ***there is no need to ask for the re-opening of the level 1 Directive***, ***but is essential that CESR's efforts would be in a way to remedy the effect of the cases of divergent interpretation and implementation between securities regulators across the European Economic Area***.

3. The FBF asks CESR not to propose the re-opening of the level 1 Directive.

The Prospectus Directive is a full harmonisation regulation which was born from a political compromise which was very difficult to conclude since there is a tendency to the specialisation of the financial places in Europe (id est. the debt securities in London, the Euro medium term notes in Luxembourg, the warrants in Frankfort and Milan, the UCITS in Paris, and so on). Thus the thresholds applicable for the derogation to the obligation to write a prospectus, the linguistic languages, the definition of the professional investors, are complicated regimes due to the political agreement.

That's why the French banks are fully aware of the fact that it would be very long and very difficult to re-open the level Directive in order to "up-grade" the Directive.

Consequently the FBF ask CESR not to ask for a re-opening of the Directive.

Of course some problems have risen with the transposition of the Directive and its application on a cross border basis. But these problems are mainly due to "super-equivalence" or "gold plating" of certain regulators which have chosen to use any faculty given by the Directive to add some obligations borne by the issuers.

4. The FBF asks CESR to solve the problem of interpretation between the securities regulators in order to avoid detrimental divergences.

The Prospectus Directive is a step forward towards integration of EU financial markets and it should be implemented in all EU member States in a positive fashion, without burdensome "super-equivalence" or "gold-plating".

The Prospectus Directive provides for full harmonisation, so that no additional requirements should be imposed at national levels. Whenever clarifications are warranted, they should be incorporated in questions-answers format or recommendations. These should be applied in a uniformly in all members States.

We wish to express the view that the requirements ex-ante on financial intermediaries appear sufficient to provide clear information and adequate protection of investors. On the other hand *controls ex post* should be reinforced at the supervisory level. This means more staff at the local supervisory authorities should be dedicated to scrutinise prospectuses. It would be welcome if the French AMF and their counterparts in other EU member States could allocate time and resources on an efficient scrutiny of prospectuses. The preparation of prospectuses imposes very heavy duties on financial services providers. This would be readily accepted if supervisors would shoulder their share of the responsibilities.

II Specific comments

II.1 European Passport

5. It is not certain as of to-day whether supervisory authorities in the host member States readily apply the provisions of the Directive for acceptance of approvals delivered on a prospectus by regulatory authorities in the home member States. This is due to legal discrepancies in the national legal environment in host member States. With further harmonisation, real progress is expected towards integration and access to capital for companies issuing securities in several EU member States.

6. For example, about the recognition of the passport by host authorities (Article 17.1), there have been cases where host authorities have refused to recognise notifications on prospectuses received from other authorities. This was on the basis of alleged non-compliance with specific provisions of the PD, most often the language rules and the rules on incorporation by reference. The FBF calls on CESR to ensure that notifications received from other authorities be under all circumstances recognised and given effect. Where a host authority wishes to question the approval given to a prospectus it should communicate its concerns to the competent authority of the home Member State, as foreseen by Article 23 of the PD.

7. Another case, concerning the translation of the Prospectus, must be enlightened. The FBF considers that the provisions of Article 19 provide clearly that it is up to the home Member State authority to verify that prospectuses are correctly translated. The scrutiny rights of host authorities pertain merely to the notification, with a view to ensuring that it complies with Article 18.1 of the PD. In no case the host authority should contest the translation.

8. Some host authorities are willing to analyse the advertising documents. Contrarily to the European passport, some hors authorities consider that the advertisings have to be "licensed" by them, although these advertisings have been analysed by the home authority. Such practices are detrimental to the efficiency of the European passport.

9. Last but not least, there are cases where host authorities ask for additional information. In fact, several host authorities are used to request additional information on already prospectuses. This has in particular happened in the case of structured instruments, and some supervisors have justified their requests with the right to establish conduct of business rules. These additional requests undermine one of the core objectives of the Directive and we call on CESR to clarify these cases as well as its understanding of the interaction of the PD with other applicable legislation.

II.2 Liability for information contained in a prospectus

10. First, the FBF recalls that prospectuses are very burdensome, due to their size and the details required. They have become extremely long documents – with sometimes up to 1000 pages. The dimension of the prospectus documentation may in itself be an obstacle to clear information of the public.

The requirement to provide a summary of the prospectus is a welcome initiative. However, prospectuses tend to loose their initial and main purpose of informing the public of prospective investors. Prospectuses are nowadays used as a means of keeping potential future litigation at bay, hence their size.

Each chapter of the prospectus is conceived as an independent module. This structure leads to redundancies and the general impression for prospective investors is that documentation is overabundant and inflationary. For example the activities of the issuer are described in five different parts in the prospectus.

11. The issuer has the primary responsibility for all the information provided in the prospectus. The principle should be clearly restated so national regulatory authorities will not impose further requirements on arrangers in that respect.

Financial services providers, have no control over information and data provided by the issuer. Financial services providers have contractual obligations towards issuers and they do exercise their professional duties in the course of the due diligence requirement they perform in each of the transactions they manage. In no instance should arrangers be required by their national supervisory authorities to certify such language as "*ces diligences n'ont révélé aucune inexactitude ni aucune omission significative de nature à induire l'investisseur en erreur ou à fausser son jugement*".

Such language is likely to be understood as an obligation for the financial services providers to guarantee the substance of the information provided in the prospectus. It appears paramount that respective liabilities be clearly defined in order to avoid confusion and establish the basis for a fair competition between EU service providers.

12. Some issues of legal language and vocabulary have arisen about the profit forecasts. The Prospective Directive has acted as a welcome piece of legislation for the adoption of a common language in the field throughout the EU. However, in some instances legal concepts defined at the national level do not correspond with the legal terms defined in the Directive. In other instances the terms used by the Directive translate into different terminology at the national level and may result in legal uncertainty.

As an example of the former, the meaning of "titre de capital" in French is more restricted than "equity securities". As an example of the latter "registration document" in the Directive translates into "reference document" in France. Similarly, the "note d'opération" as provided for in the AMF General Regulation corresponds with the "securities note" (Annex III of Directive 2003/71/EC).

Interpretation of such terms as *tendencies, objectives, profit forecasts* and *estimates* has been difficult in the context of the presentation of information. The latter categories of *profit forecasts and estimates* are the subject matter of specific due diligence requirements. A special report is produced by statutory auditors on profit forecasts and estimates and sent to the issuer. This is a source of difficulties for issuers and financial services providers alike, as they are liable for the consequences of profit forecasts and estimates. The AMF has published a 20-page commentary in the July-August 2006 issue of its monthly review[1]. However, this remains a major source of legal uncertainties and/or ambiguities for all players involved in the preparation of prospectuses, particularly for IPOs.

The FBF estimates that a decision to provide profit forecasts and estimates in the prospectus should be left to the issuer and its advisers. The provision of profit forecasts should not be imposed by national supervisory authorities in any case, as serious liability issues are at stake.

13. The time constraint concerning the declaration of capitalisation and indebtedness. The article 3.2 of the annex III of the regulation 2004/809, about the minimum disclosure requirements for the Share Securities Note, states that the issuer has to write a statement, as key information, the of capitalization and indebtedness (distinguishing between guaranteed and unguaranteed, secured and unsecured indebtedness) as of a date no earlier than 90 days prior to the date of the document. Indebtedness also includes indirect and contingent indebtedness.

The constraint generated by the fact that this information must be no earlier than 90 days prior to the date of the document is really burdensome for many issuers, since they only have one or two weeks to per year or per half-year to initiative a public offerings.

For example:

> Once an issuer, whose budgetary year stops at the 31st of December, which is able, as the large majority of issuer in the same situation, to set up his annual accounts by the end of February. This issuer needs, from this moment, about ten working days to set up a prospectus, which leads to mid-march. This issuer has only ten other working days to initiate concretely its public offerings, since after the 31st of march, the capitalisation and the indebtedness will not be no earlier than 90 days prior to the date of the document.

The FBF estimates that CESR should analyse this provision in order to propose a more flexible time schedule for issuers.

[1] AMF Revue mensuelle n°27 July –August 2006, « Précisions relatives à la notion de prévisions… ».

II.2 Linguistic regime

14. An estimation of the translations costs. As it was stated above, the prospectuses have become extremely long documents – with sometimes up to 1000 pages. The translations costs are about 500 euros per page. Thus the translation of a full prospectus in one language costs about 500 000 euros (for ten different languages, 5 millions euros).

15. Some countries impose the translation of the entire prospectus in the local language. One of the main objectives of the Directive was to allow issuers to use English for the Prospectus since they have to translate only the summary in local languages. Unfortunately, the national implementation of the language and translation requirements varies widely and is in some countries perceived as particularly strict. These provisions have now been enacted into national law but we believe that they will have to be reviewed in the medium term.

Even if the Directive gives to the host states a faculty on this matter, The FBF calls on CESR to propose a prescriptive interpretation of such faculty in order to avoid translations costs which finally will be detrimental for the financial places because the issuers will not choose the places where they will have to translate the entire prospectus.