European Association of Public Banks
- European Association of Public Banks and Funding Agencies -

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Committee of European Securities Regulators
Mr. Fabrice Demarigny
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Brussels, 31 March 2003

EAPB position paper on the second call for evidence on prospectus mandates (Ref. CESR/03-038)

Dear Mr Demarigny,

We would like to thank you for the opportunity to comment on the second call for evidence on prospectus mandates. The document was published by CESR on 7 February 2003. The European Association of Public Banks (EAPB) represents approximately 100 public banks and financing institutions from 8 European countries. Public banks, funding agencies and national associations of public banks are direct members of the EAPB.

Our position paper will provide you with our general observations and concerns regarding the CESR document. For our previous remarks we refer to our responses to the initial CESR consultation paper focusing on possible implementing measures for the prospectus directive (dated 18 December 2002) and to the addendum to the consultation paper (dated 5 February 2003).

Further consultation necessary

We would like to stress that our main concern relates to the finalisation of the consultation and the fulfilling of your mandate. We welcome the new time schedule for CESR with respect to the technical advice on the different models of prospectuses, especially the base prospectus, the specific schedules to credit institutions and the schedules adapted to the particular nature of derivative securities. In this respect we underline the necessity of having a new round of consultation for all of these documents in written and oral form because of

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the overwhelming importance for the European capital markets. As market participants have already given comments on these in the December addendum proposed building blocks, in our view a fruitful discussion is possible until 31 July 2003 in our view.

The building block approach

In our previous comments we basically welcomed the building block approach proposed by CESR. We suggested that, in case innovative products are not covered by the CESR rules then the disclosure requirements for various types of securities should prevent to draw up a new building block approach first before the prospectus can be approved. CESR kindly accommodated this request in its consultation paper, pointing out that it did not regard the disclosure requirement models as exhaustive and that, where necessary, there was to be scope for producing a prospectus tailored to a specific product together with the relevant supervisory authority.

We nevertheless fear that the building block approach will result in a high degree of inflexibility. A feature of all building blocks proposed to date has been not only a high level of detail but also allowance for numerous particularities, both in respect to issuers and types of securities. The building blocks for certain types of issuer already included in the paper (start-ups, mineral companies, property companies) suggest there is likely to be an even greater level of detail, especially when further types of securities are addressed. Our fear is confirmed by the additional provisional mandate to CESR proposing to have specific schedules to certain types of issuers in particular SMEs. This suggestion could potentially lead to a duplication of the whole set of building blocks. This shows in our view how urgent it is to have firstly an orientation system which building block to use and then to start the completion of the single building blocks.

Given the large number of building blocks that is to be expected, we should also like to point out that to make the shelf registration system workable, there should be a clear ranking between the different registration documents. If it is borne in mind that a base prospectus will be additionally possible under Article 5 (4), issuers will possibly be faced with the problem of determining which building block should be used for their issue. Clear-cut rules and lines of demarcations should therefore be drawn up to give issuers the necessary legal certainty.

This will probably also raise the question in many cases of whether an issuer can use an already prepared and approved registration document for issues of other types of securities as well. For example, a bank which has prepared the future registration document addressed to banks for equities should be able to issue not only debt securities but also derivatives on this basis.

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As far as derivative products are concerned, in particular, drawing up even more detailed building blocks seems to produce such a rigid framework that it is doubtful whether it is necessary to fix a building block for each derivative product. A more general approach could be helpful. Care should also be taken to ensure that admission to trading is as flexible as possible, particularly with new, as yet unknown, products in mind. It is highly doubtful whether this can be achieved by drawing up rules governing the most minor detail. We therefore suggest that, when drawing up further building blocks, a certain amount of scope should be allowed to ensure a more flexible approach.

IOSCO standards

It was pointed out that, when issuing its provisional mandate in March last year, the Commission stipulated that the 1998 IOSCO standards were to be regarded as minimum requirements. In its proposals for the registration document and the description of the securities for the equities prospectus model, CESR therefore adopted the IOSCO standards verbatim as well as proposing further-reaching rules. While small changes were made for the corporate retail bond prospectus model and for the securities note for derivative products, these models are also based largely on the IOSCO standards, which originally were designed only for shares. This is why there are numerous requirements that only appear to make sense for debt securities and derivative products to a limited extent.

The additional mandate touches this crucial point now by saying "The draft schedules should be based on the information items required in the IOSCO Disclosure Standards for cross-border offering and initial listings (Part I)…". This seems to relate to the modified wording that was adopted at the suggestion of the EU Parliament (Amendment 29 of 14 March 2002). Whilst the Commission's proposal of May 2001 still stipulated that the prospectus "shall be in accordance with the information requirements set out by the IOSCO", this wording was changed to read "the rules .... shall be based on the standards in the field of financial information set out by international organisations, and in particular by the IOSCO".

We believe that this change to the wording of Article 7 (2) is intended to make clear that the IOSCO standards are not to be adopted verbatim but are intended to provide (only) a basis for the information requirements. We understand this is to mean that the purpose is actually to allow deviation from the IOSCO standards – at least on certain individual issues. Using the IOSCO standards as minimum requirements would put a heavy burden especially on smaller issuers, and in many cases prevent them from issuing securities. The standards should be amended accordingly.

Definition of "Securities"

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Although great importance must generally be attached to consistency between the directive and the technical implementing measures, it should be possible to deviate from the definition of the securities in Art. 2 where disclosure requirements are concerned. Non-equity securities, for example, are also regarded as equity securities if the issuer uses its own securities as the underlying instruments. As a rule, however, these will normally be bonds or derivative products, for which the equity building block would be unsuitable on account of the nature of this security. In our view, such a deviation would also be perfectly feasible.

Base prospectus

As we previously mentioned, the base prospectus is of high importance for the banking industry. It will probably be the mainly used prospectus in the future in the whole European banking industry because this sector will also use offering programmes for issuing non-equity securities. CESR has now been formally instructed by the Commission to consider this format. Since it will be highly important, however, the building block approach now proposed for derivative products should therefore also be revised against the background of the requirements which must be drawn up for a base prospectus. We therefore consider it to be essential to develop valid disclosure requirements for base prospectuses. One important point is the flexibility which the base prospectus must grant to the issuer, especially in respect to the finalisation of the incomplete prospectus. Here it is absolutely necessary to pay attention to the necessities arising out of the current practices in the market.

With kind regards,

European Association of Public Banks

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