FEDERATION BANCAIRE DE L'UNION EUROPEENNE

Le Secrétaire Général

BI/AB
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Mr Fabrice Demarigny
Secretary General
Committee of European Securities Regulators
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Email

Friday, 31 October 2003

Dear Mr Demarigny,

I would like to thank you for the opportunity to comment on the consultation on technical advice for implementing measures of the Prospectus Directive. Please find attached the European Banking Federation's response to this consultation.

As you will see in our response we are supportive of many of the elements in this consultation. Our central concerns relate to IAS restatement and advertisement of the prospectus.

May I also take this opportunity to thank you for the high quality work produced by the Expert Group and for the very constructive hearings organized by CESR on this subject.

We would be pleased to provide further input as required. Should you have any enquiries please do not hesitate to contact me or Ms Burçak Inel (b.inel@fbe.be).

Yours faithfully,

Nikolaus Bömcke

Enclosure: 1

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RESPONSE TO THE CESR CONSULTATION ON TECHNICAL ADVICE FOR IMPLEMENTING MEASURES OF THE PROSPECTUS DIRECTIVE

30 JULY 2003 DOCUMENT

The European Banking Federation (FBE) is grateful for the opportunity to respond to the Committee of European Securities Regulators (CESR) consultation. The FBE is the united voice of the banks of the European Union (EU) and the European Free Trade Association (EFTA) countries. The FBE represents, through 18 national banking associations, over 4,000 banks, large and small, accounting for close to 20,000 billion euros in assets. The FBE was actively engaged in the process leading up to the adoption of the Prospectus Directive and supports all the key objectives of the Directive.

Remarks about the procedure

As the work of the Expert Group is coming to an end, we would like to take this opportunity to expressly thank the Group and its Chairman for their excellent efforts over the last one and half years. We look forward to cooperating with the Group as it launches potential Level 3 work.

We welcome the changes that have been made to the latest package of technical advice, in particular related to the treatment of issuers of derivative securities. As regards the current consultation, which contains several significant issues, our most critical concerns relate to the two-year IAS restatement and advertisement rules.

Remarks on the Consultation Document

Below we provide our reactions by topic.

(i) Sovereign issuers

As investors, underwriters and asset managers, banks have a strong interest in seeing sound disclosure by sovereign and sub-sovereign entities who are issuing securities. However, this has to be balanced with the general interest in having appropriately flexible information requirements adapted to the nature of the issuer. Such issuers have a significantly lower risk of default and there is plenty of information concerning these issuers in the public domain; there is a good case for requiring less – and more high-level - information.

Furthermore, the kind of information regarding their solvency – for example, GDP figures – is by nature unstable and does not correspond to the information that can be expected of a company. Although the scope and nature of information an investor may need from an emerging market (e.g. Argentina or Turkey) is in fact very different from that demanded of an industrialized issuer, this additional information will in any event be imposed by the market by the incentive to attract investors to the issue. The same applies for sub-sovereign issuers, who will – even where they may be benefiting from an explicit sovereign guarantee – will generally be asked for more information by the market than their sovereign governments. Any key additional information needed of such issuers will be required under the general disclosure requirement in Article 5 of the Directive.

Accordingly, we believe that certain items in Annex D could be usefully trimmed down:

- ⇒ 3.4: The requirement could be phrased more generally, e.g. “a description of the issuer’s economy and current financial situation.”
- ⇒ 4: Since some of these figures (e.g. c, d, e, f) may not be available, it would be more useful to refer to a more high-level disclosure.
- ⇒ 7/8: Experts will generally not be involved; hence the requirement is unnecessary.

(ii) Guarantees

We welcome the clarification CESR made during the hearing that the sovereign or sub-sovereign guarantors would be using the “guarantor building block” alongside the issuer they are guaranteeing (rather than both the guarantor and the issuer being asked to do a full prospectus). We agree that it would be useful to modify the guarantor building block (in the September 2003 advice) to adopt it to the special case of these entities since the original building block had been designed essentially for corporate guarantors.

Specifically, we suggest deleting Paragraph 5 of the building block ("equivalent information to the Issuer’s Registration Document") as this requirement is not applicable to sovereigns.

(iii) International public bodies

We do not agree with the approach taken by CESR. Institutions such as the World Bank, IMF, EBRD, or EIB are by nature akin to sovereign entities in terms of the risk of default and the basis of solvency. It would make no sense to allow the individual member state government to use a separate schedule while requiring the World Bank, for example, which is backed by governments, to use a general schedule.

(iv) IAS

Like many other representatives of issuers and intermediaries, we have strong reservations regarding CESR's decision to impose a 2-year restatement for all non-IAS accounts. Although we generally agree that investors should be able to benefit from restated accounts, we are concerned about two distinct problems:

- ⇒ Transitional problem: An issuer in 2005 (the year of the effectiveness of the Prospectus Directive) would have to restate its accounts not only for 2004 (as would be required by the IAS Regulation) but also for 2003. In our view, any requirement at Level 2 of the Prospectus Directive concerning the restatement or reconciliation of previous financial statements to IAS should not overrule the existing IAS-Regulation. In this regard, we reject the requirement that audited financial information must be presented and prepared in a form consistent with that which will be adopted in the issuer’s next annual financial statement (Annex E). This is not feasible for issuers who plan to switch over from local GAAP to IAS/IFRS and want to issue securities in the year of transition. We recognize that this is a transitional matter which the Commission could take into account, but also believe that CESR should express its view on whether this is a significant practical problem in its advice. We were encouraged to hear at the hearing that CESR would consider expressing the view in its advice to the Commission that this is a problem. As a solution, we would propose that the obligation should not apply until the IAS standards are fully in place.
- ⇒ Perpetual burden of an extra year: For all newcomers to the market after 2005, they would always have a burden of restatement that is one year longer than that required by the IAS. IFRS 1, which is the relevant provision for the preparation of annual accounts, requires a restatement for the previous year. When compared with the

requirement foreseen in the IFRS, a two-year restatement obligation would act as an additional burden on those companies not listed as of 2005 when they come to the market. Again, we believe that the implementing measure of the Prospectus Directive should not extend beyond what is required by the IFRS.

(v) Accounting equivalence:

A related problem is that of the uncertainty surrounding issuers who use non-EU local GAAP. As was pointed out during the hearing, the problem affects not just issuers from certain jurisdictions (e.g. the US) but also frequent issuers in Europe from all around the world using the same local GAAP. From the investor's perspective, the ultimate decision on such standards should rely on the quality of the underlying rules and supervision. Allowing the uncertainty to linger on has a business cost for Europe in the form of issuers staying away from the EU markets. **In this sense, we agree with the suggestion that this is a subject worthy of CESR' advice, especially if the aim is bringing the issue a closure as soon as possible in the new year while also finding a creative way of assuring markets during the interim period.**

(vi) Advertisement

From the start, the FBE has been a staunch supporter of the single passport for issuers, which we believe is the key to establishing a truly integrated pan-European market that allows issuers to benefit from a united, 450-million strong EU investor pool. To this end, we firmly supported those measures that would strengthen the passport and urged for an elimination of all loopholes and inconsistencies in the Directive. In its final form, the passport in the Directive is based on a clear regime of mutual recognition and a single authorization.

What could easily threaten the benefits of the entire Directive is the possibility that issuers may be asked to get a separate approval of their advertisement in each of the Member States where they plan to market their issue. If this were so, an issuer doing an IPO, for example, could not dream of advertising the issue even in one newspaper within the EU, since they would have to get a separate approval from every jurisdiction where the issue is offered to the public/admission to trading will take place. This could be largely avoided by the appropriate interpretation of the Directive.

Article 15 paragraphs 2 to 5 lay out the criteria that an advertisement should comply with in order to be consistent with the Directive. In addition, Article 15(6) states: *"The competent authority of the home Member State shall have the power to exercise control over the compliance of advertising activity, relating to a public offer of securities or an admission to trading on a regulated market, with the principles referred to in paragraphs 2 to 5."*

This paragraph makes it clear that only the home Member State shall exercise such power. Any other interpretation is neither logical nor consistent with the spirit of the passport for issuers.

It is also implicit in this paragraph that the specific rules and procedures related to implementing Article 15 should be the rules and procedures of the home authority only (consistent with Article 15). It would not be possible to imagine the home authority exercising this control with a set of overlapping multiple rules emanating from the host countries. This approach is also consistent with the practical reality that the detailed rules on advertisement across the EU are indeed too different for them to be reconciled and harmonized at an EU level while the principles on which they are based are not. The regulatory approach to the advertisement in the context of prospectuses will therefore have to remain at a high level. Article 15 provides this basis.

In this sense, we fully agree with the approach taken by CESR so far, which is not to work on any harmonization. We see a danger in the future implementation only in so far as issuers may be asked to go through individual approval in the host countries and/or the implementation of Article 15 is linked to any effort of harmonization of the detailed rules.

This would be especially worrisome because the definition of advertisement in Article 15 is quite far-reaching, including any activity that is related to a public offer or admission to trading (even if an exemption allows the offer/admission without a prospectus). This is confirmed by Paragraph 80 in the CESR advice.

Having said this, our members are sympathetic to the argument that some host governments may be reluctant at first to give up control over advertisement without a more detailed level of harmonization beyond Article 15. Our members have carefully considered whether it would be necessary to harmonize the procedures and rules in this area. We have considered, for example, the implication of not having harmonized rules on the language of the advertisement, having different rules in terms of prior approval, and rules affecting issues such as black-outs.

In none of these cases were we convinced that remaining differences between Member States should be an obstacle to the functioning of a system where one single authority - the same one as the approval authority for the prospectus - exerts control over the advertisement. We find that Article 15 is clear enough in terms of what an advertisement should look like; we see no benefit, but much danger, in establishing a single set of detailed rules across the EU.

Furthermore, we believe that prohibitions such as black-out periods should not be considered. The Directive clearly states that advertisements are allowed prior to an offer or listing and prior to the publishing of a prospectus, as long as reference is made to the (future) prospectus (Article 15 [2]). Therefore imposing any type of black-out periods would be contradictory with the Directive itself, as black-out periods would not only govern the dissemination (see Art 15 [7]) but constitute a prohibition of advertisements prior to the publication of a prospectus.

What is less clear is whether the host Member State should be able to exercise any right with respect to other (horizontal, i.e. non-financial sector specific) advertisement rules that may exist for advertisers in its jurisdiction. **However, in most cases we would expect the principles underlying these laws to be very consistent across Europe so as to make it possible for the host regulators to control compliance with such obligations, if any, without the resort to an *a priori* approval.**

The key element that will facilitate the passport for advertisements is a high level of trust among regulators, which we believe exists already and will only be more entrenched as the Directive is implemented fully. Given the clearly established parameters in Article 15, the principles for advertisement will be already clearly harmonized. It should be a further reassuring factor that in the case of equity issues – arguably the case where the regulators might be most likely to exert closer control over advertisement - the authority in charge of advertisement would also be the authority of registration and approval of the prospectus. In all other cases, the approving authority always has a strong link to the issue (i.e. where the admission to trading or public offer will take place). In all of these cases, it seems reasonable to expect that the authority approving the prospectus would be the best placed to control compliance with Article 15. Any specific inquiries of the host authority would be resolved through a direct dialogue with the home authority.

Conclusion

Our members would be happy to discuss any elements of this response in more detail and look forward to further cooperation with CESR.