



MEDEF

*Economic, Financial and
Fiscal Affairs*

Legal Affairs

CESR's Advice on possible Level 2 Implementing Measures for the Proposed Prospectus Directive Ref: CESR/03-128

MEDEF Position

Preliminary remarks

MEDEF wants to stress the fact that it was very difficult to react for this consultation considering the number of papers disclosed by CESR: five documents issued in April and May (with some parts of April documents becoming obsolete in May), to comment for mid-June, in the same time as Market abuse consultation. Furthermore, CESR modifications were very difficult to trace, and it was necessary to compare those five documents to both consultation papers of October and December 2002. Consequently, MEDEF chose to react only on the most significant changes occurred between CESR's October consultation paper and CESR's April and May technical advice. Furthermore, MEDEF focused its attention on the general schemes (equity and debt securities). Most of the comments are nevertheless also applicable to the specific schemes.

MEDEF knows that it was very difficult for CESR to realise a clear and efficient consultation on such a technical topic with many ramifications (specific building blocks), especially given the short deadlines, but considers that it is not possible to go on working under those circumstances. That is the reason why it seems necessary that all interested parties warn the Commission that the result will be unsatisfactory if no adequate measures are taken to improve the consultation process.

As indicated in the previous answers to CESR's consultations, MEDEF remains very concerned as proposed requirements correspond to a maximalist approach and will result in a prospectus complex and expensive to establish for issuers. This could have important consequences for financial markets dynamism, by preventing quotations of some actors.

MEDEF also notes that an important effort has been realised by CESR in order to reorganize and clarify the level 2 annexes.

PART ONE – MINIMUM INFORMATION

MEDEF is very concerned with CESR's decision regarding SME's specific scheme. CESR concludes that on the basis of the strength of the responses against having a separate building block for SMEs, CESR has confirmed its decision not to have one. Indeed, CESR explains that all respondent but one stated that there should be no special provisions for SMEs and historical information should not be restricted to two years.

MEDEF understands that CESR has to take into account general trends of response but it is necessary to consider level 1 requirements on that topic: the directive, Article 7 §1, state that to determine specific disclosure scheme, the size of the issuer, especially for SMEs must be taken into account.

It is not CESR's role to question level 1 relevance.

Registration document

Equity schedule

Lightening in Annex A

First of all, MEDEF thanks CESR for having taken into account some remarks regarding confidentiality problems (§ III E, § IV B 1c, VIII F) and burdensome new requirements (§ V D, § VIII D), and more especially appreciate CESR's changes concerning documents on display that no longer include material contracts. Regarding material contracts, MEDEF nevertheless regrets the fact that no change has been done on the paragraph VIII C, which we consider as not clear.

Problems of privacy / confidentiality

On the privacy / confidentiality consideration, MEDEF is not satisfied with CESR's conclusion on § 14.1 on disclosure of any convictions in relation to fraudulent offences. Indeed, CESR "acknowledges the fact that in certain Member States the disclosure of information required under § 14.1 (ii) of Annex A may cause legal difficulties in the application of national privacy laws", but does not change its advice. MEDEF considers that this point of this advice should be deleted.

Paragraph 14.2 contains a new requirement for a disclosure of any restriction agreed by administrative, management, supervisory bodies and senior management on the disposal of their holdings in the issuer's securities. It shows that once again, CESR does not take into account confidentiality problems. MEDEF considers that this information is relevant, but the general balance between information and privacy is too often unfavourable to privacy.

CESR's new requirement on financial conditions

CESR's new requirement on financial conditions (§ 9.1) seems to be vague, and risks being difficult to understand and implement. CESR did not give any explanation on this addition, which requires some clarification, in MEDEF's opinion.

Selected financial information

This part states that selected financial information shall be presented for each financial year for the period covered, and any subsequent interim financial period. MEDEF considers that it should be precise that interim financial statement should be disclosed only if another text (Transparency directive or any national requirement) makes it mandatory.

Profit forecasts

MEDEF is satisfied that disclosure of profit forecasts remains on a voluntary basis, but considers that CESR's definition is still unclear, especially at the end of § 13 a), which makes reference to a calculation to an approximate figure even if no particular figure is mentioned. Indeed, either there are some figures, or there are no figures, but as it is written, it will be subject to interpretation. MEDEF fears that some trend information could be considered as profit forecasts. Finally, requirement for an audit seems unrealistic and should be deleted.

Major shareholders

In paragraph 18.3, issuers have to state whether it is directly or indirectly owned or controlled. MEDEF considers that the word owned is vague and ambiguous and does not provide any additional precision. CESR should only refer to controlling shareholders.

Related party transactions

CESR's choice to refer to IAS seems rather good as it is better avoiding multiple definitions for the same notion. MEDEF nevertheless raises the problem of companies which will not adopt IAS before 2007, or which will keep on using other principles like US GAAP. It would be burdensome to ask them to use an IAS notion whereas they do not use those accounting principles.

Securities note

Equity securities note

MEDEF thanks CESR for improvements realised on the securities note schemes to make it clear and well organized. Some information required remain nevertheless redundant with the registration document in MEDEF opinion, for instance paragraph 3.1 & 3.2.

In paragraph 4, new formulation for requirements relating to information concerning the securities to be offered to trading, shows that issuers must explain company law and tax specificities (§4.5 – dividend restrictions and procedures for non resident holders; §4.11 – taxes to be paid). We consider that it could be very burdensome, as the issuer cannot disclose specificities for all investors' nationalities. We therefore recommend that CESR restrict this requirement to the strict company law and tax specificities of the issuer country, without taking into account the possible investors specificities.

Debt securities note

Information included in § 14.7, regarding interest rate is more clearly organized to treat separately cases where the interest rate is not known. MEDEF considers that CESR's new requirements on that topic are a bit vague and would be difficult to disclose for issuers: "where the rate is not fixed, description of the underlying on which it is based and of the method used to relate the two; a description of any market disruption or settlement disruption events that affect the underlying; adjustments rules with relation to events concerning the underlying; name of the calculation agent." If the issuer must describe any possible market disruption, it must be very general, depending from the underlying. MEDEF considers that issuers should disclose only specific risks.

PART TWO – INCORPORATION BY REFERENCE

MEDEF considers that CESR level two advice, as modified after consultation, is satisfactory.

PART THREE – AVAILABILITY OF THE PROSPECTUS

CESR's modifications on availability of the prospectus level two advice states that the newspaper chosen by the issuer to disclose its information should be a newspaper whose circulation is deemed to be appropriate for this purpose by the competent authority. MEDEF fears that the expression "deemed to be appropriate" could lead to an interpretation as a registered list of newspaper given by competent authorities. Such an obligation would be very burdensome, a control "a posteriori" is the only practical way that could be satisfactory. We ask CESR to precise this sentence to avoid any ambiguity.