

Paris- 12/08/2003

MEDEF

*Economic, Financial and
Fiscal Affairs*

Legal Affairs

**CESR's Advice on possible Level 2 Implementing Measures for the Proposed
Prospectus Directive
Ref. CESR/03-162**

MEDEF Position

PART ONE – MINIMUM INFORMATION

1 – DERIVATIVE SECURITIES

Issues for derivatives – highlight questions

Principal activities - Principal markets - Trend information

32. Do you consider that this disclosure is relevant for these products? Please give your reasons.

34. Do you consider that disclosure about the principal markets in which the issuer operates is relevant for these products? Please give your reasons.

36. Do you consider that disclosure about an issuer's significant business developments is relevant for these products? Please give your reasons.

We do not think that it is relevant to include these information requirements. Indeed,

- either the derivative issuer is also the issuer of the underlying instrument

This information is only of interest in cases where the derivative issuer is also the issuer of the underlying instrument. However, in those cases, the information is already available in the issuer's registration document.

- or the underlying instrument is not issued by the issuer of the derivative

In this case, we do not think that this information is relevant, as investors do not need to know about the main activities, markets and developments of the issuer of the derivative, as they are not acquiring any shares in the company.

Administrative, management and supervisory bodies conflicts of interests

37. Do you consider that this disclosure is relevant for these products? Please give your reasons.

MEDEF takes the view that this information can be relevant and is not necessarily available elsewhere. Investors may in particular want to ensure that there is no conflict of interest with the companies connected with the underlying instrument. It can therefore be useful to have this information.

Major shareholders

39. Do you consider that disclosure about an issuer's major shareholders is relevant for these products? Please give your reasons.

From MEDEF's point of view, a derivatives investor is not interested in the major shareholders because he is not investing in the issuer company itself.

Changes in CESR's view in relation to the disclosure proposals for derivatives

Profit forecasts or estimates

MEDEF appreciates CESR's view that it is up to the issuer to decide whether to include profit forecasts or estimates. However, as indicated in the replies to the previous CESR consultations, MEDEF is strongly opposed to a requirement to audit profit forecasts or estimates. This obligation is actually costly and does not really improve the quality of financial information, as the checks made by the auditors are conditioned by the reliability of the assumptions made to establish those items.

Interim or other financial information

MEDEF is concerned about CESR's remarks regarding interim or other financial statements
- as regards the form

We note that CESR chooses in paragraph 44 not to take into account the general advice of the consultees. In addition, the argument used for this choice is based on regulations that are pending without any further explanations. Lastly, it seems to close the debate since as consultees are not invited to comment on that new option.

- as regards the content

MEDEF considers that the issue of interim statements in all circumstances comes under level 1, which can be addressed either in the Transparency Directive or in the Capital Adequacy Directive. Based on this, there are two possible solutions:

- either the company has published interim statements then it would seem logical to include them in the registration document.
- or there is no level 1 rule requiring the issuer to publish interim statements, and in that case, CESR cannot enforce this.

A new approach to derivatives

59. Do you agree with CESR's revised approach in relation to retail non-equity securities and wholesale non-equity securities? If not please give your reasons.

From MEDEF's point of view, it is vital to establish a definition for derivatives. The difficulties experienced in establishing this definition should not lead CESR to create a category out of this by default.

Given the very tight delay and the fact that it is very difficult to realise an efficient consultation during the summer, MEDEF has not been in a position to propose a definition agreed by all members. Nevertheless, we invite CESR to consider the proposal made by banks (please refer to FBF's answer) and insist on the necessity to adopt a definition.

We think that the main issue that needs settling is the matter of unlisted companies who issue derivatives. For this issuer category, the most appropriate disclosure requirements would be the same as for debt issue.

Lastly, we see that in paragraph 56, CESR seems to create a distinction between retail and wholesale derivatives. This distinction would seem desirable, even though it is not very easy to set the threshold. It should refer to the nominal or the trading amount.

61. Do you agree that information about investments should not be required for banks issuing wholesale debt securities? Please give your reasons.

MEDEF agrees with that approach; this information is not of use to professional investors.

64. Do you consider that information on investments is relevant for wholesale debt securities? Please give your reasons.

MEDEF does not consider this information to be relevant to professional investors.

Derivatives Securities Note schedule Examples

75. Do you consider that examples are necessary in order to fulfil the principle that the prospectus must contain a clear and understandable explanation of how an investor's return is calculated and how the instrument works? Please give your reasons.

MEDEF does not think that it is necessary to include examples, as they provide information limited to certain specific scenarios which are not representative of the diverse potential situations. However, it is misleading to investors to supply such information, as they will naturally tend to believe that the most probable result of their investment would be a median of the different scenarios considered. In view of that, the issuer when giving examples has two solutions: either to establish a quite moderate worst case scenario in which case, investors could not clearly understand that the final result of the transaction could be even more disadvantageous than the worst case scenario, or it creates a more extreme scenario and there is a risk that the information provided would become less credible, thus further inciting investors to only consider the median.

76. What other methods (if any) do you consider can be used to provide investors with a clear and understandable explanation of how an investor's return is calculated and how the instrument works? Please give your reasons.

MEDEF is more in favour of including a description of how the instrument on offer works, clearly stating the risk run by investors, notably in cases where they can lose more than their capital.

In this respect, the effort to be made to achieve more transparency seems to relate to the vocabulary used, in order not to mislead investors. For example, the use of the term "guaranteed product" could mislead an investor and should be handled carefully as outlined by CESR in paragraph 74.

On the other hand, MEDEF is vigorously opposed to CESR's proposal to establish a comparison, for example, with risk-free products. The derivative registration document clearly stipulates that those investments present some risks. It is up to investors to choose whether or not to carry out a risk-free transaction. It is not, under any circumstances, the issuer's role to make a comparative study of the various investment solutions offered by financial markets, weighting risk and profitability.

77. If you do not consider that examples are necessary to provide investors with a clear and understandable explanation of how an investor's return is calculated and how the instrument works, do you consider that the provision of examples in the prospectus is useful for investors? Please give your reasons.

As stated in question 75, we think that those examples can be misleading and should not therefore be included.

78. Do you consider that the use of examples in the prospectus is dangerous and misleading and should not be mandatory? Please give your reasons.

Yes, MEDEF considers that the examples are misleading and should not be made compulsory for the reasons stated in question 75.

79. If examples are to be included in the prospectus, do you consider that CESR should stipulate how the examples should be prepared, for example, that they should be realistic, not misleading and should provide a neutral view of how the instrument works?

N/A

80. If your answer to the previous question is yes do you think that examples should also fulfil other requirements (for example: the need to insert the break-even point for the investor)? Please state these other conditions.

N/A

81. Do you consider that examples should be provided for derivatives? Please give your reasons.

See reply to question 75

82. If yes, for which types of derivatives should examples be provided? Please give your reasons.

N/A

83. Are there any other types of securities for which you consider examples should be provided, for example structured debt instruments that have a derivative component?

We do not think that examples are needed for other types of products for the same reasons.

Past performances and volatility

89. Which of the above options do you consider should be adopted by CESR (1, 2 or 3)? Please give your reasons.

MEDEF is in favour of solution number 1. Past performance and volatility, in MEDEF's opinion, represents misleading information. Actually, as past performance does not provide a reliable indication for the future, that information is of no use. Moreover, despite warnings, it is highly probable that investors will base their decision, at least in part, on this information. In addition, if the issuer wants to provide reliable information, particularly to examine volatility, this can turn out to be very costly.

MEDEF notes that CESR's comment in paragraph 87 proves that CESR itself recognises that this information is of poor quality but it seems to take the view that, in the absence of anything better, it can be included, pointing out to investors that they should not rely on it. If it decided to choose option number 2 or option number 3, CESR would be giving preference to the quantity of information rather than the quality.

2 - BASE PROSPECTUSES

The particular format of base prospectus and supplement

Division between final terms and base prospectus

101. Do you agree with this generic rule?

We think that the generic rule set by CESR is reasonable.

Summary/Translation

112. Which of these two approaches do you think should be applied to base prospectuses? Please give your reasons.

By construction, the final terms of the offer are known and presented at a late stage in the schedule of the transaction. This addresses the needs for flexibility and speed required by instruments issued in the form of offer programmes. Accordingly, we think that it is contrary to the general philosophy of this programme to include the final terms of the offer in the summary. To avoid depriving this programme of its relevance, it is advisable to include a warning in the summary, stipulating that the summary is not in itself sufficient and should be supplemented by

analysing the final terms of the offer and at the same time specifying where investors may consult them.

Summaries and multiple products in the same base prospectus

115. Which of these views do you consider should apply to base prospectuses with multiple products? Please give your reasons.

MEDEF shares the opinion of the members of CESR who want to leave it up to the issuer whether to publish one or more summaries depending on the product.

More generally, MEDEF would like to point out that the issuer is under obligation to present information that is as clear as possible, in a manner that does not mislead the investor (Article 5.1 and Article 6). It is therefore committing itself when it establishes how the prospectus is organised and worded. In MEDEF's view, the issuer should be allowed some latitude about how the information is supplied. If CESR's approach is too formal, it will urge on issuers to comply strictly with the obligations and therefore not to organise and structure this information.

Final terms

122. Which of these views do you consider should apply to the form of final terms? Please give your reasons.

For the same reasons as those expressed in reply to question 115, MEDEF asks for issuers to be given the option to choose whether or not to replicate some parts of the base prospectus in the text of the final terms of the offer. It would appear counter productive to give views, in abstracto, on whether or not it is appropriate to reproduce parts of the base prospectus. The issuer is definitely better placed to judge this when the final terms are drawn up.

Publication of the base prospectus and final terms including the notice

125. In relation to the publication of the final terms, should the method of publication be restricted as set out in Article 14?

In the same way as the base prospectus draws up a list of information which will be available in the final terms, it also stipulates the way this information will be accessed. So all the information regarding the final terms is combined in a single document, which is easier for the investor.

127. Do you agree with this analysis?

In accordance with the answer to the previous question, we do not share this analysis.

The content of the prospectus to be used for offering programmes

131. Do you agree with the above additional disclosure requirements in relation to base prospectuses?

We think that the additional information proposals are completely reasonable and useful to investors.

132. Are there any other disclosure requirements that are not specified above that you consider necessary for base prospectuses? If so, please specify what these are and give your reasons for why you think they are necessary.

MEDEF does not have any further suggestions.

Types of securities that can be issued under the same base prospectus

136. Do you agree with the above types of base prospectuses?

No comment

137. Are there any other types of base prospectuses that you consider are necessary? Please give your reasons.

No comment

3 - WHOLESALE DEBT SN

Introduction

143. Do you agree with this approach?

144. Do you consider that the information provided for in Annex F is adequate for wholesale investors? Please give your reasons.

145. Are there any other items included in the retail debt SN that should be included for wholesale investors? Please give your reasons.

No comment.

4 – CLOSED-ENDED INVESTMENT FUNDS

Introduction

151. Do you agree with the disclosure obligations set out in Annex G as being appropriate for this type of issuer? Please give reasons for your answer.

No comment.

Property investment companies

154. Do you consider that there is a distinction to be drawn between these two types of activities, as set out above? Please give reasons for your answer.

As we think the two activities described by CESR are fundamentally different, it would not be logical to classify them in the same category. We therefore think the distinction suggested by CESR is legitimate.

155. What would you consider to be an appropriate and sustainable distinction between both activities?

Fixing a distinctive criterion based on objective data would appear difficult on a general level. MEDEF therefore suggests that the issuer itself explains the reasons why it thinks that it belongs to one of the two categories into the prospectus. To the extent that under Article 5 and Article 6, the issuer is making a commitment, the risk of an incorrect categorisation of its activity is therefore relatively low.

5 - SN BUILDING BLOCK ON UNDERLYING FOR EQUITY SECURITIES

Introduction

162. Do you agree with this approach?

MEDEF completely agrees with the approach suggested by CESR in paragraph 161.

163. Do you agree with the disclosure requirements of the building block concerning the underlying for equity securities as set out in Annex H?

MEDEF does not have any particular comment on the information obligations in annex H.

165. Do you deem the Working Capital Statement and the information on Capitalisation and Indebtedness necessary for an informed assessment of the securities in cases of products which can be converted or exchanged in newly created shares? Please give your reasons.

We share the opinion of CESR's members that the information supplied would no longer be relevant when the option is exercised. The capitalisation and indebtedness or working capital statement are highly fluctuating balances, as demonstrated by the rapid movements of those ratios for listed companies over recent years. MEDEF therefore thinks that it is pointless to ask for this information.

167. Do you agree with this approach?

MEDEF considers that CESR's proposal to include Article 4.2.2 from the securities note on derivatives in this case is reasonable, provided that the information on past performance and volatility is removed as stated in the first part of this answer.

168. Do you agree with the combinations set out in the table?

MEDEF notes that CESR has not made any distinction between options (warrants to subscribe for existing shares) and warrants to subscribe to newly created shares, despite the fact that there is a technical difference that justifies separate treatment.

PART II - FORMAT OF THE PROSPECTUS

The prospectus: single document or separate documents

172. Which of the options set out above do you support? Please give your reasons for your choice.

We do not think this point has a major effect on the quality of the financial information. MEDEF's viewpoint is that the issuer should be allowed to set out the information as it wishes. We think that the whole prospectus regulation, set at level 1 and in the process of being determined at level 2, is already extremely precise, detailed and restrictive for issuers; it is therefore necessary to give them a minimum degree of flexibility on those more minor points.

176. Which of the options set out above do you support? Please give your reasons for your choice.

See reply to previous point. It should be left up to the issuer.

The summary

182. Which of the options set out above do you support? Please give your reasons for your choice.

MEDEF thinks that the two approaches should co-exist. The issuer should not have to reproduce the whole of the summary, if it does not wish to do so.

General principles for the drafting of a summary at level 1

The guidelines for drafting the summary put forward by CESR are not, in MEDEF's view, acceptable. In fact, as CESR points out, the level 1 prescriptions are already quite precise. More particularly, we think that saying that it is inappropriate to reproduce paragraphs from the prospectus in the summary is completely unjustified. Indeed,

- there is no reason to conclude that this would mean poorer quality information for the investor.
- the general limit of 2,500 words is a sufficient restriction to ensure that a real synthesis effort will be made by the issuer when drafting the summary
- this new restriction would be all the less relevant since it would be easily drawn aside, for example, by simply changing some words in the paragraph.

PART III - ROAD MAP

We think that the road map presented by CESR would be a useful way of gaining a better understanding of how the different schedules are connected, in view of the complexity of the system proposed by CESR. MEDEF merely notes that the difference in the area of application of the registration document and the securities note referred to in paragraph 200, is not easy to understand for non-specialised players such as private investors and small issuers. This point therefore needs to be examined further.

PART IV - ANNUAL INFORMATION

Level 2 Advice

235. The document referred to in Article 10 of the Proposed Directive of the European Parliament and of the Council on prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC should be made available, at the issuer's choice, through one of the means allowed in Article 14 of that Directive.

236. This document shall be filed and made available at the latest seven business days after publication of the annual financial information.

237. Do you agree with the method of publication proposed?
--

MEDEF fully agrees with CESR's proposal on this point.

238. Do you consider CESR should limit the issuer's choice to one or more methods of publication? Which ones?

MEDEF does not think that the options offered to the issuer should be limited. Besides, we do not see any conceptual reason justifying the differentiation of the method of publication of this document with those offered in other cases.

239. Do you consider that a deadline should be defined? If so, do you agree with the proposed deadline or would you suggest a different one? Please give reasons for your answer.

MEDEF does not oppose CESR's proposal to set a deadline. However, we think that the period of 7 business days is completely insufficient based on current practice. It would be appropriate to apply a minimum period of 30 business days. In addition, there is an ambiguity about the expression "after publication of the annual information". Reference needs to be made to the publication of the annual accounts approved by the shareholders' general meeting and not under any circumstances to the initial results announcement.

We therefore propose the following amendment:

236. This document shall be filed and made available at the latest ~~seven~~thirty business days after publication of the annual financial information approved by the annual general meeting.
