

**CESR's recommendations for the consistent implementation of the
European Commission's Regulation on Prospectuses n°809/2004
Consultation (ref: CESR/04-225b)
June 2004**

**Contribution by BNP Paribas
October 2004**

□ **Presentation of BNP Paribas**

BNP Paribas (www.bnpparibas.com) is a European leader in banking and financial services, with leading positions in Asia and an active presence in the United States. It is the first bank in terms of net income and market capitalisation in the Euro zone. The group has one of the largest international banking networks with a presence in 85 countries and 90,000 employees world-wide. BNP Paribas enjoys key positions in Corporate and Investment Banking, Private Banking & Asset Management, Insurance, Securities Services and Retail Banking.

We appreciate the consultation by CESR of the financial industry as a positive initiative and welcome the opportunity to express our views on the Consultation Paper issued by CESR, as part of the ongoing process to further improve the regulatory process under the Lamfalussy procedure.

□ **Introductory remarks**

We concur in the views expressed by the French (French Association of Private Enterprises (AFEP) as well as the European Banking Federation in their responses to the present consultation.

We welcome the principle that the detailed implementation of EU law be carried out in consultation with financial services providers.

I. GENERAL COMMENTS

Regarding the issues dealt with in the consultation paper we wish to draw your attention to the following:

a) Status and purposes of CESR's recommendations: indicative and non binding framework for CESR members

The consultation paper indicates that one of the objectives of CESR's recommendations is to dissipate any doubt that issuers and their advisers may have in relation to the content of the prospectus and to facilitate the implementation of harmonised rules across the E.U.

BNP Paribas believes it necessary for CESR to further reassert and clarify in its recommendations the following:

- its recommendations do not go beyond EU legislation and will not contradict such legislation, for the sake of consistency with other EU legislation;
- the recommendations "do not constitute European Union legislation" and will not require national legislative action. CESR's recommendations constitute a non binding framework, will not constitute mandatory rules and are not meant to form part of national regulations.

b) Information required under CESR's recommendations is too detailed.

When a relevant piece of information is published, such information has to be significant and not too detailed. Excessive details may result in CESR's recommendations being deprived of their effectiveness.

It would be better not to include in the prospectus excessively detailed information when such details impact negatively on investors' understanding.

Consequently, a large number of detailed information required under certain items of the prospectus should be deleted in order to facilitate the understanding of essential information.

c) Prospective information, such as profit forecasts and future performance, should not be required.

In requiring prospective information, much of the flexibility at level 2 would no longer be available.

II. DETAILED COMMENTS

We have several observations, which we will get to in more detail hereunder. We have chosen to answer what appears to us as some of the most significant issues. Therefore, we do not provide an answer for all the questions of the consultation paper.

III FINANCIAL INFORMATION ISSUES

1. Selected financial information

30. Question: Do you agree with the proposal? If not, please state your reasons.

A: We agree with this proposal. However, the list of selected financial data quoted under item 26 should only be indicative and taken as an example. The contents decided by the issuer should be its own responsibility.

2. Operating and financial review

37. Question: Do you consider that it is appropriate to include key performance indicators about past performance?

A: We consider that it is appropriate to include in this registration document key performance indicators about past performance and exclusively about past performance . We do not agree with the time frame of CESR's proposal in paragraph 31: "the operating and financial review (OFR) should provide investors with a historical and prospective review of the issuer's performance and financial condition". Future performance of the issuer's business should not appear in this document. The registration document is a picture of the past and present of the issuer. It would be misleading for the investor if it included forecasts for the future. For the future performance of the industry sector and forecasts of this sector, research analysts independent from the issuer must be established. However, issuers should not assume that all investors have the knowledge of qualified investors. Nonetheless investors reading these documents have some financial expertise. The OFR must be written in "plain English".

In paragraph 36, the principle of "importance" or "materiality" should be added in order to compile OFR information. As we said before, too detailed information would affect the relevance of this information.

3. Capital resources

42. Question: Do you agree with this proposal? If not, please state your reasons and please provide alternative information

We believe that **the recommendation should not require prospective information**. The information submitted should focus only on relevant and material elements. It should also be less detailed.

No prospective information should be required, in particular concerning “short and long term funding plans”. Such information is uncertain by nature and therefore could potentially be misleading to investors. Moreover such information is strategic in terms of competitiveness of the issuer and to publish it could have damaging effects in terms of competition.

4. Profit forecast or estimates

50. Question: Do you agree with the above approach in relation to profit forecasts and estimates? If not, please state with particular aspects you do not agree with and give your reasons

A: CESR requires an issuer to disclose a profit forecast in the prospectus, when the forecast has been referred to publicly.

No, we do not agree with this approach. Forecasts or estimates elements should not have to be inserted in the prospectus, especially in the case of an IPO prospectus. The responsibility of the issuer is extremely high and so is that of its advisors (banks and auditors). The issuer could not be held liable in case the forecasts were not met.

Forecasts are done under the responsibility of independent analysts and are not to be included in the Prospectus.

We are totally against the proposal to insert forecasts in the prospectus, as this proposal takes away a very useful feature of the Prospectus Regulation, which clearly states that disclosure of profit forecasts is done on a voluntary basis.

51. Question: Do you consider that it is appropriate to provide examples of what may or may not constitute a profit forecast or estimate? If so, could you please provide some examples?

A : We consider that it is not appropriate to provide examples of what may or may not constitute a profit forecast or estimate. Our answer is the same as to the previous question (50). Therefore we may not provide any example.

5. Historical financial information

75. Question: Do you agree with the conclusion stated in the previous paragraph? If not please state your reasons

A: We agree with this approach. However, French issuers are not concerned by paragraph 74 because IFRS accounts will be available for the accounting period 2005 published in 2006 with comparative figures for 2004.

D. Content of historical annual financial information

85. Question: Do you agree with this proposal?

A: We agree with the proposal.

6. Pro forma financial information

92. Question: Do you agree with this proposal? If not please state your reasons.

A: We agree with the proposal.

Annex II Pro forma financial information building block

98. Question: Please provide examples of indicators of size which you consider appropriate.

99. Question: CESR members had a discussion on appropriate definitions of indicators of size. Should they refer to IAS/IFRS figures, local GAAP figures, or other definitions or not defined at all? If you provided examples of indicators of size in response to the preceding question, please explain your preferences on definitions of the proposed indicators.

A: The proposal that “a transaction will constitute a significant gross change where at least one of the indicators of size is more than 25%” appears to us to be too high.

We believe that 15%-20% would represent a good reference. Indicators could include operating income or turnover.

For French issuers the referent will be IFRS figures. The accounts being certified by the auditors, the establishment of pro forma accounts will depend upon the auditors.

7. Financial data not extracted from the issuers’ audited financial statements

103. Question: Do you agree with this proposal? If not, state your reasons.

A: Yes, we agree with the proposal.

8. Interim financial information

Content

112. Question: Do you agree with this proposal? If not, state your reasons.

A : From the point of view of BNP Paribas the recommendation at level 3 is an extensive interpretation of level 2. More flexibility should be introduced for new quotations. It is

also important to achieve coherence with the Transparency directive as far as its execution measures are concerned.

9. Working capital statements

134. Question: *Do you agree with this proposal? If not, please state your reasons.*

A : BNP Paribas does not support the approach of CESR on this issue. It is not the mission of CESR to define the working capital statement. This definition should appear in the General Accounting Principles.

10. Capitalisation and indebtedness

136. Question: *Do you agree with this proposal? If not, please state your reasons.*

A: We do not express comments on the proposal.

IV. NON FINANCIAL INFORMATION ITEMS

2. Clarification of items

2e - NATURE OF CONTROL AND MEASURES IN PLACE TO AVOID IT BEING ABUSED

238. Question: *Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.*

239. Question: *Do you think other information is needed to clarify the nature of control or mechanisms in place to avoid control being abused? Please state your reasons.*

No, we do not agree with the recommendations and we are of the opinion that the recommendations are not appropriate. Our reasons for such opinion are the following:
First of all, it is a very difficult and political matter for issuers to assert that their shareholders are exercising abusive control given the fact that these shareholders are represented both at the Issuers' general shareholders' meetings and may also sometimes be represented at the Issuers' Boards of Directors. Thus, an issuer's shareholders' meeting may easily terminate the mandate of an executive director for having revealed an abusive control.

Second, the level of details required is unsatisfactory because too much is being asked from the issuer.

BNP Paribas considers that CESR goes beyond the commitments requested under the European Commission Regulation EC n° 809/2004 of 29 April 2004. Under the Regulation the issuer is required to make an appreciation "*to the extent known to the issuer*".

The matter is also dealt with in the accounting directives and in a pending draft directive submitted to the Council. Therefore, it would be inappropriate for CESR to take up the matter at the same time.

2g - LEGAL AND ARBITRATION PROCEEDINGS

247. Question: Do you agree with the level of detail being provided? If not state your reason

248. Question: Do you agree with the proposed recommendations?

CESR envisages the publication of detailed information concerning legal and arbitration proceedings. This information is particularly sensitive and requires striking a balance between transparency and business confidentiality.

We consider that the level of detail expressed in § 11.6 of Annex XI of Commission Regulation 809/2004 (Minimum disclosure requirements for the banks registration document) is satisfactory to provide the reader of a prospectus with correct information. Therefore, the developments proposed by CESR are not necessary.

2m – MATERIAL CONTRACTS

274. Question: Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.

The matter is extremely sensitive and was the subject of intense debate at level 2. We do not agree with the recommendations proposed at level 3, because they would entail a breach of business confidentiality. Generally “business secrecy” is not, in our opinion, protected under the various recommendations made by CESR. Besides, in this particular one, the disclosure of the characteristics of certain contracts might be a violation of the “bank secrecy” obligation applicable under national rules.

As an illustration, under CESR’s proposal § 273, b), issuers are expected to mention the parties to the contracts. Under French statutory law and French case law, however, any bank or any credit institution would violate its bank secrecy obligation if it were to supply the names of the parties to a contract. The bank secrecy obligation can only be waived under very limited circumstances.

Moreover, on a contractual level, CESR’s recommendation would not be compatible with the necessary confidentiality of business. Issuers would suffer the consequences of such a disclosure in terms of litigation and suitability.

We consider that the issuer - under the control of the regulator - should determine the level of detail adequate to provide satisfactory information to investors, without being in breach of its legitimate interests and those of the shareholders.

□ Conclusions

Finally we wish to draw your attention to the duplication in several parts of the consultation paper of the IAS Regulation. In some cases CESR's consultation paper goes beyond the IAS Regulation. For example, the re-stating obligations for issuers using non-IAS accounts and the first-time application obligations go beyond the IAS Regulation. Furthermore, duplication turns out to be risky and inefficient, as the IAS Regulation is subject to change in the future. Changes in the IAS Regulation would result in discrepancies in the rules proposed in CESR's consultation paper as to their application to issuers.

This final remark brings us back to our observation under general comments to the effect that excessively detailed recommendations may be detrimental to achieving their goal of facilitating the understanding of essential information.

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