CBI
THE VOICE OF BUSINESS

Fabrice Demarigny
CESR
Via e-mail to ***secretariat@europefesco.org***

Dear M. Demarigny

Prospectus directive Level 2 – addendum to consultation paper – CBI response

As with the previous consultation, several of our members have contributed to the response by IPMA. We would support the points made in their response, particularly about the concerns about the possible effect on non-EU issuers and thus on the EU markets overall, on wholesale treatment and the need for less detailed requirements, particularly as regards banks, more focus on the need to encourage developing areas, such as asset backed securities and on the question of what is needed for the summary. We also refer back to our previous comments on similar issues such as the Lisbon objectives.

I attach for ease of reference the earlier CBI response to the original consultation paper dated 2 January 2003. These comments such as the need to avoid duplication of information in the registration document and securities note should be taken as relevant to the addendum also. We note that many of these concerns are shared by our fellow European federations.

In addition, we wish to make the following points:

- **Corporate governance**

There is some concern that CESR's proposals for disclosure of corporate governance provisions / board practices pre-empt the findings of the Winter Report and the Commission's proposed Action Plan, which we understand is due to be published in the first quarter of this year. We do not believe that CESR should pre-empt the outcomes of this Action Plan and it would therefore be better to leave disclosure of corporate governance out altogether until this area is dealt with separately. This would avoid possible duplication if it should be required to be dealt with in the annual report, following the Winter Report recommendations. In that case the annual report would be better dealt with via incorporation by reference.

- **Blanket clause**

We agree that such a clause is needed although if CESR's advice were less detailed, the need to invoke such a clause would be reduced. It would be better to have more flexible requirements at Level 2 to avoid the need to invoke the blanket clause too frequently.

- **Details which could be reduced**

Too much detail can be as confusing to investors as too little. As well as the cost burden on companies to produce large amounts of information, it becomes more difficult for investors to digest it all. We would therefore support calls to reduce the volume of disclosure where this is not essential to investor protection.

There should not be separate building blocks for each specific industry as this will be too confusing. In this context, we do not see the need for a separate building block for shipping companies, although we welcome inclusion of one for banks, since there are particular regulatory and supervisory circumstances which justify such an approach. We believe that these provisions should apply to OECD-regulated as well as EU banks.

We do not believe that it should be a requirement to publish interim financial statements in the prospectus where no such statements exist. In addition, it should be possible to include such statements by incorporation rather

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than reproducing such statements in the prospectus document itself. Care should also be taken to ensure that any proposals are consistent with the proposed Transparency directive.

We oppose the proposed mandatory disclosure requirement for risk factors (feedback from members tells us that this would be likely to lead to increased standardisation of wording and litigation rather than improved disclosure), future investments, major shareholders, related party transactions, and working capital for debt issues. Such factors if relevant could be dealt with in accordance with the general disclosure requirement that all material facts and circumstances have to be disclosed. They will not, however, be relevant in all circumstances and requiring their mandatory disclosure in all cases could increase costs for companies without commensurate benefits to investors.

As regards profit forecasts, we are concerned that the proposals for reporting should not give investors a false sense of security. Such information cannot be audited on the same basis as historical financial information. These proposals therefore need further consideration.

Yours sincerely

Attachment:

Response to original consultation

Fabrice Demarigny
CESR
Via e-mail to ***secretariat@europefesco.org***

2 January 2003

Dear Mr Demarigny

Response to consultation on implementation of the prospectus directive at Level 2

I am writing to highlight issues which have come to our attention as part of CESR's consultation on possible implementing measures for the prospectus directive. The CBI is a membership organisation, which represents companies (including both EU and non-EU companies) based in the UK and is the UK member of UNICE, the European employers' federation. With direct corporate membership employing over four million and trade association membership representing over six million of the UK workforce, the CBI is the premier organisation speaking for companies in the UK. Several of our members have contributed to responses produced by the International Primary Market Association, the London Investment Banking Association and the London Stock Exchange so we would like to add our support to their responses.

General comments
First of all we wish to state that we appreciate the narrow time constraints under which CESR has been placed by the Commission and the difficulties that consulting over such a short deadline must cause. Some of the concerns raised with us relate to CESR's over-close adherence to IOSCO standards or to duplication of information in the registration document and securities note, but we understand the difficulties in drafting everything perfectly first time around in the time available. We hope that some of these points can be cleared up following this consultation.

We think that the main emphasis should be on: what do investors need and want? And will the end result be flexible enough to be amended if necessary? If information is not of great interest to investors, then its inclusion could cause confusion to investors or might not convey enough benefits to outweigh costs. Too much detail at Level 2 could make it difficult to adjust later to changing market conditions when legislative changes are needed. This is of particular concern with regard to the derivative market.

Specific comments
1. *Incorporation by reference*

CESR will need to take account of the changes made to the text of the directive in the political agreement reached on 5 November 2002. It would be helpful if parts of documents as well as the whole could be incorporated where the earlier document was no longer entirely up to date but other parts were still relevant (e.g. the names of directors had changed but the other information was correct).

2. *Responsibility for statements*

It should be made clear that accountants or other experts who are required to authorise the inclusion of their reports in the prospectus should only have to give a responsibility statement for their own statement, not for the contents of the entire prospectus.

3. *Documents on display*

Documents such as contracts should not necessarily be made available for inspection (unless provided for by law e.g. directors' service contracts in the UK). Material information should already be included in the prospectus. Care must be taken to preserve commercial confidentiality and international competitiveness – if EU companies are required to disclose data which others are not, this could give non-EU rivals a competitive advantage.

4. *Publication of prospectus*

The emphasis should be on practicality. If the prospectus is published on the issuer's website, a notice should also be published in a newspaper or by release to a newswire or on a list on the website of the competent authority. This may be better dealt with at Level 3.

5. *IOSCO*

One weakness of reliance on IOSCO standards for the Lamfalussy procedure is that these standards were developed by academics without close consultation of the markets and are several years old. Since there are no IOSCO standards for debt, we believe that the requirements should be more focussed on actual risk to the investor. Debt and equity should be different – investors in debt are primarily concerned with interest and the risk of non-payment of capital while investors in equity are more concerned with capital growth or with income. IPMA has made detailed suggestions for amendments to the annexes on debt which we support.

6. *Professional / retail*

With regard to equity, the standards are aimed at retail investors and thus are not always appropriate to professional investors. In this context, we are concerned that the Commission should have stated that its interpretation of the Parliament's amendment is that "based on" means "at least". We do not believe that that is correct; we believe that the meaning of the amendment is more that the main features of the IOSCO standards should be preserved such that the content should be substantially similar but that it could be altered either to add or to remove detail.

We would like to see more attention paid to the difference between retail and professional investors and to their different requirements – while it may be appropriate to demand a higher level of disclosure for retail investors (although it is arguable whether they actually read the disclosures), the cost that this entails for professional investors, who are more sophisticated and better able to judge the risks for themselves, may not outweigh the benefits. This is of particular concern for the wholesale markets which need to be globally competitive. The disclosure requirements for professionals should therefore be less than for retail.

7. Equity building block

As regards the core equity registration building block and Annex K, we believe that these require unnecessary additional details by way of selected financial data, indebtedness statement, liquidity and capital reserves. We have seen and support comments by LIBA on these issues.

8. Lisbon objective

As an organisation representing non-EU companies as well as British and other European companies, we are concerned that third country issuers should not be driven away from EU markets. The US Sarbanes-Oxley Act has shown the difficulties of not involving third country issuers in consultation and consideration and we would hope that CESR would not take that Act as its model.

The prospectus directive aims to help create truly EU financial markets to enable economies of scale and diversification of risk for investors, providing them with a wide range of competing investments, to reduce the cost of capital and to foster the international competitiveness of the EU's financial markets. This is in line with the Lisbon agenda of making the EU the world's most competitive and dynamic knowledge-based economy by 2010. In order to be the most competitive economy, however, Europe needs to compete globally for capital as well as in other markets and thus to seek to attract non-EU issuers to Europe rather than to Switzerland, the USA, or the Far East. With the spring summit coming up next year, it is extremely important that the Lisbon objective of being a competitor in the global financial markets is not forgotten. One of the considerations for CESR in proposing measures should therefore be the effect on the EU's global competitiveness. Loss of non-EU issuers would mean smaller EU markets; this would mean that the brokers would be unable to operate economies of scale and thus to keep costs down. This in turn would reduce the attractiveness of the EU markets not only to non-EU issuers but also to EU issuers.

The EU approach to Sarbanes-Oxley has been to ask for recognition of the differences in legislation and approach of EU companies via disclosure. This model should be followed consistently by the EU itself for third country issuers. Particular concerns are the requirements relating to the inclusion of financial information and the incorporation of documents by reference. Requiring compliance with IAS would impose huge costs and would drive away non-EU issuers while allowing only incorporation of documents filed by reference with a competent EU authority could prevent them from taking advantage of this provision.

Some of the current drafting requires too much complex disclosure across too wide an area which will not assist the EU securities market to be globally dynamic and competitive. As stated above, we appreciate the difficulties in timetable that CESR has faced in producing the drafts. As the real argument for this increased disclosure is in the retail field, it is necessary that a much more focussed approach be adopted in order to avoid adverse effects. Although retail investors are important, by far the major provide of capital is wholesale (both initially and later through mutual finds and collective investment such as insurance companies). The additional costs of disclosure will add to the costs of capital not reduce them.

We hope that these comments are of assistance and look forward to seeing the revised draft.

Yours sincerely

Susannah Haan
Legal Adviser