VEUO

Vereniging Effecten Uitgevende Ondernemingen

Fabrice Demarigny
Secretary General
The Committee of European Securities Regulations
11-13 Avenue de Friedland
75008 PARIS
Frankrijk
by e-mail: secretariat@europefesco.org

The Hague, 30 December 2002
Our ref.: f:\063\10712704\prospectus\b002-063.doc\mavd

Dear Mr. Demarigny,

Re: Response to CESR Consultation Paper on possible Level 2 Implementing Measures for the Proposed Prospectus Directive

INTRODUCTION

It is with great interest that the Dutch Association of Issuing Companies (Vereniging Effecten Uitgevende Ondernemingen "**VEUO**") has studied the Consultation Paper on possible Level 2 Implementing Measures for the Proposed Prospectus Directive published in October 2002. The VEUO appreciates very much to be able to comment in an early stage on the issues at hand. The VEUO will confine itself to comment the issues which are of relevance to all listed companies. Where issues are of relevance only to specific institutions, like Property, Mineral and Investment Companies the VEUO feels it is not the appropriate organisation to address those issues. In its comments the VEUO will closely follow the observations and questions in the Consultation Paper. As much as possible hereafter the comments will be clustered around the questions put forward in the relevant paragraphs of the Consultation Paper. This will be indicated by referring to the numbers of the relevant paragraphs where the questions are set out.

General Secretary
S.E. Eisma

Post address
P.O. Box 90851
2509 LW The Hague
Holland

Telephone (31-70) 328 55 85
Fax (31-70) 328 54 10
e-mail: veuo@dbbw.nl

ING Bank
The Hague
66.71.15.196

REGISTRATION DOCUMENT

(§ 44): *General approach of disclosure obligations*. By and large the principles reflected in the CESR proposals for the Core Equity Registration Building Block in Annex A to the Consultation Paper can be subscribed to. However, as discussed in the Consultation Paper, in respect of a number of issues a somewhat different approach could be preferable to the one adopted in the current Consultation Paper. Those issues will be addressed and discussed hereafter.

(§ 47): *Risk factors*. The analysis of CESR in respect of difficulties arising when further specifying risk factors is shared by the VEUO. Therefore the VEUO agrees to the proposed approach.

(§ 51, 52, 55): *Pro forma information*. In the Consultation Paper CESR sets out the risks of pro forma financial statements. In the light of the analysis of those risks, which are fully acknowledged by the VEUO, it would seem that there are no convincing arguments to make such pro forma information schemes mandatory in a case of significant gross change. Nevertheless, if a pro forma consolidation of data in certain specific cases would enhance a fair view of the results of a proposed transaction it should be allowed to include such pro forma information in the prospectus. Of course in that case it should be accompanied by the appropriate explanations and assumptions and the methods applied. However, if providing pro forma information would be mandatory, this would mean that companies would be forced to venture into an area which might be rather speculative. For those reasons the VEUO feels that "pro forma" information should not be mandatory.

(§ 64, 65): If a pro forma statement is published, the disclosure requirements set out in Annex B are by and large acceptable to the VEUO. However, the VEUO feels it should not be mandatory to have an independent auditors report. Whether this is necessary or advisable will depend on the circumstances and the aim of the pro forma statement. In the light of their responsibility of directors, the VEUO feels it can be left to the directors of issuers whether or not to have the pro forma accompanied by a auditors report (which approach for example is adopted in § 81 of the current Consultation Paper discussing profit forecasts). If it nevertheless would be made mandatory to provide pro forma information, the VEUO feels this indeed should be restricted to the occasions referred to in § 65 and therefore only should be published in the securities note.

(§ 73, 85 - 87): *Profit forecasts*. The currently contemplated definition included in the Consultation Paper is rather broad. The VEUO in any case would recommend to restrict the definition especially where it refers to "data" from which a calculation "may be made". To qualify as a profit warning a minimum requirement would seem that those data also include an estimate and are basically the only data one would need to produce a reliable profit forecast. When regulating this subject, the VEUO underlines that other legislation relating to disclosure should be taken into account. The current proposals for example seem to interfere with the general mandatory rules on (disclosure of) inside information and the relevant EC Directive. However, if a profit forecast has been published in a prospectus, the VEUO agrees that such a forecast should be updated afterwards albeit of course only up to the point that results have been made public. In line with its previous comments (see our comments on § 64, 65) the VEUO agrees with the arguments advanced in § 80 not to require a report by the company's financial advisor.

(§ 89): *Information on previous history of directors*. The VEUO subscribes to the view that the information

listed in V.A.1 (a) until (g) may be material to investors and in general terms could be disclosed as far as this is in accordance with privacy legislation.

(§ 91): *Controlling shareholders.* The VEUO is of the opinion that it should be adequate to disclose the presence of a controlling shareholder (of course it should be known by the issuing institution). This will be an effective signal to investors. If the issuing institution would feel the presence of a controlling shareholder adversely affects the attractiveness of its securities, it could disclose limiting measures (if any). Of course in that situation the disclosure should be complete, correct and not misleading.

(§ 93): *Documents on display*. The VEUO feels that a rule to put on display all documents referred to in the prospectus would be rather unfortunate. Not only would it require a disproportionate effort to screen all the documents on commercial sensitive parts, but also would it almost directly lead to complicated discussions on whether an underlying document has correctly and adequately been made public taken account of possible sensitive information. In any case the VEUO strongly feels that Paragraph VIII F sub (b) in Annex A, requiring disclosure of "material contracts", should be deleted.

(§ 95-123): *Start-ups, SME´s, Property and Mineral companies, Investment companies and Scientific Research Based Companies*. As indicated in the introduction it is somewhat beyond the scope of the VEUO to discuss proposals in respect of those specific entities. The VEUO will therefore not comment on those issues.

DEBT SECURITIES

(§ 129): *Disclosure requirements for debt*. Basically the VEUO would take as a starting point that the disclosure requirements for debt securities should be identical to those for equity as set out in Annex A. Of course, as is pointed out in the Consultation Paper, the focus of equity and debt investors may be somewhat different. However, those differences (in as far as deemed to be important) generally can and will be taken care of in the debt instrument which of course will be specifically be spelled out to investors.

(§ 134-135): *Disclosure of advisers*. Disclosure of financial and legal advisers will generally not be deemed to be very relevant in case of corporate retail debt.

(§ 137-139, 142): *Disclosure of investments*. The VEUO does not feel that past investments as such are material to a potential investor. In respect of current investments one may expect that investors would want to have some information about the current investments and maybe, to some extent, the investment policy of a company. Specific information about possible future investments may be less relevant when investing in a company's debt (at least less relevant than if investing in equity). As said before, this issue will to also be taken care of in the debt instrument. The VEUO agrees that retail bondholders will not need the same disclosures as shareholders.

(§ 145-146): *Interim financial statements*. The VEUO feels that, certainly in respect to listed companies, disclosure obligations in respect of interim financial statements would not need to be included in a prospectus. This subject is adequately taken care of in listing obligations and insider information regulations including the recent EC Directive regulating those subjects.

(§ 148-150): *Documents on display*. For the same reasons set out before (see § 93) the VEUO feels there is no case for putting all documents on display. This would certainly be rather unfortunate in respect of category (c) taken account of the risks CESR itself indicates in its Consultation Paper. As set out in § 93 it will require a disproportionate effort to check and clear the documents and subsequently be a source of ongoing discussion and litigation whether the issuer has adequately provided the information.

(§ 153, 156): *Additional information*. As indicated before investors in debt will find this information less important than investors in equity. However the general picture may be deemed to have some relevance. In case of issuing of debt therefore issuers should be free to limit themselves to such a general picture. For comments related to Annex I the VEUO explicitly refers to what has been stated before.

(§ 160 - 234): *Derivative instruments.* For the same reasons as set out by CESR the VEUO feels not able to comment on those issues at this point but will be happy to do so when the matter is raised in another consultation paper and after having studied the issue more thoroughly than it is now able to do. At a later stage the VEUO will be happy to comment on a consultation paper focusing on those financial instruments.

SECURITIES NOTE

(§ 249 - 251): *Building block approach*. In general the proposed building block structure seems workable and providing flexibility as well as offering more specific insight in the relevant elements of each of the three main classes of securities to be offered. This approach seems sensible although one should note, as CESR itself actually does, that it might not fit very well for types of securities which do not fall within the distinguished categories. One may see over the coming years an increase of financial instruments of such a mixed character. In this respect to some extent it seems acceptable that Competent Authorities would have the power to add some specific items to the currently proposed schedules. However, one should be careful that in allowing some leeway to Competent Authorities, the harmonisation aimed at by the Directive is not actually reversed. Therefore the room for national regulators should be limited and problems which may arise should be taken care of in amendments to the current schedules.

(§ 252 – 254): *Advisers and other information*. In respect of mentioning advisers the VEUO refers to its remarks under § 134, 135. The VEUO doubts whether it is helpful to discuss these issues purely from the perspective of liability. Primary focus should be whether information might be (deemed to be) relevant to investors. In line with the previous comments in this letter on the subject of disclosure of documents referred to in a prospectus (see § 93 and 148-150), the VEUO feels it is not necessary that the securities note contains the auditors report. In as far as responsibility for the prospectus is concerned, some persons certainly will be responsible for all three parts of the Prospectus. In addition to them, there does not seem to be any objection to acknowledging responsibility of other (legal) persons for specific parts of the prospectus.

(§ 255 – 262): *Disclosure and derivatives*. In respect of regulation of disclosure in case of issue of derivatives the VEUO prefers to further study the issue before taking a position (we refer also to our comments on § 160 ff. As we understand that derivatives will be the subject of a subsequent consultation paper the VEUO will be happy to address the issue at a later stage.

INCORPORATION BY REFERENCE

(§ 281, 282 and 289, 290): The VEUO fully sides with CESR in its objective (§ 270) "to simplify and reduce the costs of drafting a prospectus". The VEUO feels that this objective can be achieved without prejudice to the interest of investors which the prospectus is meant to protect. As set out by CESR itself, investors seems to be much better of with an "easily analysable prospectus" than with an disproportionate amount of information. It is quite clear that when information is misstated in the prospectus this will have serious legal, financial and reputational consequences for the issuers and the persons responsible for the prospectus. In practice this is a highly effective incentive to careful drafting of and including all relevant information in the prospectus. Likewise its is a deterrent to misleading investors by giving false information. In the Netherlands for example the standard of care and diligence required in this respect is very tight and legal proceedings have been rather successful for investors.

From this perspective, the VEUO feels that incorporation by reference may and should be allowed on a rather extensive scale provided of course – as indicated in § 277 of the Consultation Paper – that if documents contain information that has undergone material changes, such changes should be clearly communicated and supplemented by the updated information. Taking this into account the VEUO would feel that incorporation by reference might be extended to other documents as well. Further technical advice does not seem to be required in this respect. As set out before the VEUO feels that current law as to responsibility and liability is a highly effective way to safeguard that interests of investors will not be prejudiced.

As to accessibility of the documents, the VEUO in general agrees with the level 2 advice included in § 287 and 288.

AVAILABILITY OF THE PROSPECTUS

(§ 307, 314): As indicated in the consultation paper the basic rule in respect of availability is already enshrined in article 14 of the Directive. The VEUO feels that the proposed Level 2 Advice is sensible and adequate and does not have to be further specified with the exception of the reference to the eight most circulated national newspapers. The VEUO would doubt whether this criterion is useful and/or adequate. A major financial/business newspaper for example may have a more limited circulation than eight daily newspapers.

(§ 325-331): The publication of a notice as suggested by CESR in general can be supported by the VEUO. The VEUO also observes that the current recommendations in this respect seem to reflect market practice. However, the VEUO explicitly expresses its doubts whether such an obligation can validly be created in the absence of a specific provision in the proposed Directive.

(§ 334, 335): The VEUO does not see a convincing argument why investors should not be requested to pay real costs of delivery of a prospectus. It might also take away an incentive to primarily get the information from the internet. However if CESR would strongly feel investors are entitled to receive a prospectus free of charge, it should be made clear that such a legal obligation should only extend to addresses within the jurisdictions in which the offer is made.

The VEUO trusts that the views expressed in this letter will be helpful in finalising the advice of CESR to the Commission. If during that process CESR would feel that further clarification of the above could be useful, the VEUO of course will be most happy to further elaborate its views.

Yours sincerely,

S.E. Eisma