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The Committee of European Securities Regulators

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Secretary General

cc.: European Commission – DG MARKT - F2

European Parliament – EMAC Rapporteur & Shadow Rapporteurs

Brussels, January 2003

Comments on the Consultation Paper CESR-02.185b

**CESR's Advice on possible Level II Implementing Measures
for the proposed Prospectus Directive**

The Federation of European Securities Exchanges is the representative organisation in Brussels for its Members, which are the regulated securities markets and a number of associated organisations in Europe. We are aware that our comments are being delivered after the end of the formal consultation phase.

Further, we are aware that several of our Members have made individual comments. We expressly refer to these submissions, in particular where they deal with the more detailed questions raised by CESR in its consultation.

We will therefore in this submission mainly comment on more general issues and restrict our responses to CESR's individual questions to a few remarks.

1. First of all, we are surprised about the **level of detail** which CESR has applied to its response to the Commission's mandate and we are concerned about the rigidity and inflexibility that would characterise Europe's approach to prospectus publicity should the Commission (with the ESC) fully embark on CESR's proposals for the Level II implementing measures.

2. We share the concern of those of our Members that with such a type of regulatory measure, issuers (and their lawyers) will very much focus on the **actual wording and form of requirements** and be induced to ignore and/or circumvent the actual purpose of the regulation and, moreover, the actual purpose of the publicity exercise. The current discussion about rules-based vs. principles-based legislation in accounting provides in our view ample arguments in favour of more principles-based approach.
3. We are aware that the Prospectus Directive generally reflects a “maximum harmonisation” approach, although this is nowhere expressly stated. We feel that this concept is being misused, or at least not served well when it results in little more than a **compilation of the most detailed rules available** across Europe on each of the subjects.
4. We do not fully share the obvious concern that any “lighter” approach towards prospectus contents (not speaking about prospectus scrutiny) would lead to **regulatory shopping** across Europe. In our view, CESR’s proposals reflect a surprising lack of self-confidence within the regulators’ community (i.e. CESR) in the self-regulatory powers of CESR. If we have understood Baron Lamfalussy and his wise associates correctly, the ESRC (in its Level III function) could be expected to adopt a more active role in the implementation of a European disclosure policy, including “issue(ing) joint interpretative recommendations and set(ing) common standards regarding matters not covered by EU legislation”. We would have thought that only as a recourse, such recommendations and standards should then “be adopted into Community Law through a Level II procedure”¹. As indicated, we are surprised that CESR seems to forfeit from the beginning its opportunities to work for truly more flexible and adaptable European regulation.
5. The Members of FESE, Europe’s Regulated Markets, feel that the efforts to eliminate competition between regulatory environments (“regulatory competition”) overshoot and stifle their own legitimate competitive interest. Europe’s Regulated Markets are themselves – as we do not get tired to emphasise in various contexts – highly interested in the quality of their markets which includes the quality of their products, the admitted securities. They very much depend on the confidence of their investors and are thus also interested in the quality of issuers’ disclosure.² Prescribing in overly precise detail the quality criteria of the Exchanges’ products would stifle their ability to differentiate themselves from other market places. Such **competition between markets** should of course not jeopardise investor safety; completely eliminating it, however, has the adverse effect of creating a monopolistic structure in an area where the declared goal of European legislation (in the FSAP and beyond) is increased competition.

¹ Lamfalussy Report, English version, p. 37f.

² On the role of Regulated Markets in setting admission standards, cf. Art. 37 of the Draft ISD and the respective passage in the Explanatory Memorandum (p. 17 in the English version).

6. FESE and its Members are in general supportive of the **building block approach** chosen as long as it may help the competent authority to provide a flexible response to various products and/or various types of issuers. However, several of our Members feel that the Prospectus Directive and its Level II implementing measures should not contain too many building blocks for “specialist issuers”. For the purpose of argumentation on this more general comment, we would like to use the example of the proposed special building blocks for shipping companies:

We fully respect the expertise of those competent authorities in Europe that have an experience in scrutinising and approving prospectuses for shipping companies. We would feel that any effort towards sharing this experience with all European regulators (with the aim of creating a “harmonised” approach towards any shipping company submitting a prospectus for approval) is indeed a valuable intention. We doubt, however, that this should be done on the level of a European Directive, even if this is a more flexible Level II instrument.

We are aware that, to take one example, the competent authority of a land-locked country may one day find itself in the position of having to deal with the prospectus of a shipping company (as the possibly unwanted consequence of non-choice of authority for equity issuers). Still, we think that providing for this (theoretical) situation with fully-fledged legislation/regulation in this country about what to do if a shipping company should submit a prospectus is exaggerating, drives the harmonisation argument to an extreme, and creates “regulatory costs” on the side of that country’s legislative and regulatory apparatus.

We also think that national competent authorities can judge better what content and legal form of disclosure is necessary in their country to protect investors given the existing national and European rules on prospectus liability and the tradition and qualification of national courts. In some jurisdictions, the request for certain formalities of an expert’s report (on property valuation, on mineral reserves, etc.) may add nothing to the protection of investors. Work in CESR on Level III and/or IV would in our view suffice to co-ordinate competent authorities’ approach in such a context.³

On a few more specific issues, we would like to add the following remarks:

1. Further on the frequent and detailed use of building blocks, we agree with those that see difficulties in applying specific sector provisions to **conglomerates** or other widely diversified groups, or to companies that for other reasons “qualify” for different building blocks (e.g. “scientific” SMEs).
2. We tend to agree with those who fear that the disclosure of an issuer’s **bankers and legal advisers** beyond those that are directly involved in the issue and its documentation adds little informative

³ CESR actually implicitly acknowledges the benefit of reverting to national standards and customs (or the legal necessity to do so) when stating in Annex D that a valuation report must “be in a form acceptable to the regulation applicable to property experts in the country of origin” – this is in our view a good example of a matter to be addressed on Level III.

value to the prospectus as such while possibly creating unnecessary confusion with regard to liability questions.

3. In the area of disclosure of the **previous history of directors** etc., we concede a clear interest by the public in more or less relevant details of the past of such individuals; indeed, we agree that such information may be material to an investor's decision to invest. Nevertheless, we feel that national regulators would be in the better position to assess such information needs against privacy legislation in their countries and that therefore co-ordination of solutions to this conflict of interest (interest of the investor vs. privacy interest of the directors) should be left to level III. In any case, the Prospectus Directive may not be the right vehicle to discuss issues like the deletion of entries in a crimes register etc.
4. We agree with those who are equally critical on the related issue of **putting on display all documents** (contractual and others) referred to in the prospectus. This would in our view in most cases overburden the reader of the prospectus and thus add little, if any, real information value. At the same time, it would put considerable cost and burden on issuers to collate the respective documents and to clear them from recognisable but confidential references to business partners. In addition, the time and effort needed on the regulator's side to scrutinise these documents in order to be able to decide whether any information could be hidden or excluded would be considerable. We fear that such a requirement could actually prove counter-productive, as issuers might tend to hesitate to make reference to documents at all if their mere mention entails all the procedures foreseen.
5. We draw your attention to the concerns of several of our Members about the level of detail and certainty of **profit forecasts** in prospectuses. While some form of prospective reporting (including factors potentially clouding these prospects) should certainly be included in a prospectus, more choice (and attached responsibility) should be left to the management whether to include more detailed, e.g. numeric, forecasts.

As always, we remain available to you and CESR's Members for any further discussion of these and related issues. We may provide additional comments in response to CESR's consultation on the Addendum of December 2002.

Yours sincerely,

Gregor Pozniak
Deputy Secretary General