Date

6 February 2003

Secrétariat
Général

Fédération
des Experts
Comptables
Européens
AISBL

Rue de la Loi 83
1040 Bruxelles
Tél. 32 (0) 2 285 40 85
Fax: 32 (0) 2 231 11 12
E-mail: secretariat@fee.be

Mr Fabrice Demarigny
Secretary General
CESR
11-13 avenue de Friedland
F-75008 PARIS

E-mail: secretariat@europefesco.org

cc Alexander Schaub
David Wright
Christopher Huhne

Dear Mr Demarigny,

Re: CESR's Advice on possible Level 2 implementing measures for the proposed Prospectus Directive - Addendum to the Consultation Paper

Further to our response to you to the first consultation, we are delighted to respond to this second consultation on the Addendum to the Consultation Paper on possible Level 2 implementing measures for the proposed Prospectus Directive.

We would reiterate our concerns as regards the very short timescales with which you are having to work and would note that there are significant issues arising from this consultation that need to be addressed.

In addition, to addressing some of the specific areas and questions identified by you for comment, we have a number of other concerns that we have addressed below.

- A key issue of more general concern for issuers is for you is to properly articulate the building block approach and how this should operate. Indeed we would suggest that you should prepare an overarching annex that explains the manner in which the various building blocks interact. This could be in the form of a decision tree.

- We would reiterate our full support for the proposals to facilitate the creation of an European capital market through harmonising the regulatory framework across the European Union. We feel that enhancing harmonised cross-border confidence in information contained in prospectuses will promote internal market efficiency.

- We would draw your attention to our comments in our response to the first consultation concerning the multiplicity of terms used to describe historical financial information and the roles of auditors and/or independent accountants in relation thereto which continue throughout the annexes included in the Addendum. We believe that to require disclosure of “historical financial information” at Level 2 with the detailed form of its presentation left to be determined at Level 3 is the most appropriate.

  Given the current debate on the role of auditors in relation to financial information and the misunderstanding surrounding the extent of their involvement (which may currently differ from a Member State to another or from a Member State to a non EU-State), either with financial statements or with any other financial information presented in a prospectus, we believe that such

misunderstanding can be avoided or at least reduced by adopting a common approach over reporting by auditors. This comment applies to Annex 2, VII.F.1, Annex 5, VII.F.1 as well as to Annexes in the first Consultation Paper.

We would also recommend that any "public" reporting not required under the provisions of Level 2 implementing measures be precluded and Member State competent authority discretion in this area be avoided as much as possible.

In addition, we would note that requirement VII.F.2 in all the annexes, both in this Addendum and the first consultation, which requires “Indication of other information in the prospectus which has been audited by the auditors” unnecessary as we cannot contemplate what information, other than historical financial information or interim financial information, would be “audited”.

Indeed, we are considering offering further comments on the presentation and disclosure of financial information in Prospectuses with a view to achieving consistent best practice across the EU for the benefit of investors, preparers and others and we therefore may be in touch with you on this point in due course.

- We would also emphasise the comments we made in our response to the first consultation concerning the role of independent accountants or auditors in relation to reporting on profit forecasts.

Finally, in the light of the substantive nature of the comments we, and we understand many other commentators have made, we would strongly encourage you to work with the European Commission in ensuring that the revised texts which come out of the consultation process are made available for further public comment before they are adopted in final form by the European Commission. We believe that the timetable for finalising the Prospectus Directive is more than adequate to allow for this. If you would like any further explanation do not hesitate to contact us.

Yours sincerely

David Devlin
President

Appendix

Responses to specific questions

Debt securities
Trend information

We would draw you attention to the fact that item IV.B.1 that inter alia requires a material adverse change in financial position to be disclosed parallels the requirement in item VII.J concerning disclosure of a significant change in an issuer's financial position. Clearly both should not apply – the former is that which is established in wholesale debt markets and thus, we believe VII.J should be deleted.

In addition, we would request that you consider providing Level 3 advice to issuers as the meaning of both the change statements referred to above, as this is an area where great uncertainty currently exists. We would be delighted to work with you in formulating this advice.

22 *Should any profit forecast that is included be reported on by the company's auditor or reporting accountant?*

Consistent with our response to questions about profit forecast reporting in the first consultation, we accept that there may be value in the provision of reports on profit forecasts by independent accountants. However, such reporting may create expectations because readers of prospectuses are unaware of the limitations inherent in such reporting. Therefore such reporting should first be predicated on the existence of an agreed framework for the preparation and presentation of prospective financial information, including profit forecasts, in prospectuses. A similar framework for review by the company's auditor or reporting accountant should also be established. As no appropriate agreed EU frameworks exist at present, we consider that they should be developed as a matter of urgency with expert input and would be prepared to assist in such a task. These frameworks should include appropriate measures to address the increased risk of litigation which is associated with forecasts.

In respect of wholesale debt securities offerings, we consider that the definition of a profit forecast which should be reported on should be restricted to those forecasts intentionally made for the purposes of the offering concerned. Consequently, the broader definition capturing all extant statements necessary for equity securities offerings should not apply.

Related party transactions

30 *Do you consider that this disclosure requirement should be retained in relation to this type of issuer?*

We believe that the requirements of International Financial Reporting Standards should be sufficient to provide investors in wholesale debt securities with sufficient disclosure about related party transactions. Consequently, no specific requirements are necessary in this Annex.

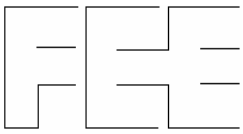
Interim financial statements

33 *Do you consider this approach to be appropriate?*

Consistent with our response to the first consultation, we believe that the requirements for interim financial statements should be consistent with those to be included in the proposed Transparency Obligations Directive for issuers of wholesale debt instruments.

Securities issued by banks

We understand that you have written this annex to address the needs of banks who issue securities as part of their business operations and therefore demand a regime where information about the issuer is only necessary as concerns the credit risk associated with the banks as issuer.



However, we do not agree with the conclusion reached by you, as outlined in paragraph 40, that there is no justification for a specific building block where a bank issues equity, or indeed debt, for its own purposes, for example to increase its regulatory capital. Whilst it may be appropriate to rely on the overarching disclosure principles to ensure that a bank issuing securities for its own purposes makes appropriate disclosure, such an approach would be inconsistent with the building block model you are advocating.

In particular, we believe that there are a number of additional disclosures that could be required of banks and other disclosures that are inappropriate for banks that a building block for banks issuing equity securities should also be developed.

We would note that the United States SEC has specific requirements for disclosure by banks which you should have regard to in drafting your proposals although these do address financial reporting disclosures as well as more general items. Whilst avoiding duplication with disclosures required specifically of banks by International Financial Reporting Standards, additional disclosures might include:

- Details of the regulatory environment in which the bank operates;

- Details of solvency or capital adequacy ratios and the basis on which they are calculated.

Disclosures that may be impracticable for a bank to disclose include indebtedness and working capital requirements,

44 *If so, do you consider that this specialist building block should be applied to non-EU banks that are subject to equivalent level of prudential and regulatory supervision, or should only EU banks be covered by this specialist building block?*

If the building block approach is to work then a specialist building block for banks must apply to all banks. Otherwise, what disclosures would be required of a non-EU bank when it issues securities to EU investors or seeks admission to trading on an EU domiciled regulated market? To the extent that non-EU banks do not make the disclosures required by International Financial Reporting Standards then they should, of course, be imposed.

45 *Other than those disclosures considered separately below, do you agree with the disclosure obligations for banks as set out in Annex [2]?*

We are concerned that the format of Annex [2] is not consistent with the building block approach as articulated by the specialist building blocks exposed for comment in the first consultation. Our view is that the specialist building blocks should articulate amendments to the core building blocks which was the case with those in the first consultation but is not that adopted in this Annex.

We would note that the detailed questions you have asked do not accord with your building block approach and would refer you to our more general responses to disclosure requirements about the relevant core securities.

<u>Derivative securities</u>

We have not responded to the detailed questions that you have posed as concerns derivative securities.

Our general observation is that any solution you determine for derivative securities should properly reflect the building block approach you are promulgating. Specifically in respect of derivative securities there are two aspects that need to be addressed. Firstly, disclosure about the issuer of the securities, which should reflect the extent to which the issuer has guaranteed the performance of the security being issued, and disclosure about the investment underlying the derivative. We note that Annex [3] does not distinguish as to whether it is addressing the issuer or the underlying investment and would therefore require substantial revision.

Asset Backed Securities

93 *Do you agree with the disclosure obligations set out in Annex [4] as being appropriate for this type of securities?*

We have a number of concerns with the Annex [4] and its application.

Firstly and as noted in our general comments in the covering letter, it is unclear to us a stop whether this annex applies to all offerings of asset-backed securities whether retail or debt or as to whether the debt securities annexes, retail or wholesale as applicable, would also expect to be complied with an issuer of an asset-backed security.

In response to this point, our view is that the building block approach should be applied by the annex on asset backed securities setting out either additional or modifications to the requirements for the underlying securities. That is if the issue is of wholesale debt securities then that building block should apply as augmented or modified by the asset-backed block.

Secondly, and importantly, the annex fails to deal with the main point regarding issues of asset-backed securities and that is information about the assets that are backing the securities.

Our view is that rules should be provided which require disclosure about the assets such as legal title, valuation, if appropriate, financial history, if appropriate as well as explaining how the securitisation structure works, in particular the flow of funds. We would advise that these rules should be written such as to be reasonably flexible in order to accommodate a rapidly evolving market place –assets being securitised ranging from financial assets, like mortgages or credit card receivables, through physical assets, like property, to "whole businesses".

Finally, we have some detailed points:

- Special purpose vehicle or entity needs to be defined if it is to be a condition precedent for use of this building block. However, we are not persuaded that it should be what is effectively a condition for the issuance of such securities. If another issuer, not a special purpose vehicle, sought to issue asset-backed securities the additional disclosures advocated above concerning the assets and the structure of the securitisation are just as important.

- Can you please identify which special purpose vehicles or entities you envisage have no legal identity?

Depository receipts

102 *Do you agree with the disclosure obligations set out in Annex [5] as being appropriate for this type of security?*

We are concerned that the drafting of this Annex has confused the roles of the "company". "issuer", "issuer of the underlying equity securities" and "depository". We agree with the overarching presumption that the information in a depository receipt prospectus should be in respect of the underlying issuer of the securities that have been or are to be deposited with the depository.

We would note that both equity and debt securities have been packaged under depository arrangements and thus both need to be addressed in any building block. In our view, the most appropriate way of creating a depository receipt annex is to either determine additional or modify existing disclosure requirements from the appropriate building block that would apply to the underlying securities.

Furthermore, we do not agree with the conclusion in paragraph 99 of the Addendum to the Consultation Paper to not distinguish between the information to be set out in the registration document and that in

the securities note. On the basis that the Prospectus Directive permits the three-document approach for all prospectuses, we do not believe you have the right to disapply this.

Specialist building block for shipping companies

111 *Do you believe that a specialist building block for shipping companies is appropriate?*

We agree with those CESR members who feel that the Core Equity building block can be easily adapted sufficiently easily that the appropriate information can be captured by those disclosure requirements without producing a specialist building block for shipping companies.

We would be concerned that the issuance of such a specialist building block would lead to demands for similar building blocks for many other types of business. We believe that specialist building blocks are only necessary where the nature of the business is so specialised as to require codification of best market disclosure practice to ensure consistency within a particular sector. We are not persuaded that shipping companies fall into this category.

We would note that there are no specific accounting rules or requirements imposed on shipping companies unlike the other types of business identified for specialist building blocks.

Proposal of a Blanket Clause

122 *Do you agree with this approach?*

Whilst it might appear attractive to incorporate a "blanket clause" addressing inapplicable items, we are concerned that you do not believe that the wording of Article 8(3) of the proposed Prospectus Directive does not satisfactorily address concerns as to disclosure of inapplicable items. Further and if the wording of Article 8(3) is deficient, we do not understand how you can override this at Level 2. Accordingly, we would strongly advise you to work with the European Commission in ensuring that Article 8(3) does meet the concerns expressed to you.

Can you also explain as to which the "three draft schedules" referred to in paragraph 120 of the Addendum to the Consultation Paper are? If this clause is to have its proper affect, it must be positioned in such a way as to apply to any prospectus.

123 *Are you satisfied with the wording of the Blanket Clause?*

We are not satisfied with the wording, as it does not appear to make sense. If the information does not exist the requirement cannot apply and would thus be not applicable. Whereas if the information does exist it cannot be omitted unless it is of no relevance to investors?

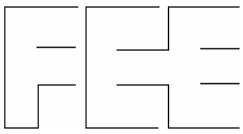
If the clause is to be retained it should be redrafted as follows:

"If certain information required in the line items is not applicable to the issuer or to the securities into which the prospectus relates, and information equivalent to that required is also not applicable, then the requirement shall not apply."

Further, why does paragraph 121 of the Addendum to the Consultation Paper limit to blanket clause to the securities note, it should apply to the prospectus and all its constituents, which is as it appears to have been drafted.

Working capital

125 *Do you consider that this disclosure is more appropriate to the securities note or the registration document?*



As identified in our response to the first consultation, we are supportive of the inclusion of a "working capital" disclosure requirement in prospectuses. As the disclosure is pertinent to the issuer's position at the date a prospectus is issued, it is appropriate that it is required in the securities note.

We would encourage you to consider providing Level 3 advice as to the meaning of "present requirements" and indeed "working capital". Indeed the United Kingdom Listing Authority's Listing Rules were amended to clarify that "present requirements" means "at least the next twelve months". We would be delighted to work with you in preparing such advice.

126 *If you consider that this disclosure is more appropriate to the securities note, do you believe that the other disclosures regarding liquidity and capital resources currently in the registration document should be included in the securities note instead?*

On balance, we believe that the other disclosures regarding liquidity and capital resources are appropriately disclosed in the registration document. This is because they relate to a more general discussion of how an issuer finances its business that would need to be read in conjunction with the rest of the description of the issuer and its business. Clearly, if any material change in any of these other disclosures occurs in the period between the publication of the registration document and the securities note, such additional disclosures as are necessary would be included in the securities note.

Additional SN building block for asset backed securities

143 *Do you consider the disclosure requirements set out in Annex [10] to be appropriate for asset back securities?*

In addition to our comments as regards the registration document for asset-backed securities above, we note you have included disclosures about the underlying assets in the securities note. Properly these should be included in the registration document. Further, the disclosures outlined are quite specific to financial assets and do not readily facilitate disclosures about other asset categories.

In addition, it seems perverse to include the definition of asset-backed securities in the Securities Note annex. Consistent with our response to the first consultation, this should be dealt with in a separate definitions annex.

Part Three - Summary

Need for level 2 advice

168 *Given the level of detail provided for by the Ecofin Text on the scope, language, length and content of the summary; taking in consideration that the summary is based on the content of the prospectus and that it is up to the issuer to evaluate which elements are essential, do you believe that there is need for level 2 advice on the content and characteristics of the summary and that, in particular, there is need to prepare specific summary schedules? If yes, please indicate what level 2 implementing measures should deal with. CESR also welcomes views on the way in which the need to standardise the content of the summary may be compatible with the maximum length the summary should normally have.*

Our view is that the summary should not be standardised as to content or format. The imposition of the 2,500 word limit means that enforced disclosure of standard items may well cause material items to be understated in a summary. Accordingly, we do not believe that it is necessary to prepare specific summary annexes.

However, we believe it would be useful for a schedule to be prepared that made it clear that Annex IV to the Prospectus Directive is "indicative" of the contents which should be considered in preparing a summary but that it should not be seen as mandating the contents for the reasons articulated above. This would be acceptable through the application of Article 7(2) of the Prospectus Directive that makes it clear that the annexes to the Prospectus Directive are "indicative".

Base prospectus/programmes

175 *Do you have any comments on the preliminary views expressed in paragraph [174]*

The key to understanding issuance programmes is that the totality of information disclosed is the same as that for other wholesale debt issues. However, the base prospectus reflects a form of registration document albeit with significantly more disclosure about the securities than would normally be the case. Effectively, the only information outstanding relates to pricing and related matters that should be published in the form of a pricing supplement. The key is to ensure that the pricing supplement does not directly create a new prospectus with the implications thereof.

We would encourage you to ensure that you are provided sufficient time in any mandate as to providing the European Commission with advice in relation to base prospectuses in order to ensure that you can properly consult with market participants.