



Date : 7 February 2003
Ref : CESR/03-038

PROSPECTUS MANDATES SECOND CALL FOR EVIDENCE

Background:

On 7 February 2003, the European Commission published its “Additional Provisional Mandate to CESR for Technical Advice on Possible Implementing Measures concerning the Future Directive on the Prospectus to be published when Securities are offered to the Public or Admitted to Trading”. The request for advice is attached.

The said Additional Provisional Mandate to CESR supplements the first provisional mandate on prospectuses of 18 March 2002, published on 27 March 2002, which remains valid for the areas which have not been subject to change or are not revoked by the Additional Provisional Mandate.

The Additional Provisional Mandate sets three different deadlines for CESR’s technical advice: 31 July – 30 September and 31 December 2003.

The Expert Group on Prospectuses, chaired by Pr. Fernando Teixeira dos Santos, Chairman of the Portuguese Comissão do Mercado de Valores Mobiliários (CMVM) set up for the first provisional mandate will continue its work on the second set of requests also. Ms Sílvia Ulissi, member of the CESR secretariat, acts as secretary to the group.

Call for evidence:

In releasing these requests for technical advice, CESR is inviting all interested parties to submit views as to what CESR should consider in its advice to the European commission. All contributions should be addressed to Mr. Fabrice Demarigny, Secretary General, CESR, 11-13 Avenue de Friedland, 75008 Paris, France or by e-mail to fdemarigny@europafesco.org by 31 March, 2003.

Timetable:

In order to meet the deadlines set by the European Commission, an indicative timetable for the work CESR will be undertaking in response to the Additional Provisional request is as follows:

- Call for Evidence – 7 February 2003
- First contributions to be received by 31 March, 2003
- Publication of a first consultation paper by mid June, 2003
- Final papers to be signed off by CESR in July, September and December 2003

More precise details on the consultation (including possible open hearings) will be disclosed once a more precise timetable shall be established.



EUROPEAN COMMISSION
Internal Market DG

Brussels, 31 January 2003
MARKT/F2 D(2002)
Orig.

Additional provisional mandate to CESR for Technical Advice on Possible Implementing Measures concerning the Future Directive on the prospectus to be published when securities are offered to the public or admitted to trading

This additional provisional mandate to CESR supplements the first provisional mandate on prospectuses of 18 March 2002. The present mandate follows the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002. In this agreement, the Commission committed itself to a number of important points, including increasing transparency. For this reason, this request for technical advice will be made available on DG Internal Market's web site once it has been sent to CESR.

The initial provisional mandate of 18 March 2002 remains valid for the areas which have not been subject to change or are not revoked by the present mandate. The initial provisional mandate is completed by this additional provisional mandate.

This additional provisional mandate for technical advice to CESR does not prejudice in any way the ongoing negotiations in the Council and the European Parliament in the context of the co-decision procedure and the discussions on the final split between Level 1 "principles" and Level 2 "implementing measures". The formal mandate will be sent to CESR once the directive has been adopted by the European Parliament and Council.

1. BACKGROUND

In its Resolution on more effective securities market regulation, the Stockholm European Council called for rapid implementation of the prioritised Financial Services Action Plan, in order to achieve an integrated securities market **by the end of 2003**, including notably the priorities set out in the Lamfalussy Report.

To meet this challenge, the European Council not only endorsed the proposed four-level approach (essential principles, implementing measures, co-operation and enforcement); it also welcomed the proposed establishment of an independent Regulators Committee (CESR) to act as an advisory group to assist the Commission in its preparation of draft implementing measures.

On 18 March 2002, DG Internal Market addressed to CESR two first provisional requests for technical advice; one of those was a provisional request for technical advice

on possible implementing measures on the future Directive on the prospectus to be published when securities are offered to the public or admitted to trading. If the deadline of 2003 is to be met, this will mean not only Directives being adopted before this deadline, but the technical implementing measures as well. This concern is of particular importance for two categories of implementing measures: on the one hand, for those implementing measures which are not subject to any deadline but without which the Directive cannot produce its effects; on the other hand, in those cases where the text agreed in Council provides for the adoption of implementing rules within 180 days following the entry into force of the Directive.

This additional provisional mandate takes into consideration that CESR has indicated that they need enough time to prepare and deliver their advice. Furthermore, under the Lamfalussy arrangement, the European Parliament will benefit from 3 more months, as a minimum, to review the draft implementing measures. These time constraints clearly show that the work of CESR needs to start in advance of the final adoption of the Directive, especially for implementing measures which need to be adopted within 180 days after the entry into force of the Directive.

Timely adoption of the implementing measures is even more important given that some Member States may need up to 12 more months – in case the implementing measures are adopted in the form of a Directive - to have them implemented into national legislation. Implementation of Level 1 and Level 2 measures will need to occur at the same time – so respecting the deadlines is imperative. In order to speed up the implementation process, the Commission might consider to propose the adoption of regulations for the implementation of Level 2 measures for a number of provisions which are covered by the present provisional mandate (e.g. Articles 5, 7, 11, 15 of the draft Directive). The Stockholm European Council, the European Parliament itself and the Lamfalussy report all urged the use of regulations whenever possible.

The first provisional CESR mandate focussed on a number of priority issues and was drafted on the basis of initial Commission proposal adopted on 30.5.2001 COM(2001) 280 final. Both the European Securities Committee and the EMAC were informed. CESR has been asked to provide advice on following priority issues:

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| (1) <u>Minimum Information</u> (Article 6 (1) of the initial proposal for a Directive) |
| (2) <u>Incorporation by Reference</u> (Articles 10 (1) and (3) of the initial proposal for a Directive) |
| (3) <u>Availability of the prospectus</u> (Article 12 (7) of the initial proposal for a Directive) |

Since the adoption of this text a number of changes have been introduced in the ongoing negotiations on the prospectus Directive. On the basis of the amendments proposed by the European Parliament after its first reading the Commission prepared its amended proposal for a directive; further changes were introduced during the negotiations in Council which led to a political agreement on 5/11/02. For instance new comitology provisions have been added – which require additional technical advice to be provided by CESR. The initial CESR mandate also needs to be adapted and supplemented in order to reflect the changes introduced into the text during the negotiations.

At this stage, therefore, new priority areas for provisional technical advice need to be defined in order to meet the tight deadlines.

2. THE PRINCIPLES THAT CESR SHOULD TAKE ACCOUNT OF

2.1. The working approach agreed between DG Internal Market and the European Securities Committee

On 30 January 2003, DG Internal Market consulted the European Securities Committee on a draft request for technical advice. At that meeting, it was agreed that DG Internal Market would request additional technical advice on certain priority issues, and that CESR should immediately start the groundwork on these to meet the 2003 deadline set by the Stockholm European Council Resolution. The meeting agreed that this request should be based on the following approach:

- CESR should take account of the principles set out in the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- The beginning of work on certain aspects of technical advice within CESR shall not, in any way, prejudice the outcome of the discussions between the European Parliament and Council. The request for technical advice does not touch or prejudice Level 1 issues at any stage.
- CESR should start work on the basis of the text agreed in Council on 5/11/02, following the first reading in the EP, on an amended proposal for a Directive of the European Parliament and of the Council on the Prospectus to be published when securities are offered to the public or admitted to trading (Doc 13593/2/02 REV 2), but also take full account of developments in the Council and Parliament which are expected to take place in 2003. For this purpose, the Commission representative attending meetings of CESR or its working parties will regularly inform CESR of any such developments.
- The Commission itself will not issue formal mandates to CESR until the final adoption of the Directive on prospectus in Council and Parliament.
- The technical advice given by CESR will not take the form of a legal text.

2.2. Consultation of the public

The Stockholm European Council endorsed the Lamfalussy recommendations on consultation and transparency. In particular, it invited the Commission to make use of early, broad and systematic consultation with the institutions and all interested parties in the securities area, especially by strengthening its dialogue with consumers and market practitioners. It also stated that CESR should “*consult extensively, in an open and transparent manner, as set out in the final report of the Committee of Wise Men and should have the confidence of market participants*”.

Article 5 of the Commission Decision establishing the CESR provides that “*before transmitting its opinion to the Commission, the Committee [CESR] shall consult*

extensively and at the early stage with market participants, consumers and end-users in an open and transparent manner”.

In this respect, DG Internal Market also draws CESR’s attention to the European Parliament’s Resolution on the implementation of financial services legislation of 5 February 2002 and the Commission’s formal Declaration in response.

DG Internal Market will ensure that the Stockholm European Council recommendations on consultation have been fully met. In particular, it will satisfy itself that CESR has consulted all interest parties on its technical advice in accordance with the CESR Public Statement on Consultation Practices. This provisional mandate will also be posted on DG MARKT website.

Once the Commission has received the CESR’s advice, it will draw up draft legal texts to put forward to the ESC and the European Parliament. It simultaneously publishes those texts on its Internet site. If the Commission amends its draft to reflect discussions in the ESC, those amended drafts will also be made public on the website.

Interested parties will have the opportunity to comment on published draft legal texts. The Commission has set up a dedicated e-mail address (Markt-ESC@cec.eu.int), allowing all interested parties to send their contributions to the Chairman of the ESC. All such comments will in turn be made public on the same Commission website.

Interested parties will have sufficient time to participate in this exercise because the ESC will not be asked for a vote until at least three months have elapsed from the publication of initial draft implementing rules. This will also allow the European Parliament to follow the process and, if it so wishes, to make its views known.

2.3. Access to finance and investor protection

In giving its advice on possible implementing measures, CESR should take full account of two key objectives: the need to encourage and build an efficient, cost-effective and competitive pan-European capital market on the one hand, and to provide the necessary levels of investor protection on the other. More specifically, CESR is invited to deliver its technical advice bearing in mind that the aim of this draft Directive and its possible implementing measures is to ensure investor protection and market efficiency, in accordance with high regulatory standards adopted in the relevant international fora.

3. CESR IS INVITED TO PROVIDE ADVICE ON THE FOLLOWING PRIORITY ISSUES:

3.1. Format of the prospectus (Art. 5 (5))

The format of the prospectus as composed by three separate documents (registration document, securities note and summary) was covered by the provisional mandate of 18 March 2002.

This request needs to be amended and supplemented as discussions have evolved in Council and Parliament. The following changes have been introduced in the amended Commission proposal and form part of the Council's political agreement of 5/11/02:

- (1) The new text offers the possibility to use a base prospectus as outlined in Article 5 paragraph 4.
- (2) The text in its current form gives an additional possibility of drawing up a single document.
- (3) The new text provides for a new comitology provision with respect to technical adaptation of the format of the prospectus.

On this basis, DG Internal Market requests CESR to provide technical advice on the format of the prospectus or base prospectus and its possible supplements by 30 September 2003. The present additional request should be partly covered by work already realised on the basis of the initial provisional mandate as far as the format of the prospectus composed by three separate documents is concerned. More particularly CESR is invited to:

- (1) Complete its work with respect to the format of prospectus as a single document, including the summary as part of the prospectus.
- (2) Specifically consider the particular format of base prospectus and supplement.
- (3) To grant particular attention to offering programs and mortgage bond issues.

The Commission might propose the adoption of a Regulation for the implementation of this provision.

3.2. Minimum Information (Article 7 (1) of the proposed Directive)

In the provisional mandate of 18 March 2002 DG Internal Market requested CESR to provide technical advice on possible disclosure requirements based on the basic structure and typical main features of different types of securities ("building block approach") involving at least the following types of transferable securities:

- (1) Shares: shares in companies and other securities equivalent to shares in companies which are negotiable on a regulated market;
- (2) Bonds: bonds and other forms of securitized debt which are negotiable on a regulated market;
- (3) Any other securities normally dealt in giving the right to acquire transferable securities under (1) and (2) by subscription or exchange or giving rise to cash settlement, excluding instruments of payment.

This request needs to be amended and supplemented as discussions have evolved in Council and Parliament. The following additional elements should now be taken into consideration:

- (1) The definition of securities has not been changed. The latest version of Article 2 (1) (a) sticks to the definition provided for in the Investment Services Directive (ISD) 93/22/EC.
- (2) However, the formulation of article 7 (1) has been largely modified: Different models of prospectuses were introduced in the amended Commission proposal following the first EP reading. The text agreed in Council clearly distinguishes between different models of prospectuses depending on the different types of information needed by investors relating to equity securities, different types and nature of offers and admission to trading of non-equity securities, the format used and the information required for non-equity securities, the size or the public nature of the issuer.

On this basis, DG Internal Market requests CESR to provide technical advice on the different models of prospectuses following the latest drafting of Article 7 (1) – which were not covered or insufficiently detailed in the initial request.

CESR technical advice related to schedules for securities aimed at wholesale markets, for derivative securities and for securities issued by SMEs and credit institutions, should be completed.

Technical advice is required to CESR for following issues:

- (1) Schedules adapted to the particular nature of derivative securities such as covered warrants, certificates or reverse convertibles should be defined; CESR should provide its technical advice by 30 September at the latest.
- (2) Specific schedules or explicit reference in the schedules to certain types of issuers in particular SMEs; CESR should provide its technical advice by 31 July at the latest.
- (3) Specific schedules or explicit reference in the schedules to certain types of entities authorised or regulated to operate in the financial markets, for example, credit institutions; CESR should provide its technical advice by 31 July at the latest.
- (4) Schedules adapted to securities aimed at wholesale markets should also be examined; CESR should provide its technical advice by 31 July at the latest.
- (5) The content of the prospectus to be used for offering programs (Article 7 par. 1 point c) has to be defined. Offering programs are supposed to cover frequent issuances of debt securities by an issuer or subsidiaries of an issuer, for example in the Eurobond market under the denomination “Euro medium term notes” or for derivative securities. Warrants in any form are covered by the definition of offering program (Art. 2 par. 1 point k); CESR should provide its technical advice by 30 September at the latest.
- (6) Particular schedules should be envisaged for the option granted to sovereign issuers and to municipalities in case they choose to draft a prospectus; CESR should provide its technical advice by 31 December at the latest.

The draft schedules should be based on the information items required in the IOSCO Disclosure Standards for cross-border offering and initial listings (Part I) and the existing schedules of the Directive 80/390/EEC¹. The elements concerning the financial information should be in line with the EU accounting strategy and international accounting and auditing standards.

The Commission might propose the adoption of a Regulation for the implementation of this provision.

¹ Council Directive of 17 March 1980 co-ordinating the requirements for the drawing-up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing (OJ L 100/1, 17/04/1980)

3.3. Annual Information (Article 10 (1) and (4) of the proposed directive)

The latest text provides in Article 10 for an obligation for annual information imposed upon issuers.

The following elements are of particular importance in this Article:

- (1) According to Article 10 (1) of the agreed text the content of information required in the document or list of documents provided for in this same article is limited to information that would be required to be published outside the context of a prospectus and, more particularly in compliance with obligations imposed upon issuers under Community and national laws and rules dealing with the regulation of securities, issuers of securities and securities markets. Issuers shall at least refer to the information required pursuant to Company Law Directives, Directive 2001/34/EC and Regulation (E) No. 1606/2002 on the application of International Accounting Standards.
- (2) The comitology procedure foreseen in order to adapt legislation technical developments on financial markets has been limited to measures related to the method of publication of the disclosure requirements provided for in this Article.

DG Internal Market requests CESR to provide technical advice by 30 September 2003 at the latest on possible implementing measures relating exclusively to the method of publication of the document that contains or makes reference to all disclosure requirements published over the past 12 months with respect to information that would be required to be published under Community and national laws and rules dealing with the regulation of securities, issuers of securities and securities markets and more specifically, pursuant to Company Law Directives, Directive 2001/34/EC and Regulation (E) No. 1606/2002 on the application of International Accounting Standards.

3.4. Incorporation by Reference (Articles 11 (3) of the proposed Directive)

According to the first provisional mandate DG Internal Market requested CESR to provide technical advice on possible draft rules on at least on the following:

- (1) The information that can be incorporated by reference in a prospectus (e.g. memorandum of association, annual and interim accounts, press releases); **this request still remains valid.**
- (2) The documents that can be incorporated by reference in order to fulfil annual update requirements linked to the registration document; **this part of the provisional mandate is being revoked since the obligation of annual update has been removed from the text during the negotiation.**

Therefore DG Internal Market only requests CESR to complete its work with respect to the documents that can be incorporated by reference in a prospectus in accordance with the first provisional mandate.

The Commission might propose the adoption of a Regulation for the implementation of this provision.

3.5. Publication of the prospectus (Article 14 (2a))

The latest text provides in Article 14 for an option to require the drafting and the publication of a notice stating how the prospectus has been made available and where it can be obtained.

Therefore DG Internal Market requests CESR to provide technical advice on possible draft implementing rules relating to the content of the notice and its methods of publication by 30 September 2003 at the latest.

The Commission might propose the adoption of a Regulation for the implementation of this provision.

3.6. Advertising (Article 15 (7))

A provision on advertising and, more particularly, the conditions that advertisements should fulfil – for instance in terms of content, presentation and quality of information - was already included in the initial proposal; this provision, subject to several changes, has been also included in the modified proposal following the first reading in the EP and in the Council political agreement.

DG Internal Market requests CESR to provide by 31 December 2003 at the latest:

- (1) factual information regarding advertisement practices and relevant legislation in the Member States;
- (2) technical advice on possible draft implementing rules concerning the dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading, in particular before the prospectus has been made available to the public or before the opening of the subscription.

The Commission might propose the adoption of a Regulation for the implementation of this provision.

4. CESR IS INVITED TO PROVIDE AND ANALYSE FACTUAL INFORMATION BY 31 DECEMBER 2003 AT THE LATEST ON FOLLOWING ISSUES:

4.1. Exemption from the obligation to publish a prospectus – Interpretation of the meaning of equivalence (Article 4 (3))

Regarding conditions for offer of securities to the public, with respect to the exemption from the obligation to publish a prospectus, the text of the initial proposal has been subject to several changes in terms of content, formulation and presentation. Article 4 of the text of the political agreement includes a detailed provision on exemptions from the obligation to publish a prospectus comprising also a comitology provision with respect to technical developments regarding the interpretation of certain of these exemptions as well as the meaning of equivalence.

DG Internal Market would like CESR to provide factual information and analysis of the way Member States interpret the notion of equivalence in the context described in Article 4 by 31 December 2003.

On the basis of the information gathered and provided by CESR and in the light of work realised in the context of the draft take over bids and mergers Directives the Commission will decide whether an additional mandate asking CESR to provide technical advice on possible draft implementing rules will be granted in the future.

4.2 Equivalence of prospectuses drawn up in third countries (Article 20 (3))

A provision on recognition of prospectuses drawn up in third countries was already included in the initial proposal; however, this provision, has been subject to several changes. The most important changes, included in the text of the modified proposal following the EP first reading and in the text of the political agreement, consist in:

- (1) introducing formally the term of “equivalence”
- (2) introducing a comitology procedure in order to ensure uniform application of the Directive in all Member States and, subsequently, uniform interpretation of the term “equivalence”.

DG Internal Market requests CESR to provide factual information and of legislation and practices of Member States regarding the treatment of third countries issuers with respect to drawing up and approval of prospectuses by 31 December 2003.

The Directive leaves to the Commission the decision whether to adopt implementing measures or not stating that the legislation of a given third country ensures the equivalence of prospectus requirements set in this Directive. On the basis of the information gathered and provided by CESR the Commission will decide whether an additional mandate asking CESR to provide technical advice on possible draft implementing rules will be granted in the future.
