

13/02/07

RESPONSE TO CESR'S CALL FOR EVIDENCE:

'THE FUNCTIONING OF THE SUPERVISORY REGIME OF THE PROSPECTUS DIRECTIVE'

I. Introduction and Summary:

1. The Federation of European Securities Exchanges (FESE) represents operators of the European regulated markets and other market segments, comprising the markets for securities, financial derivatives and energy and commodity derivatives. With 24 members, FESE represents close to 40 securities exchanges from all the countries of the EU, Iceland, Norway, and Switzerland. Through its members' activities on a global scale, FESE enjoys links with the regulatory community and industry from around the world.
2. Members of FESE have a long-standing involvement in the admission to listing/trading process as many used to carry out the function of a prospectus approval authority. With the shift of responsibility to the public authority initiated by the Directive, FESE's members do not generally fulfil this function, but retain a strong interest in the proper functioning of the Prospectus Directive regime which directly affects the attractiveness of their markets. Moreover, FESE members are also subject to the EU requirements for initial and ongoing disclosure requirements as issuers.
3. It is with these interests in mind that FESE participates in the process under way to evaluate the supervisory functioning of the Prospectus Directive (PD) regime. We welcome the current consultation, and support the general approach outlined by CESR in the open hearing of 16 January 2007 with regard to the next steps. In particular, we consider that the **Frequently Asked Questions** could be a useful tool and support CESR's intention to update it on an ongoing basis and to extend it to more difficult subjects over time. At the same time, it is very useful for CESR to review its existing **Level 3 Guidance** and revise/add to this set of guidelines in line with the current consultation and the deliberations that will continue until the spring/summer. Finally, since some of the practical problems encountered might emerge from legislative, rather than supervisory, problems, we support CESR's decision to include in its spring/summer report a list of issues on which CESR believes **possible legislative solutions** might be needed, to be communicated to the European Commission in liaison with the ESME Group.
4. The **key points** we highlight in the current response are as follows:
 - a. We urge CESR to limit **inconsistencies in the application of the time periods** which could undermine the passport for issuers and lead to an inefficient issuance process.
 - b. We urge CESR to remain involved in the process of **establishing equivalence of 3rd country accounting standards** and to lend its support to **speedy, timely and comprehensive solutions** for issuers from around the world, including the most dynamic

economies in the world such as China and India which are currently not included in the scope of the Commission's work.

- c. It would be useful to identify, and address, instances of certain host country supervisors requesting **additional information** that go beyond the PD.
- d. To make sure that the **scope of the Directive is coherent** across Europe, CESR could ensure that the supervisors utilise a consistent interpretation of key terms such as "**public offering**" and "**qualified investors**".
- e. We urge CESR to study how often the powers of **omission of information** under Article 8(2) of the PD are used and whether the application is consistent across Europe to determine if there is need further CESR guidance.
- f. While advertisement was not fully harmonized in the PD, at least many of the **practical inconsistencies in the application of the advertisement rules** could be minimised through CESR's work.
- g. CESR would do well to bring certainty to the question of whether certain **novel underwriting methods**, such as "decoupled book building" (accelerated book building), are seen by all the regulators as fully in line with PD.

5. Please see the next section for more detailed comments.

II. Detailed Remarks:

6. **Usefulness of the FAQ:** As stated above, we find the practice of creating and updating the FAQ potentially very useful in the activity of interpretation and implementation of the PD provisions. We urge CESR to tackle a broader scope of issues in this document that extend to more difficult subjects than the issues included so far. On the other hand, we agree with CESR that issues that require the lengthier deliberation process associated with drafting CESR guidelines should be included in guidance, and not in FAQ. As an example, in some instances the FAQ highlights differences of views adopted by the competent authorities. While in some cases such differing views could continue to exist without undermining the functioning of the regime, in many cases they might have to be dealt with through further supervisory convergence (Level 3) or even further legislative action where such harmonization is necessary to achieve a level playing field. In any case, the link between the Level 3 guidance and the FAQ needs to be made clearer and the use of FAQs should not be considered as a substitute for Level 3 guidelines. Close cooperation with the market participants will be useful in determining the scope and content of the FAQ.
7. **Harmonising time periods related to approval process:** The Directive harmonises to an extent the time periods related to the approval process, but leaves open certain aspects. Given that the market works around the clock and the 'time to market' affects the cost of capital, we draw attention to inconsistencies in the application of the time periods that may lead to certain products

being held up in a lengthy process. Initial evidence suggests this is a potential problem, for example in relation to different periods applying to the offering prospectus as opposed to the prospectus for admission to trading.¹

8. **Equivalence of 3rd country financial reporting standards:** FESE members supported the European Commission's decision of December 2006 regarding the extension of the deadline for the determination of the equivalence of other accounting standards with IFRS. However, we are concerned about the next steps in this area. There are two elements: 1) timing and 2) content.
9. Firstly, the December 2006 decision came far too late for certain issuers, who already had to make decisions on whether or not to remain on EU's regulated markets about six months to a year before the deadline of end-2006. Going forward, issuers need a clear and timely decision with regard to exemptions and temporary regulations regarding the acceptance of 3rd country accounting standards.
10. Secondly, the discussion in this process is so far focussed only on the US-GAAP, Canadian GAAP and Japanese GAAP. We see a strong need to extend the scope of this discussion to other jurisdictions, such as Switzerland, China and India. This is absolutely necessary to allow European exchanges and capital markets to participate in the economic revival of emerging markets, especially in Asia and the CEE.
11. We recognise fully that the responsibility for resolving these problems lies above all with the Commission, but urge CESR to take our concerns into account in all fora where CESR is asked upon to contribute to this process.
12. **Passporting/Content of prospectus:** CESR could make a "survey" of the different practices undertaken by national Competent Authorities and subsequently analyse the outcome. After this fact-finding exercise, CESR would be able determine whether there is a need for further CESR guidance to eliminate divergences. For example, there is some evidence that certain host country supervisors have been requesting additional information. This is certainly an area that CESR should focus on in its immediate work since it could undermine the passport seriously.
13. **Application/Consistent interpretation of the term "Public offering":** The Directive requires a prospectus for public offers and admission to trading; thus, the private placement exemption holds an important place in defining the scope of issues that are subject to the regime. For this aspect of the PD to function well, the supervisors must be operating on the basis of a consistent interpretation of the term "public offering" as well as related terms such as "qualified investors".

¹ As an example, in Italy the implementing legislation retained the distinction between the so-called "listing prospectus" and the "offering prospectus". The contents of the two types of prospectus have been harmonized due to the direct application of Regulation 809/2004. However, the distinction remains relevant for purposes of approval of the prospectus. In fact, the 10 or 20 day deadline provided as per article 13 of the PD starts running from the submission of the draft prospectus in the case of an offering prospectus. If however a listing prospectus is submitted for approval, the 10 or 20 day deadline does not start running until the day when the official decision of admission to listing from the company managing the regulated market is delivered to Consob. The PD does not provide that the 10 and 20 day deadlines start running after a decision of admission to listing on the RM: on the contrary, PD provides that the 10 or 20 day deadline starts running from the time of submission of the draft prospectus whether is a listing prospectus or an offering prospectus (or both).

CESR should seek to ensure that the interpretation of this term does not differ from Member State to Member State.

14. **Omission of information:** One of the areas where the PD needs to be implemented consistently is the way in which the authority exercises its right not to require certain kinds of information pursuant to Article 8 Para 2 of the PD. It would undermine the passport if certain information that is explicitly required in Level 2 is then exempted pursuant to this article of Level 1. Arguably, the omission of information should not apply to items that are explicitly required in the Level 1 and Level 2 texts. In any event, divergences would be unhelpful and confusing. While we do not have sufficient information to assert that this is a serious problem, we urge CESR to study how often the powers under Article 8(2) of the PD are used and whether the application is consistent across Europe. After this fact-finding exercise CESR can determine whether there is need for further CESR guidance to eliminate divergences.
15. **Advertisement:** We recognise that this is an area that has not been harmonised to a significant extent in Level 1 and Level 2. However, even within the scope of the PD regime, further supervisory agreements could be utilised to facilitate cross-border issuance. We thus support the many comments made in the open hearing to the effect that inconsistencies in advertisement rules should not be allowed to serve as an obstacle to the functioning of the passport and should be minimised.
16. **Barriers to innovation, e.g. in the context of decoupled book building:** The Directive was intended to encourage innovation. We are concerned that it is not clear whether certain new underwriting methods, such as “decoupled book building” (accelerated book building), are seen by all the regulators as fully in line with PD. It would be good for CESR to hold a discussion on this subject and to identify areas where greater legal and supervisory certainty can be provided to the issuers which use such accepted market innovations. This subject could be included in CESR’s FAQ on an updated basis. At the same time, this vehicle should not create the presumption that a product or process is only allowed if explicitly mentioned in CESR’s guidance or FAQ since such an approach would be completely at odds with the PD and block the market’s ability to innovate.

III. Conclusion:

17. We thank CESR for the opportunity to provide comments and remain ready for further inquiries. We also look forward to providing further input on further Level 3 guidance after the spring/summer report of CESR or earlier.