Cesr’s Recommendations for the Consistent Implementation of the European Commission’s Regulation on Prospectuses No. 809/2004

We thank you for the opportunity to respond to your request for comments on the proposed Recommendations for consistent implementation of the Prospectus Directive implementing guidelines.

We want to bring some issues to your attention in order to assist you in preparing proper guidelines for implementing the Prospectus Directive. We will divide our comments in two parts – general comments – and specific comments following the questions raised by you.

A. General comments

(1) Liability issues

General liability for the prospectus

In order to harmonise consistent and equal implementation, with all consequences it may have on different issues, we want to bring to your attention the importance of equal liabilities not pending on in which EU member state the issue is raised. The guidelines do neither cover the liability issue generally nor specifically. The liability issue is a question of liability for the issuer, (the company) the possible offerer and advisors as well as for the auditors. The guideline does not deal with these questions at all. To avoid different treatment depending on different rules in different Member states, we believe this issue should be harmonised.

The liability for the auditors

The guidelines do not deal with the role and liability for the auditors. The Minimum Disclosure Requirements require the name of auditors to be given. The names of the auditors are given directly after persons responsible for the prospectus. This may create an expectation on auditors to have a general responsibility for the whole prospectus. However, this is not clearly indicated. In addition, the auditors should give opinion on historical financial information, profit forecasts or estimates and pro forma statements.

We believe that this liability issue should be clarified and harmonised.
(2) The need for clear definitions

In many cases there are unclear definitions, which may lead to different and inconsistent interpretation of the rules and guidelines. To describe this issue in more detail, we want to give the following examples:

- the definition of profit forecasts or estimates as stated in point 49
- the definition of significant gross change as stated in point 97
- working capital as defined in point 113

(3) The need for "model prospectus"

We believe that giving models and examples would be an efficient way to achieve consistent practise. Obviously due to the short time frame, giving models and examples have not been possible. In the future, we believe that by exemplifying and giving models, the best harmonisation can be fulfilled.

(4) Specialist issuers

It is understandable that issuers, which carry out activities of particular nature, should provide more detailed information, especially in cases where there are high risks. Article 23 of the Regulation states that where the issuer is a

- property company
- mineral company
- investment company
- scientific research based company
- company with less than three years of existence (start up company)
- shipping company

the competent authority of the home Member State may ask for adapted information.

However, the guidelines require very sensitive and detailed information for these kind of companies. We believe that issuers should be treated equally principally. For example, why should shipping companies give all details of their vessels and time charter conditions, when an airline company is free from this requirement? Only, when there are significant risks, we can support requirements for more detailed information (i.e. start up companies).

(5) Complex financial histories

The proposed recommendations do not include guidance in respect of complex financial histories. We strongly encourage you to provide recommendations in this area, as it is essential for consistent implementation of the Prospectus Regulation.

B. Specific comments

Responses to questions

(1) Selected financial information

30. Q: Do you agree with this proposal? If not, please state your reasons.

The selected financial information must provide the key figures that summarise the financial condition of the issuer. Selected key figures are often used for building a
view of the issuer’s financial position. The guideline is not detailed and does not
define any specific key information other than a list of very general selected financial
data. We believe that the list of example does not very well cover critical key
information as Gross Margin, EBITDA or other such key figures. Thus the guideline is
too general.

However, this part may be given to self regulation, which as such in situations with
different kind of activities, can be the best solution.

Moreover, the phrase “on a straight-forward basis” is unclear and need more specific
guidelines.

(2) Operating and financial review

37 Q: Do you consider that it is appropriate to include key performance indicators
about past performance?

We broadly agree with the proposed recommendations. Companies use different key
performance indicators (financial and non-financial) to analyse their past
performance. As these indicators are also followed by investors, including indicators
in the prospectus can be of great value to investors when assessing company’s
performance.

Other comments

It is difficult to give a detailed recommended structure and therefore the high level
non-prescriptive approach used in the proposed recommendation is appropriate.
However, in order to ensure that companies include certain essential disclosure on
company’s historical performance, it would be beneficial to include certain minimum
information recommendations. We feel that as a minimum companies should discuss
the changes in revenues - whether they are due to changes in prices, volumes or
Currencies. Furthermore, management should inform if the past is not indicative of
the future and the reasons for this.

(3) Capital resources

42 Q: Do you agree with this proposal? If not, please state your reasons and please
provide alternative information

Whilst generally in agreement with the recommendations, it is unclear how detailed
information should be given on issuer’s covenant arrangements.

(4) Profit forecasts or estimates

50 Q: Do you agree with the above approach in relation to profit forecasts and
estimates? If not, please state which particular aspects you do not agree with and
give your reasons.

General assumptions

The principal assumptions given, on which the issuer has based its forecast, or
estimate, are very important. Also the distinction between assumptions about factors
that could be influenced and factors exclusively outside of influence is of importance
for the investors.
Reliability from the auditor’s point of view

The forecast should be reliable, i.e. it should be supported by a thorough analyses of the issuer’s business and should represent factual and not hypothetical strategies, plans and risk analyses. As FEE also comments, this means that the issuer should have a proper process for preparing estimates and also for estimating changes in strategy or tactics. In cases where the issuers have a history of bad estimation accuracy, the situation regarding reliability is very critical. How should the auditor be convinced regarding “properly prepared”? Can an issuer with poor estimation ability publish forecasts at all?

Definition of “correct” and “no longer valid”

When is a profit forecast not correct? The above mentioned definitions should be clear and detailed.

The liability of the auditor

The auditor should give an opinion stating whether the forecast or estimate has been properly compiled on the bases stated and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer.

There may be an expectation gap if the profit forecast has been prepared based on significant growth, which later on was not realised. Should the auditor also consider the degree of possibility to achieve the forecast? Could it be stated afterwards that the forecast was not reliable and that the auditor should have known it? Clear rules are needed.

51. Q: Do you consider that it is appropriate to provide examples of what may or may not constitute a profit forecast or estimate? If so, could you please provide some examples?

As also commented above generally, we believe that the lack of detailed guidance is likely to result in different practise. Profit forecasts or estimates may be considered as important from the investor’s point of view. In that sense clear definitions should be given.

(5) Historical information

75 Q: Do you agree with the conclusion stated in the previous paragraph? If not, please state your reasons.

The requirement in Item 20.1 states that the restated financial statements should be independently audited or reported on as to whether or not, for the purposes of the registration document, it gives a true and fair view, in accordance with auditing standards applicable in a Member State or an equivalent standard. This rises certain practical questions relating to the audit of the restated statements. In order for financial statements to show a true and fair view IAS 8 requires comparative information for the immediately preceding period to be presented. Applicable auditing standards prohibit an auditor to issue an audit report on separate individual statements without a comparative period. Therefore, when restating their financial statements for the two most recent years also the earliest/third year should be restated as a comparative year. This factually leads to a requirement to apply IAS/IFRS standards one year earlier than otherwise required by the EU Regulation 1606/2002.
Furthermore it is unclear whether the evidence supporting a new opinion can take into account the evidence obtained by the auditor of the underlying statutory financial statements. This matter can have substantial cost and time implications for the offering process. In addition, the requirement in paragraph 20.1 does not explicitly mandate an “audit”. We would encourage you to liaise with auditing standards setters in Europe to develop an appropriate reporting solution.

85 Q: Do you agree with this proposal? If not, please state your reasons.

If the issuer applies national accounting standards when presenting audited historical financial information, paragraph 20.1 includes a list of minimum financial information. This means that the previously issued and audited statutory information is in some cases reissued with additional disclosures and statements. The recommendation should clarify how this additional information should be presented and how should the auditor report on it.

Furthermore we would like to point out that the current Finnish Companies Act states that Report of the Board of Directors forms part of the companies statutory financial statements. This report is therefore audited and might include additional information on the company’s financial position that should be read together with the primary financial statements and notes. We understand that the paragraph 5 under Item 20.1 lists only the minimum requirements and additional information such as the Report of the BD could be given.

(6) Pro forma financial information

92 Q: Do you agree with this proposal? If not, please state your reasons.

We support the proposed recommendations relating to the definition of an “independent accountant”. We, however, do not believe that accountants other than those qualified to be appointed as statutory auditors should be able to report as required by the Prospectus Regulation.

98 Q: Please provide examples of indicators of size, which you consider appropriate.

We strongly feel that indicators of size should be set in order to ensure harmony in compliance. A significant change could be measured at least in relation to the total assets and revenues of the issuer.

Additional items

Furthermore we believe that the recommendation should include more guidance on what statements and information is expected to be given. It should also clarify that the pro forma financial information should be prepared on the same basis as the historical financial information presented under Item 20.1.

Paragraph 4 of Annex II: Pro forma financial information building block 4 states that the separate financial statements of the acquired businesses should be included in the prospectus. The proposed recommendations include no further guidance on how this requirement should be applied.

(7) Scientific research based companies

177 Q: Do you agree with the proposed recommendations? If not, please state your reasons.
The disclosure of details as described in 175 a) - d) should not be mandatory but the issuer should be free to include it. The requested information, as described, may include confidential business information that might be used by other parties for the disadvantage of the issuer. Accordingly, the issuer should be free to choose to what extent and how detailed it wishes to give information regarding its R&D activities, patents in progress, testing of products, key staff, business agreements and products in development.

(8) Start-up companies

187 Q: Do you agree with the specific disclosure requirements set out for start-up companies? If not, please state your reasons and refer to the additional information you think should be required.

We do not agree that start-up companies would be required to disclose figures and sensitivity analysis in their business plan. An uncertain future and high risk is the very nature of start-up business and accordingly the high risk associated to start-up businesses should be clear to potential investors. Thus requiring figures and sensitivity analysis information of two future years may lead investors to give unjustified confidence on the information.

188 Q: Do you agree with the proposed definition of start-up companies? Would you instead prefer that these companies are defined as those that have less than three years of existence? Please state your reasons.

We do not agree with the proposed definition of start-up companies. This is because, as drafted, it would in our understanding include also new companies that have acquired existing business or that have been established for the purpose of the existing business to raise funds from the capital markets. In this kind of situations the underlying business may have operating existence of over three years, although the legal entity raising funds is new.

189 Q: CESR may recommend to its members one of the following four options. Please state your preference and reason for your answer:

The expert's report should not be mandatory, but the issuer should be free to include it.

(9). Clarification of items

2n – Statements by experts

“278: When analyzing whether an expert, who has produced a report included in the prospectus, has a material interest in the issuer, the issuer is normally expected to consider the following circumstances, among others:"

When analyzing whether an expert has a "material interest" it should be clearly defined:

1. what is the time frame (i.e. during how many years in the past) that should be considered, whether the expert has been "a former employee" or "received any compensation"

2. whether the expert with material interest relates to individuals only, or to the entire firm providing the expert report or to any global member firm associated
to the firm/individual that provides the report,

whether a former employment to the issuer of any current employee of the firm providing the expert report create a material interest in the issuer.

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