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Position on

CESR's Advice on Level 2 Implementing Measures for the Proposed Prospectus Directive April 2003 – CESR/03-066b May 2003 – CESR/03-128

for

The Committee of European Securities Regulators

Frankfurt am Main, 15 June 2003

Introduction

As a member of the Consultative Working Group nominated by CESR to assist in the process of implementing the Level 2 Measures for the proposed Prospectus Directive I am pleased to provide my position on CESR's Advice on Level 2 Implementing Measures for the Proposed Prospectus Directive as of April 2003 (Document 03-66b including Annexes) and May 2003 (Document 03-28).

Although my following remarks will focus on revisions which I deem to be necessary I would like to state that the Advices form an important step towards requirements which match the interests of the issuers and the interests of the investor. By assuming many comments from the positions submitted on the previous Consultation Papers the requirements for information on the issuer have been reduced in many cases to a level which has been proven sufficient by market practice for many years. This reduction, however, does not endanger the protection of investors, but form elements for a prospectus that could be understood by many investor categories. It focuses on information which is important for an investment decision and avoids disclosures (for example pro forma, profit forecast, related party transactions) either not relevant especially for debt investors or possible only under uncertainty, which easily could mislead investors.

The suggestions which I would like to submit with regard to the CESR's Advice on Level 2 Implementing Measures for the Proposed Prospectus Directive as of April 2003 and May 2003 are as follows:

Historical Financial Information/International Accounting Standards (Para-graph 35 and Registration Documents)

CESR considers it sensible that the consolidated financial statements for the previous year or possibly two years to be restated or reconciled according to the standards adopted pursuant to the IAS Regulation. This requirement will constitute a severe cost hurdle, especially for the small and medium sized enterprises, including small banks. It could lead to the fact that such issuers will postpone an access to the capital markets for some years simply for cost reasons.

In addition to that, CESR allows audited financial information according to local GAAP to be used for a prospectus. However, CESR requires that the financial information under this heading must include several items. This list has to be deleted. Issuers should be able to disclose their accounts in whatever form they are required by national corporate law. The Registration Documents should not impose changes to national corporate law rules. CESR should avoid to create hurdles especially for small and medium sized enterprises.

For example for institutions with single accounts, the German statutory accounting standards (HGB) do not prescribe a cash flow statement. Neither is such a statement the subject of the audit. Thus, the Prospectus Directive would introduce an additional, costly requirement which, to date, is unwarranted by the existing European accounting

standards. In their current form, particularly the IAS provisions and the Transparency Directive allow for derogation clauses in this respect.

Although I have rejected less onerous disclosure requirements for small and medium sized enterprises in my previous positions, I would like to state, that this group of issuers should not be faced with onerous burdens.

Interim Financial Information (Registration Document Banks, Section 11.6)

The requirement of an interim report exceeds the requirement under the draft Transparency Directive since this also regulates the public offering of bonds. I would like to reiterate that CESR should not autonomously require reporting obligations. Due to the lower insolvency risks of banks, due to the public supervision, the level of disclosure required for securities issued by banks should generally be lower than that required for retail corporate debt. Given that the Wholesale Debt Registration Document does not require interim financial statements, it would therefore be preferable not to require them in the Banks Registration Document either. Therefore, this requirement should be deleted.

Responsible Persons (Registration Documents, Section 1)

The present wording requires the cumulative disclosure of the names and functions of natural persons and legal persons responsible for the registration document. Whether or not natural persons shall be liable for the prospectus is an issue of local corporate law. According to German law only legal persons must accept responsibility of a prospectus. Therefore the wording should be changed from "and" to "and/or".

Major Shareholders (Debt Registration Documents)

The wording shall be changed from "To the extent known to the issuer" to "To the extent published according to national law". As already stated in my December Position detailed information on major shareholders will not influence the ability of an issuer to meet its obligations with regard to interest and redemption payments. Such disclosure is relevant for equity securities, as it describes the level of influence an investor might have – whether he/she could influence the business direction together with other groups of investors or is restricted to the level of a "debt" investor with "dividend rights" solely dependent on the decisions of the major shareholders. In addition, for equity securities such information is important, as it gives decisive hints to the price potential, expected volatility and liquidity of the share. Such information is not of relevance for debt investors.

Therefore, the issuer should be required to publish the names and holdings of major shareholders of the company as long as they have already been published according to the respective national law.

Share Capital (Equity Registration Document, Section 21.1.)

Details on the share capital shall be disclosed as of the date of the prospectus and not as of the date of most recent balance sheet. Otherwise a section in the trend information would have been necessary to update this information.

Terms and Conditions of the Offer (Various Securities Notes)

As already suggested in my February Position CESR shall explicitly require the reprint of the complete conditions of issue so that no doubt can arise. Such text is the only legally binding relationship between an investor and the issuer and is therefore the core element in evaluating any offer of securities.

Placing and Underwriting (Various Securities Notes)

CESR has suggested to require detailed information on the material features of the agreements among the entities participating in the underwirting and placement of an issue, including the quotas and the commissions. This requirement shall be deleted. Such disclosure requirement could lead to major frictions in the market without providing meaningful information to investors. On the one hand, such information, especially quotas, will often be fixed subject to market conditions immediately prior to the launch. On the other hand, the disclosure of the competitive position of banks will influence the markets. Futhermore, normally "underwriting" and "placement" are separate aspects, although the commission split between underwriting and placement is a business decision. Quotas with regard to the placement are only available at the time of closing the offer. In addition, the detailed division of expenses can only be determined after an issue, because the sales commission is determined according to the actual number of placements achieved by the individual intermediaries.

It is sufficient, if the total costs of an issue, divided into banks' commission and material costs, would be included in a prospectus according to the section "Expenses of the Issue or Offer".

Indication of Yield (Debt Securities Note, Section 14.8)

CESR should make clear what is meant with "an indication of yield". The effective yield will only be available after the issue price has been fixed.

Guarantee (Guarantees Building Block, Section 2)

In principle, the text of a guarantee shall be reprinted in the prospectus to allow the investor to check the texts. Only in cases the guarantee is too complex the competent authorities shall be allowed for a waiver.

Structured Bonds (Document 03-66b, Paragraph 63)

As I have already stated in my February Position, debt securities shall consist of plain vanilla bonds only. Structured bonds shall be treated as derivative securities. This would easen the classification of such products. The Securities Note for Derivatives is comprehensive enough to sufficiently cover all necessary disclosure requirements for such securities.

Availability of Prospectus (Document 03-066b, Paragraph 106)

The wording "each document shall indicate where the other constituent documents of the full prospectus may be obtained" shall be made clear. For practical reasons it could not be the case that the each document which bcomes part of a prospectus by incorporation by reference shall bear the information for which prospecti it has been used. It is be sufficient that the prospectus contains such a list.

Specialist Building Blocks (Document 03-128, Paragraph 11)

CESR has suggested to give the competent authorities the right to require a valuation report or other expert's reports providing specific explaination or justification in cases of specialist issuers or industries. This clause shall be specified in a way that it does not form a general and unlimited opening clause to Level 2. In line with my overall rejection to valuation reports or other expert's reports expressed in my February Position in general I cannot see the need for an unspecified clause.