Response to
CESR's Advice on Level 2 Implementing Measures for the Prospectus Directive
Ref. CESR/03-210b

30 October 2003

Introduction

Deutsches Aktieninstitut e.V. is the association of German exchange-listed stock corporations and other companies and institutions which are engaged in the capital markets development. Its most important tasks include supporting the relevant institutional and legal framework of the German capital market and the development of an harmonised European capital market, enhancing corporate financing in Germany and promoting the acceptance for equity among investors and companies.

The BDI is the umbrella organisation for a total of 35 industrial sector associations and groups of associations in Germany. It represents the interests of 107,000 enterprises employing 7.7 million people.

A. General Comments

We would like to summarise our comments on CESR's Advice on Level 2 Implementing Measures for the Prospectus Directive as of July 2003 (Document 03-210b including Annexes) as follows:

- We in principle agree with CESR's approach referred to as "option 2" that, for comparability reasons, the last two years of audited historical financial information to be included in a prospectus should be prepared in accordance with the accounting standards which will be adopted in the issuer's next annual financial statements. However, this requirement should not become effective before the year 2007. Otherwise, in particular with respect to the introduction of IAS in the year 2005, the proposed approach would already impact on the financial year 2003. Furthermore, with respect to debt securities, it should be sufficient if the audited historical financial statements have to be prepared in

DAI

Deutsches Aktieninstitut e.V.
Börsenplatz 5 60313 Frankfurt am Main
Telefon 0 69 / 9 29 15-0 Telefax 0 69 / 9 29 15-11
E-Mail dai@dai.de Internet http://www.dai.de

Deutsches Aktieninstitut e.V.
31, rue du Commerce 1000 Bruxelles
Phone +32 2 290 89 90 Fax + 32 2 290 89 91
E-Mail europa@dai.de Internet http://www.dai.de

accordance with such new accounting standard only in respect of the last year. With respect to debt securities, CESR should not impose additional financial information requirements on companies for the purposes of a prospectus over and above those imposed under the IAS Regulation.

- The annex for sovereign issuers should also cover the other public bodies referred to in Article 1(e) of the Directive and the general wholesale or retail schedule should not apply to public international bodies.

- A "black-out period" for advertisement is not necessary. Rather, it should be required that, whereever an advertisement is published, it should contain a reference to the prospectus and where it is or will be available.

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III.1 Member States, Non-EU States and their regional or local authorities

Question 30 (Scope of the annex for sovereign issuers – public international bodies)**:**

No, public international bodies are funded by a state or a state authority and the issue of securities by such body does not involve an insolvency risk which is significantly higher than the risk related to securities issued by states. Furthermore, such public entities do not undertake a profit making business. Therefore, it would be inappropriate to apply the general wholesale or retail schedules to such public bodies and most of the requirements set forth in such schedules are not suitable for such issuers. As public bodies are by their nature more similar to states and other public authorities, it would be preferable if the annex for sovereign issues is applied to them with some minor amendments if and to the extent necessary.

The above should apply to issues by all types of public bodies and non-profit organisations referred to in Article 1(e) of the Directive.

Question 32, 33 (General disclosure requirements for sovereign issuers)**:**

We agree with item (a) to (g) of the list. However, items (h) and (i) should be deleted since the issues of securities covered by this annex do not involve such experts nor is it required that the budget of the relevant public entity which is public anyway is put on display. Rather, Annex D should include a requirement that the prospectus contains a reference to where the relevant public data are available.

Question 35 (Item 4 of Annex D – list of specific disclosure requirements relating to public finance and trade)**:**

Since there is a broad variety of public authorities not all of the specific requirements of item 4 may be suitable for each public issuer. Furthermore, even the disclosure requirements for states may differ depending on the economy of such state. Item 4 should therefore require in more general words a general description of the issuer's current financial and budgetary situation. Eventually, the disclosure referred to in the list set out in item 4 of the proposed annex may be included into the annex as samples of the disclosure which should be considered without each item being mandatory.

Question 40 (Description of the investment and development plans of the issuer and the issuer's prospects)**:**

We do not deem such requirement be included in Annex D. If an authority can be insolvent and if such investments may significantly impact on the ability of the issuer to repay its debt, then this should be set out in the risk factors section (as contemplated by CESR in paragraph 37). If CESR wishes to clarify this by means of an explicit requirement, it should require a description of the investment and development plans of the issuer and the issuer's prospects only where this may have a significant impact on the ability of the issuer to repay its debt.

Question 42 (Conflict of interest for any expert used by the issuer):

It is not clear which type of expert may contribute to the content of the prospectus with respect to information which is relevant for a state's ability to repay its debt (see also our response to question 32). This requirement should therefore not be included.

III.2 Financial information requirements in a prospectus

Question 56 (Reconciliation):

The amount of work required for a reconciliation is (not only marginally) less than the amount of work for a full restatement although a reconciliation still is quite burdensome since, as indicated by CESR, all adjustments and differences in acccounting policies would need to be identified. In particular, it would be very time-consuming to reproduce the items of the notes and all relevant contracts would need to be scrutinised again if a full restatement were made.

Question 57 to 60 (Comparability of audited financial information):

The audited historical track record and the reporting standards that are to be adopted should, in principle, be comparable. Consequently, IAS provide for example that a comparability statement is made with respect to the year before IAS have been adopted. From a mere IAS perspective, it would therefore be sufficient if the approach set out in paragraph 50 is followed.

However, given that the prospectus requirements provide for an inclusion of a three year audited historical track record for equity issues and a two years record for debt issues, these historical financial statements should, in principle, be comparable in order to achieve their objective to inform the investor on the historical financial development of the issuer. This comparability is currently achieved by including the historical track records audited in accordance with local GAAP or other GAAP applied by the relevant issuer in accordance with the law applicable. In the case of local GAAP, this comparability is however limited if applied in the context of an integrated European capital market since each Member State has different accounting standards. Furthermore, the audited historical statements included in the prospectus should be comparable with the financial statements made after the securities have been listed on a regulated market, in particular when IAS become a mandatory standard for listed companies. We therefore generally agree with CESR's approach that EU issuers should be obliged to produce their financial statements in a manner that all investors in the EU can assess the issuer's financial conditions on the basis of IAS. To the extent that IAS are applicable, any such restatement should be made in accordance with the new IFRS 1 "First-time Adoption of International Financial Reporting Standards".

However, as indicated by CESR, it would be too burdensome for issuers to include three years of audited historical financial information prepared in accordance with a new standard to be adopted. With respect to equity issues, we therefore in principle support CESR's view (option 2) that two years of audited historical financial information to be included in the prospectus should be prepared in accordance with a new standard, i.e. a new accounting system, to be adopted. However, we have the following reservations with respect to this approach:

- This approach should only apply to a new issue of equity securities. The issue of debt securities should not be subject to a preparation of financial statements for two years in accordance with a new standard, namely IAS. Since almost all issuers which, as listed companies, are subject to the new IAS Regulation beginning from the year 2005 also issue debt securities quite frequently, option 2 would, if applied to the issue of debt securities, *de facto* result in such listed issuers being obliged to start (or to have already started) to prepare their accounts in accordance with IAS now, i.e. for the financial year 2003 (two years before 2005 when IAS becomes mandatory). IAS itself would however require such issuers only to produce a comparability statement with respect to the last financial year, i.e. 2004. Furthermore, we do not believe that the issue of debt securities where information provided to inves-

tors should focus on the solvency of the issuer requires the same level of comparability as equity issues. With respect to debt securities, CESR should therefore follow the approach referred to as option 4 as set out in paragraph 50, i.e. CESR should not impose additional financial information requirements on companies for the purposes of a prospectus over and above those imposed under the IAS regulation.

- While in respect of equity issues, we believe that option 2 is in principle acceptable, the inclusion of audited historical financial statements prepared in accordance with IAS should be mandatory only from the year 2007. A full restatement is extremely burdensome and potential issuers must be in the position to plan, for instance, their initial public offering in time. If the approach referred to as option 2 were applied already for the year 2005, the audited financial statements would need to be prepared in acccordance with IAS already now, i.e. for the year 2003. This could impair equity issues proposed for the near future, in particular in light of the current economic environment. By contrast, a transitional period would allow new issuers to take into account that their accounts would need to be prepared with respect to IAS financial statements to be included in the prospectus.

  For the transitional period, i.e. basically for equity issues in 2005 and 2006, it should be acceptable that IAS (for the previous period) and local GAAP be included into the same prospectus provided that sufficient explanatory statements are made.

Question 69 (Non-EU issuers):

EU issuers and non-EU issuers should be treated equally and no different assessment should apply to EU issuers.

IV. Dissemination of advertising

Question 84:

The proposed scope seems comprehensive enough.

Question 85 (Blackout periods):

It is not clear what blackout periods exactly mean. In general, advertisements should not be prohibited for a certain period of time. Blackout periods should therefore not be imposed for the dissemination of any advertisement since, in practice, a prospectus drawn up in accordance with the Prospectus Directive is not designed to be used as the only information medium for investors.

By contrast, two other requirements should be imposed:

First, each advertisement should include a reference to the prospectus and where it is or will be available.

Secondly, CESR's advice should deal with the co-operation between the competent authority of the home Member State and the authorities of the host Member State in order to ensure that any breaches of advertisement rules applicable in the relevant Member State can be supervised effectively (see Question 87 below).

Question 87 (harmonisation of control over compliance of advertising activity):

No, we do not think that control over compliance of advertising activity should be harmonised. As national practices on this field currently differ significantly, such harmonisation would be difficult. Financial advertisement rules are usually embedded in the relevant banking and financial services regulatory regime. The regulatory framework is however very different in the Member States. We also think that the introduction of harmonised rules is not required by the interests of the European capital market. Furthermore, advertisement rules are not only subject to the regulatory regime but also to local competition law. Thus, in line with the reasoning of Article 15(6) of the Prospectus Directive, financial advertisements should be treated in the same way as other advertisements, i.e. as a national matter.

However, with respect to advertisements published in a Member State other than the home Member State, CESR should clarify how the home Member State may exercise its control over the compliance of advertising activities with the rules laid down in Article 15(6) of the Prospectus Directive. In particular, CESR's advice should deal with the co-operation between the competent authority of the home Member State and the authorities of the host Member State in order to ensure that any breaches of advertisement rules applicable in the relevant Member State can be supervised effectively without the requirement that any advertisement must be translated and filed with the home Member State authority.