



European Association for Listed Companies

CESR

To Mr. Arthur Docters Van Leeuwen

Chairman

112-13 Avenue de Friedland

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FRANCE

Per e-mail to secretariat@cesr-eu.org

Brussels, 15 September 2005

Dear Mr. Docters van Leeuwen,

Re: CESR's Technical Advice to the European Commission on a Possible Amendment to Regulation (EC) 809/2004 regarding the Historical Financial Information which must be included in a Prospectus

EALIC, the European Association for Listed Companies, aims to represent European listed companies and to promote their common interests on a European level. EALIC was incorporated in December 2002 as an international non-profit association. Through its current member-base of five national associations of listed companies and some sixty-five public companies from France, Belgium, The Netherlands, Italy, Portugal and Spain, EALIC represents to date hundreds of issuing companies. A document describing who is who in EALIC is enclosed for your convenience. (*Enclosure 1*)

Although EALIC concurs with the need for issuers to provide additional information in the case of complex financial history, it considers, however, that this should be achieved in a flexible and proportionate way. Where the pro forma information requirement applies, it is proportionate and there is no need to add further disclosure obligations. In addition, EALIC questions the advisability of amending Commission Regulation (EC) 809/2004 (hereinafter the "Regulation") just a few months after its adoption. Over time, practical experience gained *inter alia* from issuers with a complex financial history will allow for a comprehensive assessment of the situation and help to prepare for a review of the Regulation, if and when required. Experience gained from implementation at Member States level will help to ensure that the requirement is implemented in a proportionate and flexible way.

Attached hereto, you will find EALIC's detailed answer to CESR's Consultation Paper. (*Enclosure 2*)

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EALIC would be pleased to enter into a further dialogue with CESR regarding this subject matter.

Yours sincerely,



Dorien FRANSENS
Secretary General

Enclosures: 2

**EALIC's ANSWER
TO
CESR's CONSULTATION PAPER DATED JUNE 2005
ON
CESR's TECHNICAL ADVICE TO THE EUROPEAN COMMISSION ON A POSSIBLE AMENDMENT TO
REGULATION (EC) 809/2004 REGARDING THE HISTORICAL FINANCIAL INFORMATION WHICH
MUST BE INCLUDED IN A PROSPECTUS**

DEADLINE : 15 SEPTEMBER 2005

14 September 2005

I. INTRODUCTION

Commission Regulation (EC) 809/2004 (hereinafter the "Regulation") requires the inclusion in a prospectus of audited historical information covering the latest three financial years as well as of the audit report in respect of each year. The question arose

- i) whether issuers that have a complex financial history (for example in case of significant acquisitions or disposals made by the issuer during the concerned period and that are not fully reflected in the historical financial information) should include additional information (in relation to the business acquired or disposed of during the concerned period) so as to ensure proper investor protection, and if so,
- ii) whether an amendment to the Regulation is necessary to that end.

II. SCOPE OF THE ADDITIONAL REQUIREMENTS

1. Preliminary remark

CESR would like to clarify that the proposed requirements are in addition to the requirements already set in the Regulation. In particular, it is important to highlight that issuers with a complex history, will need to comply with item 20.1 of Annex I and with Annex II, should this be applicable, in addition to the proposed requirements.

27. Question: Do you agree with this approach? Please give your reasons.

EALIC concurs with the need for issuers to provide additional information in the case of complex financial history. It considers, however, that this should be achieved in a flexible and proportionate way.

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Article 20.2, Annex I, read in conjunction with Annex II of the Regulation already provides for the requirement to present pro forma information in the case of significant gross change. A significant gross change is defined in Recital 9 of the Regulation as "*a variation of more than 25% relative to one of the indicators of the size of the issuer's business*". Pro forma information must be presented in an aggregated form and needs to be published in respect of the most recently completed financial period.

EALIC considers that, where the pro forma information requirement applies, it is proportionate and there is no need to add further disclosure obligations. Current practice at Member State level indicates that additional information is required on a case by case basis. By its very nature, pro forma information is hypothetical (it is a description of how the transaction – e.g. acquisition or divestiture - might have affected the earnings of the issuer had the transaction been achieved at the beginning of the reporting period) and does not represent the company's financial situation. Requiring, in addition to the pro forma information, as CESR suggests it, the disclosure of historical information of the acquired or divested business would not make the information more reliable nor help the investor to make a reasoned assessment.

As a consequence, EALIC questions the advisability of amending the Regulation just a few months after its adoption. Practical experience gained *inter alia* from issuers with a complex financial history will allow for a comprehensive assessment of the situation and help to prepare for a review of the Regulation, if and when required. Even the largely heterogeneous cases presented by CESR are calling for a cautious approach in this respect. It is therefore suggested that the mandate given by the Commission to CESR be considered only as a preliminary step.

Rather, clarification should be sought for the time being as to the circumstances in which the existing additional information requirement may apply. Experience gained from implementation at Member States level might help to ensure that the requirement is implemented in a proportionate and flexible way. In brief, EALIC favors that the issue be taken in consideration in the context of level 3 measures.

2. Types of securities

32. Question: Do you consider that the scope of the requirements for issuers that have a complex financial history should apply in relation to public offer or admission to trading on a regulated market of any equity security to which the Shares Registration Document applies or should it be restricted only to a prospectus published in relation to a public offer or admission to trading on a regulated market of shares? Please give your reasons.

Should additional requirements be provided for, EALIC believes that their scope should be restricted to shares and related securities, as it is already the case for pro forma information under the Regulation.

3. Possibility of an exemption for small and medium-sized enterprises

35. Question: Do you consider that, in relation to additional requirements for issuers with a complex financial history, there is a need to distinguish between different types of issuers? Please give your reasons.

The Regulation provides that the information requirements apply to all issuing companies irrespective of their size or nature of their business. EALIC doubts whether there would be reasonable justification to alter this principle. Rather, and although EALIC is not in favor of new additional information requirements, if such additional requirements were to be introduced anyhow, their scope should be limited.

III. ADDITIONAL REQUIREMENTS FOR ISSUERS WITH A COMPLEX FINANCIAL HISTORY

40. Question: Do you believe that the cases described below¹ should be considered as a comprehensive list? If not, provide examples of any other cases you would consider convenient to address and of the additional requirements you would consider appropriate to require in those examples.

First, EALIC considers that it may prove difficult if not impossible to establish a comprehensive list of examples, as economic developments may result in complex financial history not yet accounted for. Thus, the list provided may only be illustrative.

Second, due to the largely heterogeneous circumstances of the cases described, the relevance of the additional financial information requirement varies greatly: in some cases (e.g. a newly incorporated holding inserted over established businesses) the discussion is about additional, already available and disaggregated information with respect to the established businesses, while in some other cases (e.g. significant acquisition or divestiture) the issue is about aggregated and largely hypothetical information.

CASE 1. The issuer is a newly incorporated holding company inserted over established businesses.

CESR considers that financial information for the significant businesses or subsidiaries for each year during the required periods of three years or shorter, as the case may be, should be provided.

45. Question: Do you agree with the proposed approach? Please give your reasons.

¹ See hereinafter, e.g. newly incorporated holding company inserted over established businesses; companies under common control but which never formed a legal group; significant acquisition or disposal, etc..

EALIC agrees with the proposed approach, provided the disclosure concerns available, historical and disaggregated information, rather than pro forma information.

Historical financial information

a) Accounting standards

CESR has considered three options that can be summarised as follows:

- Option 1: specifically defined accounting standards must be used that may be different from that used by the issuer;
- Option 2: idem as under option 1, but if those accounting standards differ from that used by the issuer, they must conform in some way to the issuer's own standards;
- Option 3: any accounting standards may be used provided they conform in some way to the issuer's own standards.

51. Question: Which of the three options proposed do you prefer? Please give your reasons.

52. Question: If option 2 or option 3 is preferred, how would you request the issuer to conform the information given to the issuers accounting standards?

a. Restatement

b. Reconciliation

c. Narrative description of the differences?

Please give your reasons and provide input on the costs that each of the options would imply for issuers.

EALIC favours option 1 which is already provided for under the Regulation, for the disclosure of historical information. According to this approach, the financial information must be prepared according to IFRS in the case of the issuer or acquired businesses in third countries, whereas in the case of acquired businesses in another Member state it may be prepared in accordance with the Member state national accounting standard. Going beyond that requirement, as options 2 and 3 suggest, would not be warranted.

b) Minimum content of the financial information

CESR has considered three options that can be summarised as follows:

- Option 1: the information must include at least the same content as for the historical information in item 20.1, Annex I, of the Regulation;
- Option 2: the information must include at least the same content as for the pro forma information;
- Option 3: if explanatory notes are already required, the information must include at least the same content as for the pro forma information.

*57. Question: Which of the three options do you prefer? Please give your reasons.
If you support option 1, please provide input on the costs this option would mean, especially if a cash flow statement or a statement showing changes in equity would have to be produced only for the purposes of the prospectus.*

EALIC supports option 1 as such would be coherent with the Regulation.

c) Auditing standards

CESR considers in principle that the historical financial information of the significant businesses or subsidiaries should be audited or reported on as to whether it gives a true and fair view. In addition, the prospectus should include a statement that the information was audited and any refusals of auditing, qualifications or disclaimers, if any, should be reproduced.

61. Question: Do you agree with this approach? Please give your reasons.

EALIC agrees with this approach but considers that such audit should not be required when the information was already audited under provisions applicable to the acquired business.

63. Question: do you agree that there should be auditor's involvement concerning this additional information given in case of reconciliation or narrative description? Please give your reasons.

64. Question: What kind of assurance should the auditor provide in relation to the restatement, reconciliation or narrative description:

a) a full scope audit

b) a review scope

c) a report, as in item 7a) of the pro forma annex, stating that in their opinion the financial information has been properly compiled on the basis stated?

Considering what EALIC replied to question 51 here above, this case is not applicable.

CASE 2. The issuer seeking admission to trading or making an offer consists of companies that were under common control or ownership but which never formed a legal group. This case would include where a division of an existing business has been prepared to form a different entity, which then makes a public offer or seeks admission to trading on a regulated market (so called “carve out”).

Where a business is separated to form a different entity and has no statutory accounts, CESR proposes to require the issuer to provide, for all years for which historical information is required, all reliable information taken from the internal or management accounts of the issuer.

68. Question: Do you agree with this approach? Please give your reasons and provide input on the costs that each year of drawing up of historical financial information would imply for issuers.

EALIC refers to its reply to the questions under Case 3 hereinafter, as it believes that, in the case of the carve out option, there is no real difference between the two situations.

CESR considers that the involvement of an independent accountant or auditor is necessary and proposes three options for their intervention, namely:

- a) a full scope audit,
- b) a review scope
- c) a report.

70. Question: Which of the above options proposed do you prefer? Please give your reasons and provide input on the costs that each of the options would imply for issuers.

Considering what EALIC replied to question 68 here above, this case is not applicable

CASE 3. The issuer has made a significant acquisition or disposal during the three year historical record or subsequent to the last audited consolidated financial information on the issuer.

CESR has analysed two options that can be summarised as follows:

- Option 1: if the significant acquisition or disposal is already fully reflected, no further information would be required, except for, when applicable, the pro forma information required in Annex II of the Regulation;
- Option 2: in addition to the pro forma information, three year historical information regarding the acquired or disposed of businesses would be required as in cases 1 and 2 above, except in case of consolidation.

77. Question: Which of the alternatives proposed do you prefer? Please give your reasons.

EALIC favours the first option on two grounds: first, the existing practice does not seem to put the requirement in question; second, supplementing the pro forma requirement by the disclosure of the acquired or divested business's historical information would not add anything to the objective of pro forma information, namely to describe how the transaction might have affected the earnings of the issuer had it occurred at the beginning of the reporting period.

78. Question: Would you propose any other option to deal with these situations? Please give your reasons and provide input on the costs that each of the options would imply for issuers.

No.

CESR thinks that the requirements proposed in case of completed acquisitions or divestitures should also apply in case of a firm commitment to acquire or to dispose of a business, although the transaction has not been completed yet at the date of the approval of the prospectus.

81. Question: Do you agree with this approach? Please give your reasons.

EALIC believes that acquisitions or disposals which are the subject of a firm commitment, but are not completed yet as of the date of the approval of the prospectus, should not be subject to the proposed requirements. Specific provisions in place in the Member States already provide for an adequate regime governing this situation.

CASE 4. The issuer has changed its accounting reference date during the three years period.

CESR considers that in such case the historical information should be presented for at least three calendar years.

83. Question: Do you agree with this approach? Please give your reasons.

EALIC agrees with the proposed approach although it believes that three calendar years are too long a period. EALIC would recommend a period from one to two years maximum.

WHO IS WHO IN EALIC ?¹

I. MEMBERS

A. Listed companies

Aegon	Mediobanca
Alcatel	Michelin
Atos Origin	Océ
Akzo Nobel	OPG
Assicurazioni Generali	Philips
Autostrade	PSA Peugeot Citroen
Banca Nazionale del Lavoro	RAS Riunione Adriatica di Sicurtà
BNP Paribas	Reed Elsevier
Carbone Lorraine	Royal Dutch Shell
CIR	Royal P & O Nedlloyd
CSM	Saint-Gobain
DSM	Sanofi-Aventis
Enel	Sanpaolo IMI
Eurotunnel	SBM offshore N.V.
Essilor International	SMI
Fiat	Solvay
Finmeccanica	Société Générale
France Telecom	Sonae
Fortis	Stork
Fugro	Telecom Italia
Hermès International	Telefonica
Inbev	Total
Indesit Company	UCB
Italcementi	Umicore
Kas Bank	Unicredito Italiano
Koninklijke Grolsch	Unilever
Koninklijke Vopak	Vallourec
L'Air Liquide	Veolia Environnement
L'Oreal	Van der Moolen
Lafarge	Vinci
Lagardère	Vivendi Universal
Marzotto	VNU
	Wolters Kluwer

¹ Update 8 September 2005

B. Associations of listed companies

- Association Française des Entreprises Privées – (AFEP)
- Association Nationale des Sociétés par Actions (ANSA)
- Associazione fra le società italiane per azioni (ASSONIME)
- Association Belge des Sociétés Cotées (ASBL) - Belgische Vereniging van Beursgenoteerde Vennootschappen (VZW) – (ABSC – BVBV)
- Vereniging Effecten Uitgevende Ondernemingen (VEUO)

II. BOARD

- Alain Joly, Chairman
President Supervisory Board L'Air Liquide
- Cees van Lede, Vice Chairman
Supervisory Board Akzo Nobel
- Stefano Micossi, Vice Chairman
Director General Assonime
- Gabriele Galateri di Genoa, Director
President Mediobanca
- Baron Hugo Vandamme, Director
Chairman Roularta and Chairman Kinopolis
- Bertrand Collomb, Director
Chairman Lafarge
- Rob Pieterse, Director
Former Chairman Management Board Wolters Kluwer
- Dorien Fransens,
Secretary General EALIC
- Paul Cronheim, Vice Secretary General
Partner De Brauw Blackstone Westbroek
- Robert Baconnier, Vice Secretary General
Chairman and Managing Director ANSA

III. LEGAL COMMITTEE

- Paul Cronheim, Chairman

Partner De Brauw Blackstone Westbroek

- José Luis Amorim

Group Controller SONAE

- Robert Baconnier

Chairman and Managing Director ANSA

- Stephen Cowden

General Counsel and Company Secretary Reed Elsevier

- Jaap de Keijzer

General Secretary VEUO

- Carmine Di Noia

Deputy Director General and Head Capital Markets and Listed Companies Division Assonime

- Sven Dumoulin

Senior Legal Advisor Unilever

- Bernard Field

General Secretary Saint-Gobain

- Dorien Fransens

Secretary General EALIC

- Koen Geens

Partner Eubelius

- Philippe Lambrecht

General Secretary Federation of Belgian Enterprises

- Maria Luz Medrano

Director Financial and Mergers & Acquisitions Telefonica

- Christian Schricke

General Secretary Société Générale

- Alexandre Tessier

General Director AFEP

IV. PERMANENT OFFICE & POINT OF CONTACT

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