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CESR's Advice on possible Level 2 Implementing Measures

Representing the entire Austrian banking industry the bank and insurance division of the Federal Economic Chamber would like to comment as follows:

1. General comments

We note that CESR's Advice at hand does not apply to base prospectuses at the current stage (see para 123). However, we attach great importance to a clarification, as to which paragraphs of the current advisory might also be applicable to securities issued under an offering program. Furthermore we are very concerned about the circumstance that CESR has not been mandated by the Commission in terms of providing technical advice in connection with offering programs so far. Such offerings are of essential importance on capital markets.

Considering the timeframe, concerns exists in terms of the lack of annexes comprising indications for debt issues other than Corporate Retail Debt issues, particularly issues of credit institutions or such issues which are exclusively targeted at whole-sale markets. At this stage there are also no indications how facilitations for issues with a denomination of more than 50.000 EUR could be set forth.

Regarding the above mentioned concerns in terms of the fact that important types of securities are missing so far, we emphasize that our comments must be deemed tentative, subject to the announced "Addendum to the Consultation Paper" which CESR plans to produce before the end of the year.

2. Comments related to specific paragraphs

Minimum information

A. Registration document

para 51

It should be specified if pro forma financial data shall be additionally published.

para 52

Pro forma financial information could especially in case of planned downsizing of the company be required. In all other cases it should be considered carefully if planned but not yet achieved goals should be included.

para 65

No, it would not be more appropriate since narrowing the scope to occasions where securities are being issued in the transaction, would mean a higher risk exposure for the investor.

para 85

A repeating or updating of outstanding ad-hoc profit forecasts would require a high input of human and financial resources.

para 89

In order to comment on compatibility with Austrian Law there has to be a specification of what the word "Details" means. Generally spoken it is possible to publish private data only with allowance of the person concerned. If the Details refer to personal data, this would mean a collision with the Austrian Data Protection Act.

Debt Securities (Paragraphs 124 – 156)

para 124 – 128

According to these paragraphs CESR's advice and annexes concentrate on disclosure requirements for corporate retail debt securities. Therefore, instruments such as debt securities offered to wholesale markets investors, and debt securities offered by non-corporate issuers such as credit institutions are not covered so far. Disclosure requirements for issues in connection with a base prospectus are not included either (para 128). As already expressed above (see general comments) we are concerned that the timetable envisaged for implementing measures as regards these particular instruments will create pressure at a later date. Hence, and bearing in mind that these instruments form a significant amount of the market issuing volume, we would strongly suggest, as soon as possible, asking the Commission for an appropriate deadline extension for advice beyond March 2003.

para 129 (questions)

No. The requirements should be reduced so as to achieve an appropriate distinction between equity and debt investors' needs for information.

para 134 – 135 (questions)

We do not consider disclosure of advisers to be relevant.

para 137 - 139 (questions)

Disclosures regarding a company's investments should not be taken to be material disclosures in terms of debt instruments.

The high costs and administrative effort, which could keep companies from raising capital this way, must be considered. Basic and profound disclosures shall be published which enable the investor to decide whether he will get his investment back.

para 148 - 150 (questions)

The requirement of documents on display to such an extent places demands on issuers. Moreover, data protection and privacy laws could be violated (especially regarding third partners to material contracts as well as regarding the particular contents of such contracts).

para 151 – 156 (questions)

We believe that information as set out in Annex "A" are too detailed in terms of debt issues. The disclosure requirements should be harmonized with the purpose of providing information related to the issuer's ability to pay interest on the debt and to repay the capital sum.

para 160

No, it is not necessary to have specific derivative registration document requirements.

para 170

Yes, it would be useful to provide some form of definition for these securities.

B. Securities Note (Paragraphs 235 – 262)

General remarks

Referring to the above-mentioned concerns in terms of the lack of any information as to how a base prospectus shall be drawn up, we give tentative comments, subject to the addendum announced. Furthermore, we give our answers on the assumption that the Securities Note does not apply to issues under an offering program at all.

para 250

The format seems to be suitable.

para 251

Yes.

para 252

Disclosure of advisers should not be obligatory, or if ever they should only be mentioned if they could be held liable.

para 253

This information should not be part of the Securities Note.

para 254

Responsibility for the particular documents should be allowed to rest with different persons, particularly considering the time which customarily has elapsed between registration and an issue.

para 257

3a could be an appropriate alternative.

para 259

We do not believe that such disclosures should be required in Securities Notes at all.

In any event, no disclosure should be required as regards issues under an offering program, since such detailed information would be contrary to common market practice and accepted information comprised in Pricing Supplements.

para 260

Data concerning the past performance of the underlying can be disclosed provided it is specified that data of performance in the past cannot reveal the trend of future performance.

para 261

Annex K: III.B. We think Part III.B should be optional.

Annex L: III. B. We think Part III.B should be optional.

Part Three – Availability of Prospectus

General remarks

Article 14, paragraph 1, of the Directive proposal is unclear, since it does not set forth a clear point in time by which the prospectus must be published. There should be additional technical implementing measures proposed by CESR to make this paragraph more concise, taking into account current market practices.

para 304

We support the clarification set out in para 304. We would like to emphasise that in our estimation, not only the internet publication but also none of the other availability means pursuant to article 14 (2) lit. a to d. of the Directive proposal can constitute a public offer by itself. Otherwise, article 14 para 1 would fail to be applicable, since pursuant to this provision, a prospectus has to be made available prior to the public offer. Accordingly, we would like to broaden the clarification made in para 304.

We also support the idea to insert a disclaimer.

para 307 (question)

No.

para 314 (question)

No.

para 324

The information demanded in lit a, b, d, e, f, g is acceptable. Lit b and c include details, which could also be easily learned from the prospectus itself.

para 325 – 328 (questions)

Article 14 paragraph 2a of the current (amended) Directive proposal stipulates that *“In addition, a home Member State may require that a notice stating how the prospectus has been made available and where it can be obtained by the public must be published”*. We support such regulation based on Directive level rather than at level 2 and consider article 14 paragraph 2a to be sufficient.

We would also agree with an indication on the website of the competent authority which could be considered as an alternative to the publication of a formal notice by the issuer/offeree (question 328).

para 332 – 335 (including questions)

We do not support that the issuer should not be entitled to ask the investor for the payment of the delivery or mail costs, since such costs seem to be quite reasonable for an investor.

Any reduction of costs in terms of paper copy delivery should be aimed at. Therefore CESR should definitely deal with such issues at level 2 legislation (see question 335).

With kind regards

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Austrian Federal Economic Chamber