



Bundesministerium der Justiz

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(bei Antwort bitte angeben)

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Postanschrift:

Bundesministerium der Justiz, 11015 Berlin

Hausanschrift: Mohrenstraße 37, 10117 Berlin

Lieferanschrift: Kronenstraße 41, 10117 Berlin

Telefon: 0 18 88 5 80 - 0

(0 30) 20 25 - 70

bei Durchwahl: 0 18 88 5 80 - 9304

(0 30) 20 25 - 9304

Telefax: 0 18 88 5 80 - 95 25

(0 30) 20 25 - 95 25

The Secretariat
The Committee of European Securities Regulators

by e-mail

Subject: Prospectus Directive

**Concerning: Comments of the Federal Ministry of Justice on CESR's Advice on
Level 2 Implementing Measures for the Proposed Prospectus Directive**

The Federal Ministry of Justice is very grateful for the opportunity to submit some brief comments on CESR's technical advice on level 2 implementing measures of the Prospectus Directive. As a matter of course our comments are not exclusive; the purpose of the proposals is to highlight some specific company law and financial law aspects from a German perspective.

1. Minimum Disclosure Requirements for the Wholesale Debt Registration Document (Annex 1 – CESR/03-128):

In general, the proposed requirements for the Wholesale Debt Registration Document seem to us to be in some ways too detailed and not absolutely necessary for the capital markets. These concerns shall be demonstrated by the following examples:

a) Requirement 2.2:

Requirement 2.2. states that details must be disclosed if auditors have resigned, been removed or not been re-appointed during the period covered by historical financial information. The magic word is the term "details". In our view, the sole fact of resignation of an

auditor, removal of an auditor or of not being re-appointed as an auditor shall be disclosed. The term “details” could, however, be construed to mean that information about *the reasons and the background* of the resignation of an auditor, the removal of an auditor or of not being re-appointed as an auditor will be disclosed. This interpretation can especially be based on the words “if material” in requirement 2.2. Such an interpretation of the term “details” seems inappropriate to us, because the disclosure of such material details could infringe the auditor’s rights of privacy. In addition, such information about the reasons and background of the removal of an auditor is not of substantial interest to the capital markets. We would like to suggest a more precise wording to the requirement 2.2 in order to exclude any misunderstandings on the interpretation of this requirement:

“The fact that auditors have resigned, been removed or not been re-appointed during the period covered by the historical financial information must be disclosed.”

b) Requirement 9:

Requirement 9.1 states that the principal activities *performed outside* the issuer by the members of the administrative, management or supervisory bodies shall be indicated in the Wholesale Debt Registration Document. This requirement raises the question for the necessity of disclosure of such facts in a Wholesale Debt Registration Document. In our view principal activities performed outside the issuer of a management member does not play an important role for the disclosure requirements even if these activities may be significant with respect to that issuer.

According to requirement 9.2 potential conflicts of interests between any of the persons referred to in 9.1 must be clearly stated in the Wholesale Debt Registration Document. The second sentence states that a *negative statement* to that effect should be made in case there are no such conflicts. In general, we welcome the aim of this requirement. However, we would like to suggest that instead of a negative statement a positive statement about potential conflicts of interests may be sufficient and appropriate in a Registration Document. The general problem of a negative statement is not due to intentionally false statements, but especially due to careless, not intentionally incomplete statements. Even in the case of careless incomplete statements members of the administrative, management and supervisory bodies would run the risk of full liability and disclaimer of liability against the background of D&O insurances.

2. Minimum Disclosure Requirements for the Depository Receipts issued over shares (Annex 2 – CESR/03-128):

a) requirement 14:

With respect to requirement 14 we would like to challenge the deeper sense of the disclosure of information about any senior manager which is relevant to establishing that the issuer has the appropriate expertise and experience for the management of the issuer's business (cf. 14.1 (d)). The disclosure of information about senior management causes a lot of problems. On the one hand, the term "senior management" is very wide and gives great scope for interpretation as to which persons are senior managers. On the other hand, it is difficult to understand the necessity of this information for the capital markets.

Furthermore, we would like to suggest deleting the words "details of any public criticisms and/or" in the requirement 14.1 (iv). The disclosure of such details could infringe the rights of privacy of the persons concerned. In addition, the sole public criticism provides no sufficient basis for disclosure and could lead to pillorying the person concerned in an unjustified manner. For this reason, we would prefer disclosure only of sanctions by statutory or regulatory authorities.

In the same way as indicated above under 9.2, we would like to suggest deleting the disclosure requirement of any negative statement.

b) requirement 16:

Requirements 16.1 and 16.2 seem very detailed and superfluous for capital markets.

c) requirement 20.1:

According to the requirement 20.1 the financial information must include (a) a balance sheet, (b) an income statement, (c) a statement showing either (i) all changes in equity or (ii) changes in equity other than those arising from capital transactions with owners and distributions to owners, (d) cash flow statement and (e) accounting policies and explanatory notes. The requirement (d) is only necessary in consolidated financial statements and it should not be a requirement for all other issuers who are not obliged to prepare consolidated accounts. We would therefore like to suggest deleting this requirement (d) in requirement 20.1 and in all other requirements about historical financial information for the same reason.

3. Draft paper CESR/03-066b

We would like to recommend deleting paragraph 35 on page 10. The duty of CESR is limited to regulating the disclosure requirements and not to creating material accounting standards. According to paragraph 35 these issuers have to reconcile or restate their consolidated financial statements according to IAS for the previous year or possibly two years if they make application for listing their shares on a regulated market. However, the upcoming IASB-Standard "First time adoption" will probably require the restatement or the reconciliation according to IAS only for the previous year. Additional requirements should therefore be avoided.

For the Federal Ministry of Justice

Ute Höhfeld