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Position on

Prospectus Mandates
Second Call for Evidence

for

The Committee of
European Securities Regulators

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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 the Prospectus Mandates Second Call for Evidence of 7 February 2003.

First of all, I would like to mention that my comments have to be seen in connection with my December 2002 and February 2003 positions on the Consultation Paper, the Addendum and the respective Annexes. The aspects which I would like to make with regard to the Prospectus Mandates Second Call for Evidence are as follows:

3.1. Format of the prospectus

(1) Complete its work with respect to the format of prospectus as a single document, including the summary as part of the prospectus.

In the case that the prospectus is a single document, the prospectus shall start with the summary, followed by the securities note and then by the registration document. The securities note shall be arranged before the registration document because such information will normally be more concise than the registration document. Furthermore, it is the first step in the investment process. Almost no investor will analyze the creditworthiness of an issuer and then decide whether he oder she will buy a share or a bond of that issuer.

However, I would like to reiterate my previous comments to avoid any duplications with regard to the content of the securities note and the registration document.

The summary should be one of the central elements of the work of CESR with regard to the Prospectus Directive. Disclosure requirements on the content and characteristics of summaries could lead to a market standard with regard to prospectuses which – as a consequence – could increase the willingness of investors to consider the prospectus and not any marketing material as the core element of information. Being successful, the summary will substitute the present "term sheet culture".

The summary will be the most prominent part of any prospectus, because it will contain the core elements of the registration document and the securities note. Therefore, the summary could be expected to be the first (and in many cases only) document to be carefully studied by investors:

- Institutional investors will use the summary as an entrance to find more about the "decisive" elements on the issuer and the issue.

- Private investors in a foreign country, who are not familiar with the language of the registration document and the securities note, have more or less only access to the summary, as it is the only part to be translated in their language.

Taking into account the 2,500 words approach it should be officially stressed that the summary can only serve the purpose to highlight potential risks/investment considerations. In this connection it should be made clear that not all items set out in the indicative list of Annex IV of the Proposed Directive have to be included.

(2) Specifically consider the particular format of the base prospectus and the supplement.

For the base prospectus I recommend to adopt the procedures for the present "unvollständiger Verkaufsprospekt" according to German law. Under such regime, the base prospectus shall contain the following information:

- Securities note for the respective product. The securities note shall specify the type of product and provide all basic information, including the conditions of issue and the section on risk and examples how the instrument works. All information to be supplemented on the day of issue should be marked by "blanks".

- Registration document with all information on the issuer. Any update to the registration document part of the base prospectus shall be provided by a supplement.

- One base prospectus should contain various securities notes for various types of debt or derivative securities, to avoid double paperwork.

In the case of an issue, the securities note for the respective product shall be filled with the "blanks". CESR should allow for a high degree of flexibility with regard to the "blanks". As practical experience has shown even new tranches of "standard products" require certain adjustments very often, for example additional information regarding certain specifics of a new underlying, changes in the method of calculating the exercise values or the interest rates, etc, which could not be foreseen in detail at the time of the preparation of the base prospectus. The supplement shall also be provided in an easily readable form, not only in a simple compilation of "blanks". I prefer that the issuer provides the investor with a completed version of the "conditions of issue", the "final terms" and the "summary", respectively.

(3) To grant particular attention to offering programs and mortgage bond issues.

Both aspects refer to the content of the registration document and the securities note. Please refer to my comments on section 3.2 subparagraph (5) below.

With regard to mortgage bond issues, a clear difference has to be made between "mortgage backed securities" and "mortgage bond issues". "Mortgage bonds" have to be defined as securities referring to the real estate business based on specific national legislation. In Germany the "Pfandbriefe" can be considered as "mortgage bond

issues". For these types of bonds the securities note could be expanded by a line item. The issuer shall be required to describe the basic elements of the national legislation with regard to such type of bonds (necessary for foreign investors not familiar with the respective law) and to confirm that the issue meets these requirements. The extent of information regarding the underlying "mortgages" shall be subject to the requirements of the national legislation. CESR shall analyze which type of bonds in the various legislations shall be subject to these rules.

All other bond issues which do not have such preferential status by law shall be considered as "mortgage backed securities" and be subject to the disclosure requirements of "asset backed securities".

3.2. Minimum information

(1) Schedules adapted to the particular nature of derivative securities such as covered warrants, certificates or reverse convertibles

On the one hand, the issue of derivative securities and the demand from investors have shown significant growth over the last years, on the other hand, derivative securities form the most innovative and diversified segment of the securities markets. Any requirements for derivative securities, therefore, shall allow a clear disclosure of the profit and loss potential of such products and shall allow for further flexibility in the development of the market.

The starting point must be a general definition of derivative securities. I would like to make reference to my position on the October Consultation Paper where I suggested the following definition: "Derivative securities are securities where the payment and/or delivery obligations are linked to an underlying (including but not limited to the price of one or more securities, indices, commodities, energy, yields, currency (rates), weather events, etc.) unless the payment of interest is merely linked to a fixed rate or to a recognised interbank interest rate." The second part of the sentence starting with "unless" should be inserted to make it clear that plain vanilla fixed and/or floating rate bonds with EURIBOR or LIBOR interest payments are not regarded as derivatives. All other linkages to an underlying, should, however, qualify the product as a derivtive.

The most important factor for derivative securities is a proper description of the product, including the terms and conditions, which should be set forth in the securities note. The requirements regarding the issuer should be lower for derivative securities than for equity, but in general also lower than for debt.

As CESR has already provided a suggestion for the registration document and the securities note for derivative securities I would like to make reference to my detailed comments in the February position on the Addendum, especially paragraphs 60 to 93 and 139.

(2) Specific schedules or explicit reference in the schedules to certain types of issuers in particular SMEs

As already mentioned in the December position on the Consultation Paper I am convinced that there should be no difference between "normal" companies and SMEs as long as they are listed on the same market. Less onerous requirements could only apply where the company is only making a public offering and is not seeking admission to the stock exchange. For transparency reasons issuers should not be subject to different requirements if they are traded in the same market segment.

- Due to the ability to gain a clear overview of the structure of a small to medium sized company, the information necessary for the prospectus should be compiled in a relatively straightforward manner. In any case, the issuer must have systematic accounting and controlling systems to keep such information available.

- Particularly in the case of small to medium sized issuers that offer their shares without seeking admission to the stock exchange, it is sometimes difficult to dismiss the suspicion that dubious business models expose investors to the risk of losing their capital investment (grey capital market).

(3) Specific schedules or explicit reference in the schedules to certain types of entities authorised or regulated to operate in the financial markets, for example credit institutions

The justification for a specific schedule for financial institutions is given by the different type of business compared to a manufacturing or service company. Therefore, a prospectus of a financial institution will have another character than a prospectus for a manufacturing or service company.

Furthermore, banks and other financial institutions are permanently regulated and supervised by public authorities. As almost all (major) banks are issuers of securities, the disclosure requirements should be brought in line with the disclosure requirements laid down by the supervisory authorities for the financial sector, for instance in the annual report. There is no reason, why a bank as an issuer of debt and derivative securities should provide substantially more information on its business than as a borrower of term and saving deposits or seller of OTC derivatives. It is the same type of ordinary business, different to that busines only by the securitization of the obligation.

As CESR has already provided a suggestion for the registration document for credit institutions I would like to make reference to my detailed comments in the February position on the Addendum, especially paragraphs 43 to 59.

(4) Schedules adapted to securities aimed at wholesale markets

The differentiation between "retail investors" and "wholesale investors" is based on the the proposed Directive. However, it should not be interpreted that "wholesale investors" need less information than "retail investors" because of their professionalism. "Wholesale investors" are the only group of investors who can fully understand and analyze the information disclosed in a prospectus regarding the diversity and complexity, while the average retail investor is overstrained with too much information. Therefore, even for "retail investors" CESR shall reduce the disclosure requirements for retail prospectuses to the understandable minimum.

The main purpose of the differentiation shall be the opportunity for issuers to have a quick and simple access to a certain group of investors with a powerful placement potential enabling the issuers to make use of favorable market conditions for their refinancing needs.

However, concerning the listing of such "wholesale bonds" on an exchange no exemption should be made with regard to the disclosure requirements, as long as they are listed in the same exchange segment as retail corporate debt.

As CESR has already provided a suggestion for the registration document for wholesale debt I would like to make reference to my detailed comments in the February position on the Addendum, especially paragraphs 9 to 35.

(5) The content of the prospectus to be used for offering programs (Article 7 paragraph. 1 point c)

Offering programs will form the core of the issuance activities under the proposed Directive. Nowadays, the majority of the debt and derivative securities in the EU countries are issued under an offering program. The most important group of users of offering programs are banks and other financial institutions for which the issuance of securities is part of their ordinary business. Other major users are sovereigns, international institutions and blue chip companies. This emphasizes the importance of the work of CESR on this topic. Any disclosure requirements for the content of a prospectus to be used for an offering program have to be based on two aspects:

- to adequately inform the investor on the respective issue and
- to enable the issuer to quickly react to favorable market conditions.

Therefore, CESR should carefully take into consideration any implications of disclosure requirements on both aspects. This guideline for developing the rules is especially important for the registration document.

Even if CESR will not follow my approach to significantly reduce the disclosure requirements laid down in the registration document for credit institutions issuing stand alone-debt it should do so with regard to offering programs. The argument is especially

true for offering programs which will be used by banks continuously tapping the market: For many banks the issuance of debt and derivative securities is part of their ordinary business. There is no reason, why a bank as an issuer of securities should provide substantially more information than as a borrower of term and saving deposits or seller of OTC derivatives.

Such approach has already proven successful for many decades in Germany. The regulation for the listing on the official market (Börsenzulassungs-Verordnung) only focuses on some basic information, the annual accounts being available to the public and on a description of material changes since the close of the last fiscal year.

For other issuers, especially the blue chip companies, the registration document shall correspond to the information required for issuers of wholesale debt.

The disclosure requirements should also be fixed in the light of the restrictions of paragraph 16 of the proposed Directive. The focus shall be laid on information material to the creditworthiness of the issuer and not simply on all information which is material to an issuer in general terms. Due to the right to withdraw any acceptances according to paragraph 16 section 2 in practice no issuance activity could take place during the preparation of the supplement and the subsequent approval process. Such interruptions shall be reduced to the absolute minimum to ensure issuers with an almost permanent access to the capital markets.

With regard to the disclosure requirements on the product, the securities notes for single issues could be adopted for offering programs, however taking into consideration the amendments suggested to these documents already listed in my December position on the Consultation Paper and my February position on the Addendum.

(6) Particular schedules for sovereign issuers and for municipalities

Any sovereign issuers and municipalities deciding for a prospectus shall give a clear picture on its legal, political, economic and financial situation to the investor. Focus shall be laid, among others, on the following aspects

- Legal structure of the issuer
- The structure with regard to any liabilities
- The legislative and executive bodies
- Assets, including ownership in public or private entities
- Financial situation over the past years, including budget, volume and segmentation of tax revenues, volume and segmentation of expenditures, debt situation
- Concise information on major trends

3.3. Annual information

The major objective of article 10 of the proposed Directive is the regular update of information to the investors. Therefore the annual information shall be published in absolutely the same way as the initial prospectus, including the use of the same websites or newspapers, even for any notice. Otherwise, an investor has constantly to screen various sources to be updated even on one issuer. As a consequence, the issuer shall be put under the obligation to publish a notice to the investors when it decides to change the method for publication.

3.4. Incorporation by reference

As I have dealt with that topic in my December position I would like to make reference to this statement. Incorporation by reference does simplify the process of drawing up the prospectus, but should nevertheless only be used to a limited extent. Financial statements (including interim reports) as well as information about the issuer may be incorporated by reference only where the latest version of the relevant information has been contained in an earlier prospectus as it is a cornerstone for the information of the investor.

Press releases shall not be allowed for any incorporation by reference, but directly included in the text of a registration document or a supplement. On the one hand, press releases in general are part of the "marketing sphere" of an issuer which means that almost all issuers will accept liability according to the terms of the directive only for a certain number of their press releases. On the other hand, the number of press releases is normally very high compared to other kind of documents as well as the content seldom exceeds more than two pages.

3.5. Publication of the prospectus

The prospectus shall be available in printed as well as in electronic form. Member states should make use of paragraph 14 section 2 last sentence of the proposed Directive and require issuers to publish any prospectus at least on the internet as this has already become the main source of information for investors. As various surveys in Germany has shown people who invest in securities, like equities or derivatives, are above average in using the internet.

It could not be expected that an issuer will publish the prospectus in a newspaper in full length. Therefore, a short notice shall be published in a newspaper where the prospectus can be obtained. Such newspapers shall be newspapers of national circulation among the financial community, not newspapers of national circulation as such. The notice shall not contain details, but only the reference to the offer and the prospectus describing the offer. The selection of the newspapers shall be made by the national competent authorities as it is already done in Germany by the stock exchanges

with regard to the so called "Börsenpflichtblätter" (mandatory newspapers and magazines where notices on securities are allowed to be published in order to fulfil the respective regulatory requirements).

Further thoughts on that topic can be found in my December position, especially to paragraphs 291 to 335.

3.6. Advertising

Advertising has become an important tool for distributing and placing securities with private retail investors. Therefore I welcome that the proposed Directive requires advertisements stating that a prospectus has been or will be published including the indication where investors will be able to obtain it and being consistent with information contained in the prospectus. As long as both requirements are met the need for detailed implementing measures concerning the dissemination of adertisements could not be seen. An issuer or offeror shall be allowed to publish advertisements whereever and whenever it appears necessary to him.

However, any exercise of control over advertising activities by member states should mean only a control after and not prior to a publication. Otherwise any timely marketing will be severely disturbed – contrasting the changes in the world of financial media to the need of markets. Almost all major financial newspapers and magazines have adjusted there printing processes in recent years in a way that advertisements can be submitted "just in time" almost at the same time as the journalists close the text sections.

It must be made clear, however, that advertisements could only be published in such jurisdictions where the securities are publicly offered based on the prospectus. Some definitions have to be made with regard to internationally distributed newspapers and the internet.

Legal form of the implementation rules

In most cases the rules shall be adopted by a regulation. Although I am supportive to such idea concerning the aspects dealt with in paragraphs 3.1. and 3.3. to 3.6. the minimum information rules according to 3.2. shall only be fixed in the legal form of a directive. As the legal, institutional and economic framework is still different among the EU countries, a regulation could lead to rigidity instead of harmonisation. Even "simple" line items could have a slightly different meaning in different countries and therefore require slightly different wordings. Therefore, the respective competent authorities should be allowed to adopt the disclosure requirements to the respective national environment. The details of a full harmonisation shall be fixed on Level 3 process by the respective authorities.