

Dr. Wolfgang Gerhardt
Senior Vice President
Sal. Oppenheim jr. & Cie. KGaA, Frankfurt am Main

Member of Consultative Working Groups
to advise CESR Expert Group on Prospectus

Position on

Formal Mandate to CESR for technical advice on
a possible amendment to the requirements
regarding historical financial information

Call for Evidence
Ref. CESR/05-384

Frankfurt am Main, 18 June 2005

Introductory Remarks

As a member of the Consultative Working Groups to advise CESR Expert Group on Prospectuses I have accompanied the process of the Level 2 and Level 3 implementation of the Prospectus Directive. In addition, I have taken part in the German implementation of such legislation. Therefore, I would like to take the opportunity to comment on the Call for Evidence regarding the formal mandate to CESR for technical advice on a possible amendment to the requirements in Commission Regulation regarding the historical financial information which must be included in a prospectus.

My position is based on the statements which I constantly made in my positions regarding the Level 2 and the Level 3 process. First of all, I am convinced that it is not the proper moment for such Mandate and any amendment of the Regulation. Most countries are still in the process of implementing the Prospectus Directive and have not made sufficient practical experience in enforcing the new rules which already include disclosure requirements on historical financial information which appear to be sufficient to me under the present circumstances of the introductory phase. Especially in the case of complex financial history such practical experience is very important. Therefore, any amendment shall be done in connection with a revision of the complete Regulation based on practical experience. CESR should suggest to the Commission that the Mandate shall be a preparatory step for such revision.

CESR should follow a very flexible approach in advising the Commission. I would like to focus on the following aspects as a first view on the topic which I will certainly more balance in a consecutive statement on the consultation paper to be published by CESR.

Characteristics of financial information

Financial information is considered by most investors as a disclosure of an extremely high quality independently checked by external auditors. Any inclusion of new elements to the financial information section in a prospectus should not - but could - hamper such impression.

In contrast to the description of the issuer and the description of the security the major objective of including financial information should be a “copy paste approach”, a pure reprint of information already existing. The disclosure requirements for prospectuses shall be based on such information which is available according to the respective accounting standards and other European guidelines laid down in other directives, like the Transparency Directive. Except for certain, special situations there should be no further involvement of external auditors.

The Mandate is implicitly based on the assumption that even a complex financial history can be unambiguously reconstructed after two or three years. Based on my previous responsibility for prospectuses of corporate issuers in the case of an initial public offering and based on the discussions between banks and auditors regarding standards for comfort letters in Germany I have severe doubts whether external auditors could

confirm the correctness and reliability of such documents without making any restrictions.

CESR should not oversee that the relevance of such additional financial information is of limited value if the authors could only confirm the assumptions on which the conclusions of the issuers published in the prospectus are based, but not directly confirm the relevance and correctness of such statements. I am convinced that the auditors will clearly state the limited explanatory power of their statements, and, despite such “disclaimer” the investors might rely on the relevance of the statements not explicitly taking into consideration the caveats. This, however, would contradict the basic principle, laid down in the Mandate, that “the provision of the full range of financial information which is relevant in a particular case is necessary to ensure proper investor protection”.

Applicability to shares only

In the case, that despite my remarks CESR intends to develop rules, CESR should only focus on complex financial history disclosure requirements for shares and related securities taking into account the specific profit potential and risk profile of such securities.

Time line for complex financial history

The aspect of the three years period leads me to another important point. It will be extremely difficult – close to practically impossible – to create new “old” financial information for a period covering two or three years in the past. Therefore, any complex financial history should be restricted to the last financial figures thereby explicitly disclosing to the investors that the issuer has been faced with an interruption in its financial history.

Examples for complex financial history

I have doubts whether a concrete list of cases for complex financial history could be identified. On the one hand, such list would never be complete due to the long term shifts in the characteristics of structural change in any economy, on the other hand CESR should avoid that the disclosure requirements could enable issuers to disclose a “more beautiful picture” on its past performance. CESR might take into consideration transactions which have recently taken place in corporate Europe: for example the sale or the spin-off of high losses bearing units by global corporate issuers (the historical financial information for the selling issuer would show an improvement in its results!) or the merger among two European banks, and discuss the possible outcome, if one of these issuers submit a prospectus to the competent authorities.

For example, I agree to the bullet “the issuer is a newly incorporated holding company over an established business” – but I refuse to the bullet “the issuer has changed its accounting reference date during the three year period.” Regarding an issuer covering a

group of companies never formed a legal group or an issuer having disposed a significant part of its business, my final results would depend on the specific case.

Exemption for small and medium-sized enterprises

There should be no exemption for small and medium-sized enterprises. The rules should be structured in a manner that they are applicable to small and medium sized in the same way as to big issuers. Therefore, only percentage barriers should be fixed.

Cost and time

The cost and time aspect is of higher importance than for any other disclosure requirements as in most cases any restatements require additional work by the issuer, the auditors and the banks. Therefore, it should be reduced to the minimum to allow for a efficient market structure.