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Mr Fabrice Demarigny
Secretary General
Committee of European
Securities Regulators (CESR)
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10178 Berlin, den 15. September 2005
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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

Dear Mr Demarigny,

Since the first draft of the Prospectus Directive was presented in May 2001, the Zentraler Kreditausschuss (ZKA)¹ has always been closely involved in the Directive's passage through all levels of the fast-track legislative process. We are therefore pleased to have a further opportunity to comment on the above-mentioned consultation paper.

Before replying specifically to the questions raised in the consultation paper, we should, however, like to make a few remarks of a general nature:

¹ The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks financial group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 2,300 banks.

As already explained in our comments of 20 June 2005 on the preceding Call for Evidence, we do not feel that an amendment to the Regulation makes sense at the present time. The EU member states are currently busy transposing the new prospectus regime into national law. In some member states, transposition has still to take place. All market participants in the issuing sector are therefore working hard to implement the new regime and to gear new prospectuses to it. The Commission has rightly stated on several occasions in recent weeks that, now that virtually all Financial Services Action Plan projects have been completed, the time has come for these to be implemented at national level and put into practice by market participants. Confidence is an essential feature of a financial marketplace – not only confidence in the integrity of market participants but also confidence in the regulation of the financial market. Short-lived rules cause market participants to lose confidence, as they no longer have the planning security that is crucial particularly in issuing business. We would therefore ask CESR to bear these fundamental concerns in mind and make them clear in its recommendations to the Commission, particularly as we see no need either at present or in the future for any legislation going beyond the current Regulation.

There is no doubt that, where issuers have complex financial histories, investors may have additional information requirements that cannot necessarily be covered by presentation of the standard historical financial information called for in item 20.1 of Annex I and II. In such cases, the Regulation generally authorises supervisors to request additional financial information from the issuer where necessary (see Article 3 a.E of Regulation (EC) 809/2004). This is in line with current supervisory practice of deciding on a request for additional information on a case-by-case basis, taking into account the merits of each case. This approach has proved successful and is regarded by supervisors as sensible and appropriate (see paras. 24 and 36 of the consultation paper). CESR, too, finds in its consultation paper that this flexible approach should be retained and that it is neither practicable nor efficient to set detailed rules for every single case (paras. 37 and 38 of the consultation paper). We fully agree.

This is why it is all the more puzzling that the consultation paper nevertheless recommends concrete rules for different types of complex financial history. We believe that the general authority given to supervisors to request additional information where necessary is a suitable and flexible enough means of ensuring that a prospectus contains all the decision-relevant information required by investors. There is no need in our opinion for any special rules going further than this.

Subject to these reservations, may we now reply to the individual questions in the consultation paper as follows:

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

We agree with CESR that the basic requirements for the presentation of historical financial information set in item 20.1 of Annex I and II must always be complied with. Should certain structural changes at issuers result in no financial information being available for the entire period in question, supervisors have the right to request additional decision-relevant information. On the other hand, we reject any general requirement to disclose further annual financial statements over and above the information required in item 20.1 of Annex I and II. This would lead to information overkill and ultimately to confusion on the part of investors and would thus be diametrically opposed to the aim of investor protection.

32. Q: 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 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.

We believe that formalised additional requirements for issuers which have a complex financial history are basically unnecessary. Having said this, we nevertheless agree with CESR that the scope of the specific requirements for issuers with a complex financial history should at least be restricted to issuers to whose issues the Shares Registration Document applies.

35. Q: 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.

If additional financial information is to be required from issuers with a complex financial history, we believe that this information should be the same for all issuers of shares and equivalent instruments. Any differentiation according to the size or nature of the business of the issuer is inappropriate in our view and would pose considerable problems.

40. Q: Do you believe that the cases described below should be considered as a comprehensive list? If not, please 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.

As explained above, we believe that the current supervisory practice of requesting additional financial information on a case-by-case is adequate and appropriate. When introducing a requirement to include additional financial information on subsidiaries in a prospectus, preference should be given in our view to a flexible approach over an exhaustive list of individual cases. Complex financial histories are usually individual cases with highly specific features. When assessing these, supervisors should be able to decide on a case-by-case basis whether – and if so – what kind of additional financial information is needed to obtain a full picture of the issuer’s financial position. This is also how we understand paras. 37 and 38 of the present consultation paper.

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

If a decision is taken to amend the Regulation, CESR’s proposal to adopt the same definition of “*significant*” as in Recital (9) of Regulation (EC) 809/2004 makes sense. On the other hand, the requirement that, where a new holding company is set up, the prospectus should contain historical financial information for each significant subsidiary for the last three financial years, goes too far. It should at least be limited so that the financial information on subsidiaries only has to be included in the prospectus where it is already available. Any requirement to subsequently prepare pro-forma financial information for parts of the issuer’s group must be rejected for cost reasons alone. Moreover, the value of this historical financial information is likely to be very limited, as pro-forma information for periods going back further than twelve months harbours the danger of giving investors a possibly false picture of the issuer’s financial position. This is backed by experience to this effect in the past. What is more, providing financial information retroactively for a period of more than twelve months is not common practice internationally.

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

Assuming that prospectuses of issuers with a complex financial history have to contain additional financial information, we favour option 3. The historical financial information on subsidiaries should always be presented in the form in which it is already available. Where necessary, important differences in the accounting standards applied should be explained for the investor’s benefit by way of a narrative description. We should also like to add in this

context that the basic principle for all concepts for the establishment of financial information requirements should be the following: The financial information that is already available should be included in the prospectus. Preparation of financial information specifically for prospectus purposes should be the exception, not the rule. Retroactive presentation of financial information should therefore be avoided for cost reasons and because of the limited value of such information.

Finally, we assume that the financial information which has to be included on subsidiaries of the issuer is not governed by the other provisions of item 20.1 of Annex I, i.e. no financial information for the last three financial years is required, but presentation of the annual financial statements for the last financial year suffices. Otherwise the result would be information overkill at Level 2 that would not be in the interest of investors.

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

We are firmly in favour of explaining the differences in the historical financial information between individual parts of a group by way of a narrative description (see our reply to 51. Q) We reject any restatement (a) or reconciliation (b) of historical financial information. This would mean the preparation of additional (pro-forma) information, which may well be impossible for technical reasons alone. Moreover, additional financial information for periods going back further than twelve months harbours the danger of providing a possibly false picture of the issuer's financial and trading position.

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

We prefer option 2. However, we should like to point out once again that we reject any requirement for the issuer to separately prepare or present comprehensive historical financial information on subsidiaries solely for prospectus purposes. As we believe that the value of such information is limited, we are firmly against any requirement to prepare and include it and the resulting additional cost burden for the undertakings affected. Option 1 must be rejected in our opinion because it requires, for example, the preparation of a cash flow statement

regardless of whether this is required under national GAAP (which is not the case for individual accounts in Germany, for instance).

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

We agree with CESR that the historical financial information provided in a prospectus needs to be audited or reviewed by an independent auditor. As a rule, audited financial statements are already available and these can be then be used for the prospectus without any further auditing. We take a critical view of any requirement to prepare additional information specially for prospectus purposes (see above). Should additional pro-forma information have to be prepared in exceptional cases, e.g. at the request of supervisors, it should be reviewed by an auditor.

63. Q: 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.

We believe that the involvement of an auditor to assess the information describing the differences between different accounting systems makes sense. In our view, the right form of auditor's involvement is the presentation of a report as referred to in para. 64 c).

68. Q: 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.

We do not agree with this approach. The requirement to include in the prospectus all reliable information available taken from the internal or management accounts of the issuer goes too far in our opinion. We suggest instead that, if a requirement is introduced for issuers with a complex financial history to include additional financial information in a prospectus, this information should be prepared on the basis of their segment reporting and used for the separate business units. Segment reporting comprises information obtained within the scope of the consolidated financial statements and audited by an auditor.

70. Q: 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.

We prefer the option of a report (para. 69 c). Generally speaking, however, already available audited information should be used as far as possible (see reply to 68.Q).

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

We prefer option 1. In the event of significant acquisitions or disposals of subsidiaries or business units the rules on the preparation of pro-forma information in Annex II apply. No additional requirements are needed in our opinion.

78. Q: 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.

We believe that the already existing rules on disclosure of pro-forma information are sufficient to ensure that the investor is informed adequately in the event of acquisitions or disposals of parts of the issuer's business.

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

We believe that the rules on the provision of pro-forma information in these cases are adequate.

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

While we agree in principle with CESR, we do not believe that it is necessary to include any rules to this effect in the Regulation.

May we, in conclusion, stress once again that we see no need to amend Regulation (EC) 809/2004. In our view, this would only create more bureaucracy without bringing any noticeable additional benefit. We therefore urge CESR members to reconsider the project.

Please do not hesitate to contact us should you have any further questions.

Yours sincerely,
for the Zentraler Kreditausschuss
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