

Response to

CESR'S CALL FOR EVIDENCE:

“Formal Mandate to CESR for technical advice on a possible amendment to the requirements in Commission Regulation (EC) 809/2004 regarding the historical financial information which must be included in a prospectus”

(Ref: CESR / 05 – 384)

CESR is invited by the European Commission to provide technical advice on a possible amendment to Regulation (EC) 809/2004 in order to ensure that the Regulation requires, or enables competent authorities to require, the inclusion in a prospectus of all historical financial information which is necessary, in a case where the issuer has a “complex financial history”, to enable an investor to make an informed assessment of the financial condition and prospects of the issuer.

CESR is therefore inviting all interested parties to submit views as to what should be considered in its advice as regards the setting of additional information to be required to issuers with a complex financial history.

Such a circumstance arises when the issuer has not prepared its historical financial information as a single business during the whole period for which such information is required under the Regulation (EC) 809/2004 (i.e. for shares: audited historical financial information for the latest 3 financial years).

This occurs when the issuer has not been required historically to prepare statutory financial statements presenting the totality of its operations, and CESR lists in particular the following cases:

- the issuer is a newly incorporated holding company inserted over an established business;
- the issuer seeking admission to trading or making an offer consists of companies that were under common control or ownership but which never formed a legal group;
- the issuer has made a significant acquisition (representing more than 25% of the group) during the 3 year historical record or subsequent to the last audited consolidated financial information on the issuer, including specific reference to cases where the acquired target has different accounting policies;
- the issuer has disposed of a significant part of its business since the last audited accounts;
- the issuer has changed its accounting reference date during the 3 year period.

Being thankful for the opportunity to comment on CESR's call for evidence, we focus hereafter on the issues raised in paragraph 3.1.

Generally, and as we already stated in our response to CESR's Consultation Paper on level III of the Prospectus Directive (ref: CESR/04-225b), we think that in case of issuers with a complex financial history, the approach of requiring 3 years of historical financial information on the combined group on consolidated basis should be followed.

From our point of view, such information should not be referred to the issuer *strictu sensu*, but to the “business perimeter” of the issuer as determined at the moment of the applying for the admission to listing and/or the public offer: this approach may be the only one complying with the principles stated by article 5 of the Directive.

Referring specifically to the questions in paragraph 3.1, we think that:

(Q1) CESR’s proposed list of cases is exhaustive;

(Q2) the same approach should be followed in relation to IPOs of shares and first placements of bonds by unlisted companies. In such cases, issuers with a complex financial history should be required to supply respectively 3 and 2 years of aggregated/reconstructed historical financial information related to all the relevant business/entities included in the perimeter of the group;

(Q3) for shares, the 3 year (T-1, T-2, T-3) historical financial information that should be supplied by an issuer with a complex financial history could be the following:

- as of T-1: pro-forma financial statements;
- as of T-2 and T-3: income statement and balance sheet reflecting the performance of the business/entities included in the perimeter existing at the time of the application for admission.

Specifically we would suggest:

- in the case of acquisitions, an income statement and balance sheet aggregating the financial statements of the issuer (even if a newly established holding company) and those of the companies acquired (“aggregate”¹);
- in the case of mergers, an income statement and balance sheet aggregating the financial statements of the issuer (even if a newly established holding company) and those of the merged companies (“aggregate”);
- in the case of newly established issuers that derive from spin-offs and/or the contribution of existing business units and/or assets and liabilities, an income statement and balance sheet of the business unit and/or the assets and liabilities subject to the spin-off and/or the contribution (“reconstruction”);
- in the case of spin-offs and/or the contribution of business units and/or assets and liabilities to previously existing companies, an income statement and balance sheet aggregating the financial statements of the previously existing companies and the income statement and balance sheet of the business unit and/or the assets and liabilities subject to the spin-off and/or the contribution (“aggregate”).

Finally, and as we already stated in our response to CESR’s Consultation Paper on level III of the Prospectus Directive (ref: CESR/04-225b), we would like to focus on an issue, which was never examined and refers to the audit of the financial statements that provide the basis for the pro-forma documents.

¹ The “aggregate” income statement and balance sheet should be prepared by summing the different income statement and balance sheet items, cancelling any intra-group items but without making the pro-forma adjustments

We refer to the historical data included in the pro-forma financial information, that is the historical financial information of both the issuer and the acquired business/entities. Annex I Item 20.1 of Regulation 809/2004 requires that the issuer's historical financial information has to be audited, but no mention is made about the audit of the historical financial information of the acquired business/entities. This clearly represents a risk for investors and we therefore think that, if such data are not audited, the fact should be specifically outlined in the "risk factors" section. We would also suggest that the financial information that provide the basis for the pro-forma should be audited to a preponderant extent.

We hope that You will find our comments useful and we remain at disposal for explanations and details, looking forward to further cooperate.

Milan, 16th June 2005