

Position on

**CESR's technical advice on a possible amendment to
Regulation (EC) 809/2004 regarding the historical financial
information which must be included in a prospectus**

Consultation Paper
Ref. CESR/05-428

MMag.Dr. Eva Maria Sattlegger
Head of Capital Market Services
Legal & Compliance
RAIFFEISEN ZENTRALBANK ÖSTERREICH AKTIENGESELLSCHAFT

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

Vienna, September 15, 2005

Introductory Remarks

Being in charge for documentation of investment banking products, in particular the set up of prospectuses for share issues / going public, for more than twenty years, I am pleased to have been invited to present my position from the practical point of view on a possible amendment to Regulation (EC) 809/2004 regarding the historical financial information to be included in prospectuses.

Basic Comments on the Historical / Existing Legal Structure

Reflecting the history of DIRECTIVE 2003/71 EC I may draw your attention to the former Prospectus COUNCIL DIRECTIVE 89/298/EEC of 17 April 1989, which states in Art 11.1. as follows :

"Where a public offer relates to transferable securities the prospectus must contain the information which, according to the particular nature of the issuer and of the transferable securities offered to the public, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of the rights attaching to the transferable securities.!

Whereas Art.11.2. lists minimum information to be inserted in a prospectus, Art.11.6. requires: "Where certain information specified in paragraph 2 is found to be inappropriate to the issuer's sphere of activity or its legal form or to the transferable securities being offered, a prospectus giving equivalent information must be drawn up."

Following this, a rather flexible and successful practice, namely a dialog on a case by case basis between stock exchange / authorities, issuers, law firms, investment banks in their function as lead manager, and auditors, developed during the last 14 years in order to provide the market with comprehensive and optimal information.

In consequence of that, a similar approach was made in / by DIRECTIVE 2003/71 EC

- introduction L 345/65 (16) / Directive
- introduction L 345/67 (34) / Directive
- in particular its central provision of Chapter II / Art. 5 (1)/ Directive,

which stipulates as follows:

"Without prejudice to Art 8(2), the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading.... is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer.....and of the rights attaching to such securities."

Following from that, headline of Article 7 (Minimum Information) as well as Introduction I/ page 1 ff. paragraph (2), (5), (6), (22) of the Regulation make clear that just a typology / enumeration of minimum information requirements should be given by the Regulation, and any additional information necessary to give a complete picture of the investment should be appropriate to the type of securities or the nature of the issuer involved.

But then:

With provision of Chapter II Art 3 (2) last sentence of the Regulation, which stipulates that a competent authority shall not request that a prospectus contains information items which are not included in Annexes I to XVII. – a fundamental idea of the Directive, any flexibility, has been given up, and a provision has been created which stands in basic contradiction to all the provisions (including the headline of Article 3 itself) mentioned above.

Basic Comments on the Approach Proposed

Since experience of more than 14 years has proven and as we learned from the participants of the Open Hearing and during our meeting in Paris as well, economic reality is changing / developing all the time and we will not be able to foresee all the cases of company-structures, capital measures, etc and cover them by our modules / annexes.

Step 1

To comply with the basic idea of the DIRECTIVE – with respect to our mandate “Historical Information”, on the one hand, with respect to all other subjects which may come up in practice, on the other hand, I am convinced that in the long run the first step and the most efficient way will be to keep the requirements flexible by rewording Article 3 of the Regulation / deleting the respective last sentence.

Additionally – in particular with respect to our mandate – recital (9) of the Regulation 809/2004 (requirements in case of proforma information) should be brought in line with the requirements for issuers with complex financial history.

Step 2

In order to harmonize the market / the process of approval more deeply, in particular to avoid “approval arbitrage”, parts of the results of the Consultation Paper June 2005 should become the basis of a general guideline for the competent authorities (Level 3).

In form of an addendum to these general guidelines / principles to be worked out, our four or more cases should be exemplary (not in taxative form) added to show which problems / aspects shall be considered in similar situations.

Step 3

Finally these cases / addendum should be kept alive and be revised – based on the experience of the competent authorities – after 2 – 3 years.

Step 4

Bearing in mind the principle “less may be more” it should – following the general guidelines to be given - be up to the flexible decision of/ material assessment by the competent authority, which and in which form and to which extent – considering the individual situation - additional information shall be required.

Short Comments on the Questionnaire

- ad II. / Q 27: yes, additionally, but in form of general guidelines
- ad II. / Q 32: restricted only to public offer or admission to trading
- ad III. / Q 35: no need to distinguish dependent on the type, but dependent on the individual situation and legal structure
- ad IV. / Q 40: no, the list may be added in descriptive form to the general guidelines
- ad IV. / Q 45: no (we have to take into account the situation that the “established business” consists of for example 10 x 10% subsidiaries, etc. and in that case would not be covered as proposed)
- ad IV. / Q 51: to be checked with the auditors
- ad IV. / Q 52: to be checked with the auditors
- ad IV. / Q 57: dependent on the individual situation / branche, etc.
- ad IV. / Q 61: will not work in practice
- ad IV. / Q 63: so far as reasonably practicable / to be decided case by case
- ad IV. / Q 64: to be discussed with the auditors
- ad IV. / Q 68: basically yes, as far as reasonably practicable
- ad IV. / Q 70: to be discussed with the auditors
- ad IV. / Q 77: a) depending on the individual situation, but option 2 to be preferred - b) referring to my comment on Q 45, the proposed solution does not cover all cases c) following to this recital (9) should be brought in line accordingly
- ad IV. / Q 78: narrative explanation, but to be discussed with the auditors

ad IV /Q 81: no, not practicable (ad hoc requirements, etc.)

ad IV/ Q 83: no, if causing additional costs for an interim audit