Response

to 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

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Introduction

Deutsches Aktieninstitut e.V. is the association of German exchange-listed stock corporations and other companies and institutions which are engaged in the capital markets development. Its most important tasks include improving the relevant institutional and legal framework of the German capital market and the development of a harmonised European capital market, enhancing corporate financing in Germany and promoting the acceptance for equity among investors and companies.

DIRK (Deutscher Investor Relations Kreis e.V.) is the German investor-relations association and was founded in 1990. It is a registered association since 1994. Its members comprise more than 220 German listed companies including all DAX 30 companies, represented by their respective investor relations officer. One of DIRK's goals is to actively articulate the common interests of its members by means of an open dialogue with all institutions involved in the capital market.

A. General Comments

While we still have doubts whether an amendment to the Regulation is necessary with respect to complex financial histories, we welcome that CESR stresses in paragraphs 36 to 38 of the Consultation Paper that its members

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should retain flexibility and that it would neither be practicable nor efficient to set detailed rules that would have to be applied in all cases. Complex financial histories require by their nature a flexible approach and any rules relating to this matter can only give general guidance. Against this background we believe that CESR's level 2 advice on this subject can, and should, be further limited to key principles on the basis of which complex financial histories can then be addressed in a prospectus. In addition, CESR may give further guidelines at level 3 which should, however, be based on practical experience in connection with the application of any new level 2 rules relating to complex financial histories. This would give CESR and its members sufficient flexibility to take into account the specific features of each individual complex financial history.

This means that, at level 2, the additional rules can be kept at a high level which allows the members of CESR to require a reasonable amount of additional disclosure beyond the current requirements in accordance with the principle of materiality. If CESR believes that some details are necessary, CESR may wish to propose that the Regulation should provide for certain disclosure requirements which are not yet reflected in the current version of the Regulation and which its members may, at their discretion and in accordance with the principle of materiality, apply on a case-by-case basis. An amended Regulation may therefore expressly provide for the possibility that historical financial information about entities other than the issuer, e.g. subsidiaries, or about significant businesses which, due to the complex financial history of the issuer, are not sufficiently reflected in the relevant historical financial information of the issuer. We do not believe that many further details should be set out in the Regulation. If CESR decides to propose such more detailed rules then it should be left to the discretion of the competent authority to decide in each individual case which disclosure should be provided.

Given the broad range of different scenarios of complex financial histories, we do not believe that it is practicable that level 2 specifies requirements for a few cases which are intended to cover all possible scenarios. This approach would necessarily lead to impracticable results in a number of cases and possibly to a lack of disclosure in certain other cases. Rather, a flexible approach should be taken without any mandatory requirements for predefined cases.

Furthermore, CESR should keep in mind that there is often an international element in a transaction such as in particular a U.S. rule 144A private placement. Generally, EU disclosure requirements should not be more stringent than the requirements in other important capital markets, namely the U.S. and therefore CESR should also take into account the requirements for complex financial histories which are imposed in the U.S. Otherwise, EU issuers and capital markets would face a competitive disadvantage.

B. Detailed Comments to the Questions Raised in the Consultation Paper

II. Scope of the Additional Requirements

1. Preliminary remark

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

It is crucial that issuers are not required to produce and to provide double information. Given that the various scenarios of complex financial histories can differ substantially, it is difficult to answer this question on a high level basis and the competent authorities should therefore have flexibility.

In our view, such requirements should, generally, follow, and should be based on, the principle of materiality in accordance with Art. 5(1) of the Prospectus Directive. If CESR believes that its members need some clarification in the Regulation in order to enable them to impose additional requirements then we do not object such clarification. We think, it should, however, be kept to a minimum of high level requirements to be applied and put in a concrete form on a case-by-case basis at the discretion of the competent authority as discussed in the paragraph "General Comments" above.

2. Types of securities

Question 32: 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 security 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.

Any additional requirements in connection with complex financial histories should, in principle, only apply to shares (Article 4(1) no. 1 of the Regulation) and in no event to debt and derivative securities (which is not common in practice and which would not be appropriate in light of the different risk profile of debt and derivative securities).

Furthermore, while pro-forma information has to be provided for all instruments issued under the share registration document, we believe that it would not be appropriate to require the additional, and in many cases very burdensome, requirements for convertible and exchangeable bonds which are subject to Annex 1 of the Regulation.

At least in case of convertible or exchangeable bonds where the investor has the right to exercise the conversion or exchange right in its discretion, the investor primarily bears the risk involved in an investment in a debt security and only from the date of exercise of the conversion or exchange right

(which may be a long period after the offering of the convertible or exchangeable bond) it bears the full risks of an equity investor. At that time (i.e. when the investor decides whether it should convert the bond into shares) any additional information which would have been prepared in a costly manner as of the issue date of the bond, will however be outdated and of no particular use for the investor.

3. Possibility of an exemption for small and medium-sized enterprises

Question 35: Do you consider that, in relation to additional requirements for issuers with a complex financial history, there is a need to distinguish different types of issuers? Please give your reasons.

No, there should be no general exemption for small and medium-sized enterprises (SMEs).

However, regardless of the size of the issuer, disclosure requirements which are too burdensome and costly may constitute a barrier for new issuers to use the capital markets for financing purposes. Costs and issue proceeds should therefore be in a reasonable balance.

Due to the lack of general criteria for a distinction between SMEs and larger companies, we believe that this is another example where flexibility granted to the competent authority may help since a complex financial history of, for instance, a "family owned company" may not require the same disclosure as, for instance, the establishment of a new holding company over 10 or 20 entities which may previously have been owned by different shareholders.

III. Flexibility for Competent Authorities (Paragraphs 36-38)

Flexibility is crucial as described in the paragraph "General Comments" above and should therefore be reflected to a larger extent in CESR's advice than it is currently the case.

IV. Additional Requirements for Issuers with a Complex Financial History

Question 40: Do you believe that the cases described 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 set out above, CESR should not provide for a comprehensive list of cases which excludes flexibility. Rather, in light of the flexibility principle which has also been stressed by CESR, CESR may, if it regards some illustration as necessary, provide examples together with a clear statement that the individual circumstances may require a different approach.

Case 1: The issuer is a newly incorporated holding company inserted over established businesses.

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

No, we do not agree with the requirement in paragraph 43 that historical financial information should be required for the last three years. In many cases, it would be difficult or even impossible to provide this information for such long period in the past, in particular if it is also required to provide such historical information in accordance with a new accounting standard (e.g. IFRS) which were not applied in the past, because the necessary figures are simply not available for such financial information. As pro forma information, historical financial information in relation to complex financial histories should therefore only be required for the last year. If CESR believes that this may not be sufficient in certain cases, then CESR should provide for sufficient flexibility so that, e.g. in case of material acquisitions, a competent authority can apply different standards depending on the size of such acquisition in comparison to the assets of the issuer.

a. Accounting standards

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

Question 52: If option 2 or option 3 is preferred, how would you request the issuer to conform the information given to the issuers' accounting standards?
a. Restatement
b. Reconciliation
c. Narrative description of the differences?
Please give your reasons and provide input on the costs that each of the options would imply for issuers.

As set out above, there is a very broad range of scenarios of complex financial histories and we do not believe that a general approach for all cases is reasonable and possible. Therefore, no specific option should be required. Rather, the competent authority should retain flexibility so that it can reflect the individual circumstances of the relevant issuer and the accounting standards which have been applied in the past by such issuer. Any general requirements in this context (if any and if possible at all) should be considered only after consultation with, and in cooperation with, the accounting industry. Otherwise, market participants might be required to provide information for which no sources or no assistance from auditors would be available.

In any event, a restatement is not appropriate. A restatement is made very rarely and typically only where errors are contained in the accounts. Requiring restatements in connection with complex financial histories would mean

that an extraordinary and costly statement would be prescribed which is not justified by the objective of the requirements in relation to complex financial histories.

b. Minimum content of the financial information

Question 57: 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.

Again, it is difficult or even impossible to provide for a general rule which in an appropriate manner covers all scenarios of complex financial histories without bearing the risk that issuers have, in certain cases, to comply with unreasonable, unnecessary and costly requirements.

If CESR however believes that it should give some general guidelines, then option 2 should be followed. Generally, and subject to the individual circumstances, it makes sense that explanatory notes are provided while, generally, a cash flow statement or a statement showing changes in equity as proposed in option 1 should not be required since this would clearly be too costly and burdensome in case of complex financial histories without providing an equivalent benefit for investors.

c. Auditing standards

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

In principle, where a prospectus has to contain complex financial historical information, independent auditors or accountants should be involved. Again, flexibility is required also in this respect. A full audit and an independent auditors' report from auditors would, however, not be appropriate in a number of cases where a review by the auditors may be sufficient. CESR may also wish to reconsider the approach proposed by it in light of the responses received from the auditing industry. It is important that the disclosure required is, or can be, reflected in the relevant auditing standards and that auditors are in a position to assume responsibility for their respective statements. Otherwise, such additional information would be of limited value and the costs and the time for producing it would not be appropriate and reasonable.

Question 63: 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.

Question 64: What kind of assurance should the auditor provide in relation to the restatement, reconciliation or narrative description:

a) a full scope audit
b) a review scope
c) a report, as in item 7a) of the pro forma annex, stating that in their opinion the financial information has been properly compiled on the basis stated?

Again, the flexibility approach would enable issuers and the competent authority to find, together with the relevant auditor, a way to address these matters.

Case 2: 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. This case would include where a division of an existing business has been separated to form a different entity, which then makes a public offer or seeks admission to trading on a regulated market (so called carve out).

Question 68: Do you agree with this approach? Please give your reasons and provide input on the costs that each year of drawing up historical financial information would imply for issuers.

There should be no strict requirements for a specific case which limit flexibility. See our responses to Question 40 and in connection with Case 1.

To the extent that in paragraph 67 CESR refers to internal or management accounts, this approach is not feasible since such accounts are not produced in accordance with the relevant GAAP standards.

Question 70: 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.

Flexibility should be retained. See our response to Questions 63 and 64.

Case 3: The issuer has made a significant acquisition or disposal during the three year historical record or subsequent to the last audited consolidated financial information on the issuer.

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

Question78: 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.

Flexibility should be retained. See our response to Questions 45, 63 and 64.

In normal circumstances, option 1 would be sufficient. Option 2 would require issuers to provide separate historical financial information about acquired businesses for a period of three years which appears to be unreasonably burdensome.

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

No, it is not possible to fulfil any disclosure requirements in relation to complex financial histories when only a firm commitment has been given while the transaction has not yet been closed. At the time when a firm commitment is given the purchaser does typically not have the relevant information about the acquired entity available in order to fulfil disclosure requirements relating to historical financial information. Therefore, a reconciliation would not be possible.

Case 4: The issuer has changed its accounting reference date during the three year period.

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

Flexibility should be retained. See our response to Question 45. Generally, we do however not believe that Case 4 should be addressed as a matter of complex financial histories if only the accounting reference date has changed.