

ZENTRALER KREDITAUSSCHUSS

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Prospectus Directive (2003/71/EC)

i.e.: European Commission Working Document dated 12 November 2003
(ESC 36/2003)

AZ: 413-EU-PROSP

Dear Sir or Madam,

As Zentraler Kreditausschuss¹ we would like to cordially thank you for the opportunity to comment on the Commission's working document 36/2003 dated 12 November 2003. We appreciate the opportunity to comment on the Prospectus Directive's requisite implementing provisions already at this early stage. We feel that this exercise is of vital

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*

importance, because the draft which has now been published, contains a number of interpretation issues which should be discussed as early as possible in an open and candid atmosphere between the European Commission and market participants. We furthermore welcome the fact that, in its working document, the Commission has already adopted numerous of CESR's regulatory proposals which were put forward in its comprehensive consultative documents and advices, although there are occasional deviations to which we cannot unreservedly subscribe. Furthermore, there are fundamental issues which, to date, have not been mentioned by CESR and which would need to be discussed.

Executive summary

Before commenting on the actual content of the working document we would like to make the following general points:

➤ Compliance with the scope of the mandate: No Level 1 Regulation at Level 2

Due to the Lamfalussy procedure, we attach fundamental importance to a clear-cut distinction between European Level 1 legislation on the one hand and the setting of prudential supervision standards at Level 2 on the other hand. By way of two examples from the current working document we should like to illustrate our view that much still needs to be done in this respect:

The document contains, for instance, provisions with regard to the issuer concerning the field of so-called historical financial information which, in our view, go well beyond the scope of the provisions contained in current European Directives. The working document stipulates, for instance, that the issuer shall have to present IAS compliant annual financial statements for the last two years preceding the issue (cf. e.g. Annex 1, Appendix K, 11.1).

In this regard, first, we would like to point out that the findings of the last CESR consultation round (so-called December package) which, again, also covered historical financial data, were not waited for, although the document contained blanks with a clear reference to the pending outcome of the ongoing deliberations. Regarding advertising, there was a specific renunciation to a draft. Now, however, the impression is given that it is already a foregone conclusion how this issue will be regulated. Hence, it would have been redundant for CESR and market participants to look into the issue a second time after the end of the first consultation. We would therefore like to make the urgent request that the findings of the so-called CESR December package be taken into account in the preparation of the final proposal to the Securities Commission.

Furthermore we have concerns over the provisions on the historical financial data in terms of the conflict between the Level 1 Directives and the IAS Regulation EC/1606/2002. Article 4 of this Regulation ensures that issuers of shares do not have to prepare their consolidated financial statements in line with IAS before 1 January 2005. Pursuant to Article 9 a, Member States may allow issuers of debt securities to still draw up their group financial statements until fiscal year 2006 pursuant to the national accounting standards. Yet, the working document which has now been presented does not provide any transitional periods thus, *de facto*, suspending the choice granted in the Regulation; in our view this is not compatible with the Level 1 and Level 2 jurisdictions defined in the Directive for a financial services action plan. We will present our detailed assessment of this matter in the paragraphs following the executive summary.

In addition to this, the provision contained in Annex 1, Appendix K Nr. 11.1, second paragraph, pursuant to which the audited annual financial statements of the last two years have to be prepared in a way that is consistent with the next annual statement, is not feasible for issuers planning to switch to IAS during that year in which they also plan their IPO. These issuers do not have the respective audited IAS annual statements available for the past years. Therefore, this provision should absolutely be deleted.

One further example for a Level 1 Regulation at Level 2 is the obligation for an interim reporting for companies that are not listed at the stock exchange which offer debt securities and other non-equity securities to the public without introducing them at the stock exchange (cf. Annex, Appendix K, 11.5.2). Such an interim reporting obligation at Level 1 is neither envisaged in the proposal for the Transparency Directive nor in the most recent proposals made by the Commission concerning capital adequacy requirements for banks. Nor is any such obligation contained in any other Directive or Regulation. If it had been the intention to introduce such an interim reporting obligation specifically for the purposes of the Prospectus Directive, then this would have had to take place at Level 1 of the Directive. In the consultation procedure, this, too, has been criticised by us *vis a vis* CESR.

We feel that such an interim reporting obligation is inappropriate because particularly smaller and medium-sized credit institutions which offer debt securities on a permanent or repeated basis, are burdened with an annual interim reporting obligation when the base prospectus or the RD are drawn up during the fourth or the 1st quarter of a fiscal year. Therefore, this provision should be deleted.

The Zentraler Kreditausschuss has different views on the question whether a regulation is the suitable means to implement the directive. Whereas the **German Savings Banks and Giro Association, the Association of German Public Sector Banks, the Association of German Mortgage Banks and the Federal Association of German Cooperative Banks** would prefer a directive instead of a regulation the **Association of German Banks** supports the current form of the legal document.

Yet if preference should be given to a regulation, it would have to be explicitly stipulated, with national implementation of the Prospectus Directive in mind, that the regulation can only take effect once the Directive has been implemented. As European regulations are directly applicable law and are effective in all Member States after their publication in the Official Journal of the EU, there could be problems in Member States in which Directive 2003/71 EC underlying the regulation has not yet been transposed into national law. It is

thus theoretically conceivable that the regulation is already in force, while national prospectus rules are still based on the old Directive 2001/34/EC and Directive 89/298/EEC. We would thus suggest that the proposed regulation can only enter into force as accessory legislation alongside transposition of the Directive into Member State law. This could be achieved by adding an Article.

General Comments on the Working Document 36/2003

As has been announced earlier, before addressing the individual articles of the Directive and the schedules we would like to share our view on the financial information which needs to be published in the prospectus.

➤ Financial Statements:

Any requirement on level 2 of the Prospectus Directive concerning the restatement or reconciliation of previous financial statements of the issuer to IAS should not overrule the flexibility rendered to Member States and its users under Art. 4 and 9 lit. a of the IAS-Regulation EC/1606/2002. Article 4 of the Regulation ensures that share issuers do not have to prepare their consolidated financial statements pursuant to IAS rules prior to 1 January 2005. Pursuant to Article 9 a, Member States may allow issuers of debt securities to still draw up their group financial statements until fiscal year 2006 pursuant to the national accounting standards. The working document which has now been presented by the Commission does not envisage any transitional periods. De facto, this working document now derogates the elective choice granted in the Regulation; this would be incompatible with the Level 1 and Level 2 jurisdiction specified in the Directive on an action plan for financial services. The requirement set out in Annex E providing that the audited financial information of the last two years must be presented and prepared in a form consistent with that which will be adopted in the issuer's next annual financial statements is not feasible for issuers planning to switch from local GAAP to IAS in the financial statements for the current financial year and who want to issue securities in that financial year. Such issuers do not have audited restated IAS- financial statements in place at the time of the issue since their financial statement for the previous business year has necessarily been drawn up according to local GAAP without any restatement. We therefore recommend replacing this requirement.

We generally agree with the idea, that EU issuers, when having securities listed on a regulated market and therewith falling under the scope of the IAS Regulation, should be obliged to prepare their financial figures so that investors can assess the issuer's situation

on the basis of IAS. In our view, this indeed follows from the function of IAS as the accounting standard for all companies which have securities listed, which also lies behind the IAS Regulation. We also agree that the requirement of a restatement on the basis of IAS serves this purpose best. As for the number of years for which the accounts should be restated, we would, however, see a difference between the issuance of equity and non-equity securities. For the former, a restatement of the previous two accounts seems necessary, but also sufficient to us. For this, we would not refer to the need to give investors, in the following (two) years, some historical track record, as investors in the secondary markets (for which the following accounts will be relevant) generally can not reasonably expect the same amount of information as those subscribing to newly issued securities. On the basis of the above described function of IAS, we do however think that investors have to be able to assess at least the current financial situation of the issuer according to IAS, so that the latest account should always be restated. For equity securities, we also think that investors should be able to assess the user's financial development on the basis of IAS; we therefore agree that the issuer should also have to restate the previous accounts.

On the other hand, for non-equity, in particular debt securities, we would regard the same requirement as too burdensome and would not give the interest of investors in obtaining comparability within the IAS figures the same weight as for equity. We would therefore regard it as sufficient that investors have the possibility of comparing the issuer's (restated) IAS figures with those of already listed companies, and at the same time have, for the issuer, a track record in the previous accounting standard available, with the possibility of non-IAS and IAS financial statements in the last year. This is in line with the IFRS 1 on first time adoption of international financial reporting standards dated June 2003, which requires a restatement for one comparison year. In this regard, we would like to point out that, in our understanding, IFRS 1 is the relevant provision for the preparation of annual accounts. We assume that a restatement of the financial accounts of previous years, which is required by CESR, is in form and content identical with the requirement in IFRS 1.36 to provide "comparative information". Although we agree in principle that the issuer should have to restate the previous accounts, the conversion to another accounting Regulation - in

particular the IAS transition in 2005/2007 - has to be taken into account. IFRS 1 provides comprehensive transition rules concerning the first-time adoption of IAS. If - in consequence of the date of conversion - IAS accounts are not available, the accounts based on national GAAP should be sufficient for the prospectus.

Therefore, we reject the requirement that audited financial information must be presented and prepared in a form consistent with that which will be adopted in the issuer's next annual financial statements. If an issuer intends to switch over to IAS by the end of 2005, then it could only tap the market in late 2005 with IAS financials for 2003 to 2004 (equity) and 2004 (debt), respectively. Therefore, this principle will impair capital market activities for those issuers. Especially in light of the IAS Regulation, the time between now and 1 January 2005 (when the IAS Directive, and consequently the proposed requirements, would become effective at least for equity securities) would not be long enough for a smooth transition. During the period of transition to IAS/IFRS, the companies should not be imposed with additional requirements. Otherwise, a clean conversion to the international accounting rules might be jeopardised.

Furthermore a lot of firms do not issue any listed bonds but offer their titles for public trading. Due to the absence of a relation to the capital market, the IAS is not pertinent to these undertakings. The proposal partially takes this into consideration since, on principle, also national accounting rules are viewed as permissible. Nevertheless, these undertakings stipulate an additional information requirement which relates to the cash flow statement. In the absence of national accounting provisions, a cash-flow statement is only drawn up in the event of group accounting. Thus, the prospectus requirements would introduce an additional requirement beyond the existing European accounting standards. In our view, principally the prospectus Directive should refer to the existing IAS/IFRS and the national GAAP instead of setting new standards for accounting purposes.

Furthermore, with regard to the individual provisions contained in the working document, we would like to make following points.

Comments on the Recitals

➤ Recital 4

This recital stipulates that the duplication of information should be prevented. Yet, due to the host of information envisaged in the appendices for the individual prospectus parts, it will not be possible to entirely prevent certain information from cropping up several times. Already nowadays, this is standard prospectus practice and there have been no complaints about this to date. Hence, the duplication should therefore only be ruled out if such duplication gives rise to the concern that prospectuses will no longer be intelligible or that said duplication may even confuse the investor. In many cases, however, readability is even enhanced by repeating information that has been provided earlier, in a different context.

We therefore propose the following amendment:

"...where a prospectus is composed of separate documents multiple usage of information should be limited in a way that the clarity and legibility of the prospectus for the investor is not jeopardized or reduced."

➤ Recital 8

We do not welcome the proposal to include pro-forma information in the prospectus that is contingent upon certain conditions. Such information might confuse the investor. If, in a specific case, there should indeed exist circumstances which would justify a pro-forma information under the parameters mentioned in the recital, then a description of these circumstances within the framework of the risk factors would be the right place. If, despite the foregoing caveat, this provision should be upheld, then it would be worth considering to include the significant change of 25% mentioned in the recital – which we, as a matter of fact, feel is feasible – in the Regulation proper or in Appendix B.

➤ **Recital 15**

In our view, the legal text of recital 15 could give rise to misunderstandings. Whilst, for special purpose vehicles, sentence 1 still appears to refer to the depository receipts mentioned in recital 14, sentence 2 apparently refers to the schedule for banks which is described in great detail in Annex K. We feel that a clarification of these matters would be helpful.

➤ **Recital 16**

In line with the CESR proposals, for derivatives a so-called ‘everything else box’ should be created. Yet, here we would welcome it, if Art. 1 would provide a definition of derivatives. One possible wording might be:

„Derivative securities are securities where the payment and/or delivery obligations are linked to an underlying (including but not limited to securities, currencies, commodities, indices or other measures), unless the payment of interest is merely linked to a fixed rate or to a recognised inter-bank interest rate.“

In so far we feel that the distinction between normal debt securities and derivative products based on a 100% payback is not very well set-up.

Notwithstanding this reservation, we expressly welcome the fact that – in the context of the drawing up of a prospectus for derivative securities on a voluntary basis - examples may be given in order to describe the respective product. We do not share the view that has been put forward in various consultation rounds, i.e. that examples and worst case scenarios should be mandatory for such products. Our scepticism is owed to the fact that such examples cannot fully take account of all modalities and would therefore be rather misleading and instead of helpful.

➤ **Recital 18**

Nevertheless, we welcome the Commission's plans that one base prospectus may contain descriptions of various securities categories, even if the wording e.g. in Article 4 paragraph 4 is not entirely clear (cf. our later presentations on this issue).

➤ **Recital 20**

We would also appreciate a further indication by the Commission concerning the preconditions for omission of information pursuant to recital 20. One specific issue that would require clarification is, when information shall be regarded as 'not relevant'.

➤ **Recital 23**

In our view, the language of recital 23 is rather misleading. The wording "where the final terms contain only the detailed pricing characteristics of one or more issue.. without any material information on the issuer, there is no need for the issuer... to supplement the summary of the base prospectus" gives rise to the impression that for all final terms featuring more information than the pricing characteristics, a supplement pursuant to Art. 16 would have to be handed in which would thus make it subject to approval. Yet, this is not in line with the provision contained in Art. 5 paragraph 4 of the Directive, pursuant to which the base prospectus should allow a swift emission of securities without having to undergo a renewed approval procedure for the final terms. Therefore we recommend deleting recital 23 or rewording it to match the provision contained in Art. 4 paragraph 6 of the paper.

Comments on the Articles

➤ **Art. 2**

In **Art. 2 paragraph 1**, in our view, the word ‘or’ contained in the definition of the term ‘schedule’ should be replaced by an ‘and’, since the schedules differentiate between both, the issuers and securities. The same applies for **Art. 2 paragraph 4**, where for the sake of clarity, the word „and“ in the second line should be replaced by „and/or“. The proposed definition in Art. 2 (5) does not seem suited as a general definition of special purpose vehicles. It should therefore be deleted, or at least moved to the particular schedule where it is needed.

➤ **Art. 3**

In Art. 3 paragraph 1, the competent prudential supervision body is granted the right to request an amendment or addition of certain information on a case by case basis. Past experience has shown that these clauses entail the risk of a national overregulation and therefore also call into question the harmonisation of the market. At least the authority should only be entitled to make these requests if novel financial products are concerned for which a market standard has not yet been established and where, furthermore, the information duties provided for in the Regulation are not sufficient. We therefore propose the following amendment:

"on a case by case basis provided that the respective prospectus is related to a security for which a market standard has not yet been established and the information duties provided for in this Regulation are not sufficient."

Art. 3 paragraph 1 lit. a describes the scope of application of the share registration document. Yet, with a view to the Directive’s legal wording, we wonder whether, for compatibility reasons, the term ‘equity’ should not be upheld instead of the new term ‘share’.

Furthermore, pursuant to **Art. 3 paragraph 1 lit. a (ii)**, the share registration document should also be applied to those equity securities the underlying of which is based on securities which have not yet been admitted for trading. Especially the legal wording

chosen by the Commission differs from CESR's advice. CESR had specified that those shares that

-can be physically delivered

-are issued by the issuer of the derivative; and

-are not physically admitted to trading at the time of approval of prospectus

would be issued with equity disclosure requirements. (page 7 of Ref. CESR/03-300).

We would welcome a clarification to the effect of this legal wording; this would make clear that the share registration document should only be used for newly issued securities.

This clarification could be given within a recital.

Art. 3 paragraph 1 lit. d defines the scope of the so-called "debt and derivative securities registration document", the mentioned security types are not clearly defined. Regarding debt securities, the second sentence contains a definition which differs slightly from the one used in the following provision ("corporate debt" as opposed to "debt"). There is also no definition of "derivative securities". To avoid confusion, it would be highly preferable to introduce definitions of the terms "debt securities" and "derivative securities" in Art. 2. – Also, as under provision i), it should be clarified that this schedule is also applicable to securities which do not have an individual denomination, but can be acquired on issue for less than EUR 50 000.

In **Art. 3 paragraph 1 lit. f** with a view to the schedule for guaranteed securities the "guarantor" should be mentioned after the term "guarantees" since the former plays a major role due to the guarantee which he provides.

Art. 3 paragraph 1 lit. k: The scope of the Bank Registration Document proposed in this provision deviates from that suggested by CESR in its Advice to the Commission. Firstly, CESR had proposed not only to include credit institutions as defined by Directive 2000/12/EC, but also other "regulated firms such as investment banks that have substantial experience of issuing securities". As the latter condition would be very difficult to judge in practice, and the existence of an effective regulation should be the decisive factor in so far, we would regard it as preferable if all entities regulated according

to the Investment Services and the UCITs Directive would be allowed to use this schedule. Secondly, CESR had proposed to allow non-EU banks "which are subject to significantly high standard of prudential and regulatory supervision" to make use of this Registration Document. Accordingly, the scope of this schedule should in our view not be restricted to non-EU banks that have their registered office in a member state of the OECD, but should in addition be extended to all regulated entities (including entities covered in the EU by the ISD or the UCITs Directive) which are subject to effective supervision in their home countries, which would have to be assessed on a country by country basis by way of level 3 provisions or practice of individual authorities.

In **Art. 3 paragraph 3** the basic principle is described pursuant to which in future the schedule which contains the most stringent and most comprehensive information requirements may be used for issues of other securities for which there are less comprehensive information requirements. Although we welcome this approach in principle, we would like to point out that **the road map drafted in Annex 2** does not comply with this basic principle since, for instance, pursuant to this principle, the share registration document would equally have to apply to all other issues. This does not become clear from the legal text contained in the proposal.

➤ **Art. 4**

The **road map** contained in Annex 2 in combination with **Art. 4** does *not* envisage that the RD for debt instrument issues and derivative issues with a denomination of > or = € 50,000,- (Annex 1, Appendix D) may also be used for wholesale non-equity issues. For this it would rathermore be necessary to prepare a separate RD pursuant to Annex 1, Appendix I. In our view this is in contradiction to the basic principle that that schedule which, in terms of content, is more stringent, may always substitute a schedule that is less complex in terms of content. Since, in addition to this, allowing to issue wholesale bonds also under a retail base prospectus would also be in line with practitioners' requests on the ground, Annex 2 should provide for a corresponding more flexible solution.

In **Art. 4 paragraph 1** at the end of the second paragraph a definition is given of the “Final Terms“ (“Information, which are not known when the base prospectus is approved and which can only be determined at the time of the individual issue“). Also with a view to guaranteeing uniform application in all Member States as far as harmonisation is concerned, in our view this definition should be integrated into the nomenclature definition contained in Art. 2.

The provisions contained in **Article 4 para. 1 sentence 2** concerning the mandate to the competent prudential supervision bodies to request prospectus information beyond that listed in the Appendices on a case by case basis in our view is in contradiction to the harmonisation approach envisaged by the Prospectus Directive and the Lamfalussy approach. Particularly for reasons of legal certainty, the Appendices should contain an exhaustive list of required information (Annex 1). Otherwise this would give rise to the risk of prudential supervision arbitrage. At least the authority should only be entitled to make these requests if novel financial products are concerned for which a market standard has not yet been established and where, furthermore, the information duties provided for in the Regulation are not sufficient. We therefore propose the following amendment:

"on a case by case basis provided that the respective prospectus is related to a security for which a market standard has not yet been established and the information duties provided for in this Regulation are not sufficient."

Pursuant to provision contained in **Article 4 para. 4**, there should be three categories of base prospectuses which, respectively, exclusively cover certain types of securities (ABS, options on the issuers' own shares, mortgage bonds and other non-equity securities). This means, for instance, that an issuer who has prepared a base prospectus for mortgage bonds prepared pursuant to Art. 5 paragraph 4 b) of Directive 2003/71/EC, may not issue any conventional debt securities under this base prospectus. He would have to prepare a separate base prospectus for this. This is not in line with practical requirements on the ground. For instance in Germany, both, mortgage bonds and uncovered debt securities are

issued under one and the same offering programme. There is no obvious reason why it would be necessary to prepare separate base prospectuses for this exercise. The only essential thing is that the prospectus will provide the investor with all the information on the issuer and on the issued securities that will also have to be included in a full prospectus.

In practice, if needs be, it might even be possible to fall-back on the option provided for in Article 8 paragraph 4, i.e. that for certain securities types it should be possible to refer to a registration document (incorporation by reference) so that - as is the case in the example quoted above - the cumbersome preparation of respectively one full base prospectus, e.g. one for mortgage bonds and one for uncovered debt securities, could be avoided. Yet, especially in those cases in which the issuer knows at a given issue date that he wants to issue uncovered debt securities *and* mortgage bonds, possibly even at the same time, we feel that such an incorporation by reference is not very meaningful and rather inappropriate.

At least the securities types mentioned under the third and the fourth indent in Art. 4 paragraph 4 should therefore be subsumed under one category. Furthermore, preference should be given to a 'comprehensive solution' in the form of a summary of all four indents.

➤ **Art. 7**

In **Art. 7 paragraph 2** it should be made clear that the risk factors associated with the issuer do not have to be incorporated in a securities note. The second indent should therefore be complemented as follows:

- *“as the case may be, the risk factors linked to the issuer and the type of security covered by the issue,”*

- In **Art. 7 paragraph 1**, and in **Art. 8 paragraph 1** the terminology should therefore be consistent at the end of the fourth indent. We therefore propose to

make a corresponding reference to Art. 3 (“... *is drawn up as defined in Art. 3*”), as is already envisaged under Art. 7 paragraph 1.

- **Art. 10 paragraph 1**, fifth indent should – by way of clarification – also allow the option of involving base prospectuses as follows:

*“Earlier approved and published prospectuses **and/or base prospectuses;**”*

The provisions contained in **Article 7 para. 3** describe the possibility that the regime developed in the schedules may be modified at one’s own discretion and we welcome this move. Yet, this provision is contradicted by the provision designed in **paragraph 4** pursuant to which – upon a respective request by the home state authority – it is required to make cross references to the regime developed in the schedules. We therefore propose deleting paragraph 4.

➤ **Art. 8**

Concerning the requirement to include cross references (**Art. 8 paragraph 3**) we would like to refer to our comments on Art. 7.

We furthermore welcome the possibility envisaged within the framework of a base prospectus in **Art. 8 paragraph 4** to refer to a separate registration document. In practice, this should constitute a sufficient surrogate for the fact that, for the base prospectus, the European Commission does not plan to allow the breakdown into the three components (registration document, securities note and summary) envisaged for the full prospectus. Yet, we propose expanding the provision contained in Art. 8 paragraph 4 allowing reference to one part of the base prospectus which – as far as content is concerned – corresponds to a registration document. Frequently an issuer during his first-time issue will prepare a complete base prospectus (i.e. including the registration document) for a specific issue and then, at a later stage, will want to include other securities types into the base prospectus. Here, it should be possible that the initial base prospectus is incorporated by reference whenever it contains information content that also has to be included in a registration

document. We therefore propose expanding the provision contained in Art. 8 paragraph 4 to include the following complement:

*„In case the issuer, the offerer or the person asking for admission to trading on a regulated market has previously filed a registration document **or a complete base prospectus** for a particular type of security and, at the latest stage, chooses to draw up a base prospectus in conformity with the conditions provided for in Art. 5 a) and b), the base prospectus shall contain:*

- *The information contained in the previously or simultaneously filed and approved registration document **or the respective part of the base prospectus** which shall be incorporated by reference, following the conditions provided for in Art. 10 of this Regulation; and*
- *the information which would otherwise be contained in the relevant securities note less the final terms where the final terms are not included in the base prospectus.”*

Art. 8 paragraph 5 gives a blueprint for two types of final terms. Firstly, this should be possible in the form of one single document which merely contains the final terms; secondly this should take place through an integration of the final terms into the base prospectus. We feel that these two options are not sufficient. Rathermore, in the layout of the final terms, the issuer should also be allowed to present the major features of the issue; obviously these features will not deviate from the information already contained in the base prospectus. It also is an advantage for the investor if he is given an opportunity to see all the major parameters of the issue at a glance. We would therefore like to suggest the following legal text:

“- in the form of a separate document containing the final terms and the relevant information about the issue“.

➤ **Art. 9**

The provisions contained in **Article 9 para. 2** provide for a 15 working day deadline after disclosure of the annual financial report for publication of the information which needs to be published pursuant to Art. 10 paragraph 1 of Directive 2003/71/10. We feel that this deadline is too short. Particularly with a view to the provisions contained in Art. 9 paragraph 3 pursuant to which so-called out of date information has to be labelled separately will engender considerable compliance effort. It will not always be feasible to achieve this within 15 working days. We therefore propose extending the deadline contained in Art. 9 paragraph 2 to 30 working days.

➤ **Art. 10**

The possibility to include external documents outside of the prospectus in which is enshrined in **Art. 10** is to be welcomed. Yet, in terms of the language of the reference document, the provision seems to be still rather unfinished. It may appear logical that the reference documents have to be prepared in the same language as the prospectus. Yet, if a German institute using an English issue vehicle wants to exclusively offer a bond for public trading in Germany, then, in future, it will frequently prepare an English prospectus for this purpose. This is permissible and since this is anchored in Art. 19 paragraph 2 of the Prospectus Directive this would also suggest that it is regarded as acceptable for the investor (only the summary may be requested in the Home State language). If the English language prospectus for instance refers to a consolidated annual report that is written in German, then the excerpts from the report would have to be translated into English, although the issue is only destined for German investors. The meaningfulness of this approach is extremely doubtful. Art. 10 paragraph 2 of the Regulation should therefore take account of this case.

➤ **Art. 11**

Art. 11 stipulates the requirements for the electronic publication of the prospectuses. The fact that the issuer or offerer shall be generally responsible for the correct publication is perfectly legitimate. This notwithstanding, after due consideration of the technical

capabilities, Art. 11 paragraph 1 is too far reaching in our opinion. Essentially, art. 11 paragraph 1 lit. b can only contain a goodwill clause (i.e.: best efforts.) {0>

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This is because, in effect, 100% safeguards against the manipulation of electronically published documents are unlikely to result from such a provision. Therefore, a more favourable legal text would therefore read as follows:

"b) the prospectus or the base prospectus shall be transformed in a file format that is reasonably deemed to hinder any manipulation or modification from unauthorised persons."

Concerning **Art. 11 Abs. 1 lit. d**, we take it that the issuer or the offerer do not have to be responsible for the investor actually succeeding in the download or in the printing out the document since the root cause of errors may also be related to the investor's system; therefore, we are not entirely convinced that the text proposal will also be understood accordingly by the Commission. Hence, we would welcome the following clarification:

"d) Nothing within the system used to electronically publish the prospectus or the base prospectus shall prevent the investors from downloading and printing the respective document."

➤ **Art. 16**

We welcome the Commission's approach to wait for CESR's advice on advertisement. Nevertheless we would like to point out our opinion to this matter: In our view there should be no further harmonization of the advertisement rules beyond the principles set out in Article 15 of the Directive.

What could easily threaten the benefits of the entire Directive is the possibility that issuers may be asked to get a separate approval of their advertisement in each of the Member States where they plan to market their issue. If this were so, an issuer doing an IPO, for

example, could not dream of advertising the issue even in one newspaper within the EU, since they would have to get a separate approval from every jurisdiction where the issue is offered to the public/admission to trading will take place. This could be largely avoided by the appropriate interpretation of the Directive.

Article 15 paragraphs 2 to 5 lay out the criteria that an advertisement should comply with in order to be consistent with the Directive. In addition, Article 15(6) states: *“The competent authority of the home Member State shall have the power to exercise control over the compliance of advertising activity, relating to a public offer of securities or an admission to trading on a regulated market, with the principles referred to in paragraphs 2 to 5.”*

This paragraph makes it clear that only the home Member State shall exercise such power. Any other interpretation is neither logical nor consistent with the spirit of the passport for issuers.

It is also implicit in this paragraph that the specific rules and procedures related to implementing Article 15 should be the rules and procedures of the home authority only (consistent with Article 15). It would not be possible to imagine the home authority exercising this control with a set of overlapping multiple rules emanating from the host countries. This approach is also consistent with the practical reality that the detailed rules on advertisement across the EU are indeed too different for them to be reconciled and harmonized at an EU level while the principles on which they are based are not. The regulatory approach to the advertisement in the context of prospectuses will therefore have to remain at a high level. Article 15 provides this basis.

In this sense, we fully agree with the approach taken by CESR so far, which is not to launch any work on further harmonization. We see a danger in the future implementation only in so far as issuers may be asked to go through individual approval in the host countries and/or the implementation of Article 15 is linked to any effort of harmonization of the detailed rules. We would therefore urge the Commission to follow this general high-level approach in the future section on advertisement of the implementing measures.

Comments on the Schedules:

Annex 1, Appendix A: Share registration document Schedule

5.1.5. The information requirement on historical developments of the issuer is much too vague and not congruent with the one contained for example under the same number in the Debt Registration Document, which could be an obstacle in using an Shares Registration Document for issuing debt. But as we nevertheless prefer the wording given the Debt schedule the wording should be as follows:

“the recent events particular to the issuer which are to a material extent relevant to the evaluation of the issuer’s business”.

6.1.1 & 6.2: These requirements should be restricted to a description of the current situation regarding the issuer’s activities and principal markets. A description of the ”historic” development of the issuer’s activities and principal markets within the period covered by the historical financial information would not help investors in assessing the issuer and its financial situation, but would increase the issuer’s expenditure following from this requirement substantially.

14.1.(i) Given the research effort involved in researching such information, the requirement that for all of the issuer’s senior management bodies a list will have to be prepared of those companies where, in the past 5 years, they held the position of a senior management or of a supervisory body, is disproportionate. There are already sufficient safeguards for investor information as a result of the provisions on the disclosure of conflicts of interests.

14.1 (ii): The requirement under (iii) to disclose bankruptcies etc. "with which a director was associated" is too vague. In so far, a wording like "where such person was a director

with an executive function at the time of or within the 12 months preceding such events" seems preferable.

The requirement under (iv) requires disclosure also of "public criticisms" of the relevant persons by authorities. In our view, this disclosure requirement should be restricted to "sanctions" which the persons were subject to. It appears unclear, already, how the term "public criticism" is to be understood. For example, it could be construed so as to cover statements made by employees of a regulatory authority in an interview; this would clearly not be justified, as such statements would not necessarily imply any wrongdoing on the side of the relevant person worth being disclosed to investors for the next five years. The disclosure of a criticism would only appear justified if it constitutes one of the sanctions which the regulatory authority is entitled to impose. In this case, however, it would already have to be disclosed as a "sanction". The reference to "public criticisms" should therefore be deleted from this item.

16.2: This item has to be put under the same restriction as the one under 15.1: Disclosure on an individual basis should not be mandatory if individual disclosure is not required in the issuer's home country and the information is not otherwise publicly disclosed by the issuer.

20.1: Please see our comments on Historical Financial Information given above.

20.2: As there is a risk that investors are misled by pro forma financial information a publication of such information should, in our view, not be mandatory. The recent regulatory developments in the United States have led to restrictions in the use of such information; it would therefore seem odd to require the publication of such information. Furthermore it needs to be ensured in any case that no pro forma statements have to be prepared for transactions that are still in the planning stage.

Yet, in case the Commission should feel the need to uphold this requirement, the significant size of 25% mentioned in recital 8 would have to be integrated into the legal text of the Regulation itself or into the schedule described in Annex 1, Appendix B.

20.9: It is generally unclear what is meant by changes in the issuer's "trading position". Only the financial position is of relevance in so far.

22: We welcome the proposal concerning 'material contracts' in so far as the Commission revisits the proposal made by CESR to waive the recording or even the publication of material contracts. Nevertheless we take the view that the term "material contract" is too vague. The purpose of a prospectus is not to provide a due diligence report to investors but only to inform him about the nature and the major risks of his investments. Accordingly, it should be sufficient if the risks resulting from a contract that are material for the assessment of the company and/or the securities have to be described in the prospectus. The obligation to disclose such risks already follows from the disclosure requirement no. 4 "Risk Factors".

23. From our point of view, the scope of application of the disclosure requirement set forth under no. 23.1 - given its unclear wording - is misleading. As far as we are concerned, the current wording does not indicate that merely experts who prepared a report which is quoted in the prospectus, need to be mentioned by name and job title. We harbour the particular concern that - without a respective clarification - the German translation of no. 23.1 might be faulty. Therefore we propose - in line with the wording adopted under no. 24 (b) - the following clarification:

„Where a statement or report attributed to a person as an expert and prepared at the issuer's request is included...".

Apart from this, the same applies to all building blocks containing the phrase 'statement by experts and declarations of any interests'.

Appendix B: Pro forma financial information building block

Please see our comments on Appendix A no 20.2.

Appendix C: Share Securities Note

3.3: The requirement to disclose "Conflicts of interest in the issue/offer". Should be deleted because conflicts of interests are sufficiently dealt with by other (regulatory) requirements, and the term appears too vague. Furthermore the wording of the requirement to disclose "any interest, including conflicting ones that is material to the issue/offer" is too vague. There is no guidance at all to determine interests which are material to the issue/offer. It will also be especially difficult to fulfil for non-EU issuers, who might have different standards to deal with conflicts of interests. This requirement should thus be deleted. At least, a certain guidance should be provided, for example by inserting examples or restricting the obligation to cases in which there is a concrete risk of a damage for investors.

4.11: Concerning taxes in our view only information on withholding taxes should have to be provided; regarding further tax issues, a recommendation to investors to seek individual tax advice should be sufficient. Otherwise, an offer of securities in a multitude of EU countries, or an admission to trading in such countries, would mean that detailed tax descriptions would have to be given for all such countries, which would lead to a voluminous tax section in the prospectus and would create substantial practical problems for the issuer which could endanger multinational offers, as it will often be difficult to obtain detailed tax advice for a large number of jurisdictions, before the prospectus is submitted to the competent authority.

5.3.4: The obligation set out in 5.3.4. does not seem justified. It seems to be based on the idea that any transactions with the members of the administrative, management or supervisory bodies or senior management etc. made at a lower price are an indication that the offer price is too high. However, a disparity between the public offer price and the

price directors and senior management had to pay up to one year before the public offer will in almost all cases simply reflect price movements of the security; in addition, many of the transactions with directors and senior management will be the result of stock option and similar plans. Thus, transactions with the named bodies have in the vast majority of cases absolutely no relevance for the question if the public offer price is appropriate. This requirement should therefore be deleted.

5.4.3 We object to the disclosure obligation of the quotas and of the commissions of the underwriter. Neither the underwriting quotas nor the commissions going to the syndicate constitute meaningful information for the investor. Rather more, these designate processes at the primary market to which the investor does not have any access. The investors can by no means glean meaningful information for themselves from the respective higher or lower underwriting quota of their financial intermediary via whom they acquire the respective title. Yet, for the underwriting bank, the publication of this underwriting quota has massive implications, since it discloses the competitive positions.

What is more, the commissions flowing inside the syndicate are irrelevant for the investors. What is important for investors is the fees and/or prices which they have to pay on the secondary market for the acquisition of the quotas. Yet, these do absolutely not correspond to the commissions of the primary market that are valid for the underwriters. The primary market commissions are risk compensations for the underwriting whilst the secondary market commissions are compensations for services. We therefore advocate deleting the respective disclosure obligations.

At most, we view a summary quote of the commission total as acceptable.

Appendix D: Debt and Derivatives Securities RD

5.1.5: This requirement is not congruent with the one contained under the same number in the Shares Registration Document, which could be an obstacle in using an Shares

Registration Document for issuing retail debt. But we prefer the wording given in this schedule; see also our comments to 5.1.5. Shares Registration Document.

5.2: We take the view that the company's current and future investments are under normal circumstances not of relevance for investors in debt securities, and that these requirements should therefore be deleted.

5.2.3: This requirement does not appear in the Equity Registration Document, which again could be an obstacle in using an Equity Registration Document for issuing retail debt.

6.1.2: A description in particular of new products and/or activities does, under normal circumstances, not help investors to assess the risk inherent in debt securities. Disclosure of new products and/or activities should only be required if they belong to the issuer's principal activities, in which case they would be covered by 6.1.1.

10.2 & 11.2: In our view conflicts of interest as well as corporate governance practices do not, under normal circumstances, help investors in assessing the risk of a debt security. In our view, these requirements should therefore be deleted. In addition, the requirement to disclose potential conflicts of interest and corporate governance practices will be especially difficult to fulfil for non-EU issuers, who might have different standards for both.

12: The information about mayor shareholders has no relevance for investors in debt securities generally. Under normal circumstances, disclosure about major shareholders does not help investors to assess the risk that the issuer becomes unable to fulfil its obligations under the securities.

13. Please see our comments on historical financial information given in the general comments on the Working Document.

13.7: It is generally unclear what is meant by changes in the issuer's "trading position". Only the financial position is of relevance in so far.

15: We take the view that the term "material contract" is too vague. The purpose of a prospectus is not to provide a due diligence report to investors but only to inform him about the nature and the major risks of his investments. Accordingly, it should be sufficient if the risks resulting from a contract that are material for the assessment of the company and/or the securities have to be described in the prospectus. The obligation to disclose such risks already follows from the disclosure requirement no. 4 "Risk Factors".

Appendix E: Debt Securities Note

3.1: The requirement to disclose "Conflicts of interest in the issue/offer" should in our view be deleted, because conflicts of interest are sufficiently dealt with by other (regulatory) requirements, and the term appears too vague. Furthermore, the wording "any interest, including conflicting ones that is material to the issue/offer" is even more vague than the previous one; there is no guidance at all to determine interests which are material to the issue/offer. It will also be especially difficult to fulfil for non-EU issuers, who might have different standards to deal with conflicts of interests. This requirement should thus be deleted. At least, a certain guidance should be provided, for example by inserting examples or restricting the obligation to cases in which there is a concrete risk of a damage for investors.

4.14: As set out above in our view only information on withholding taxes should have to be provided; regarding further tax issues, a recommendation to investors to seek individual tax advice should be sufficient. Otherwise, an offer of securities in a multitude of EU countries, or an admission to trading in such countries, would mean that detailed tax descriptions would have to be given for all such countries, which would lead to a voluminous tax section in the prospectus and would create substantial practical problems for the issuer which could endanger multinational offers, as it will often be difficult to obtain detailed tax advice for a large number of jurisdictions before the prospectus is submitted to the competent authority.

5.4.3: In our view the details of the underwriting agreement and the underwriting quota are irrelevant for investors and not material for the assessment of the company or the securities. The only fact of interest to investors is the total amount of commissions paid, which is already now regularly disclosed in prospectuses; the disclosure requirement should therefore be restricted to this point.

Appendix F: Requirements for Guarantees

No comments.

Appendix G: Asset Backed Securities Registration Document

1.2: Where an undertaking/obligor for which disclosure is to be made is not involved in the issue, the information used for the prospectus can either have been published by the undertaking/obligor, or it can be taken from publicly available sources. Accordingly, the words " or contained in publicly available sources" should be added at the end of the second, in the middle of the third and at the end and the last sentence under this number.

4.5.: The assessment by which jurisdiction the pool of assets is governed may itself vary in the different jurisdictions concerned. Moreover, it is not clear which factors determine the jurisdiction by which the assets are governed.

Appendix H: Asset Backed Securities Securities Note

2.2.1: The assessment by which jurisdiction the pool of assets is governed may itself vary in the different jurisdictions concerned. Moreover, it is not clear which factors determine the jurisdiction by which the assets are governed.

2.2.2. Such a description may generally not be given without the corresponding agreement of the debtor of the underlying asset since this would be in breach of the banking secrecy. The same applies to 2.2.11 and 2.2.12 as well as to 3.5.

2.2.3: It should be clarified what is meant by "legal nature".

2.2.13: For practical reasons, as the number of assets may be high, it should be made clear that this information may be given by specifying ranges of yield and maturity etc.

2.2.15: As for 2.2.11, the requirement to disclose information about the assets should be restricted to information that the issuer is aware of and/or is able to ascertain from information published by the obligor(s), or from publicly available sources. Furthermore, the relationship of this requirement to the one laid down in 2.2.11 is still unclear. It would be preferable if the two obligations would be merged into one.

2.2.16: We regard the requirement to provide a valuation report for real property as unduly burdensome to issuers.

3.3.: The date of purchasing the liabilities will be subject to frequent change particularly in the case of revolving portfolios so that we propose deleting the term 'and date'.

Appendix I: Wholesale Debt Registration Document

3: A section about risk factors should only be required if there are such factors; the wording of this item should be amended to clarify this.

9.2: As set out above for the Retail Debt Registration Document, we take the view that the disclosure of conflicts of interest does not, under normal circumstances, help investors in assessing the risk of a debt security. This is much more true for investors in wholesale debt. In addition, the requirement to disclose potential conflicts of interest will be

especially difficult to fulfil for non-EU issuers, who might have different standards to deal with such conflicts.

10: The information about major shareholders has no relevance for investors in debt securities generally. Under normal circumstances, disclosure about major shareholders does not help investors to assess the risk that the issuer becomes unable to fulfil its obligations under the securities. It should certainly not be required for securities targeted at wholesale investors, which have other means to assess the risk connected with the securities.

11.6: It is generally unclear what is meant by changes in the issuer's "trading position". Only the financial position is of relevance in so far.

12: In our view the term "material contract" is too vague. The purpose of a prospectus is not to provide a due diligence report to investors but only to inform him about the nature and the major risks of his investments. Accordingly, it should be sufficient if the risks resulting from a contract that are material for the assessment of the company and/or the securities have to be described in the prospectus. The obligation to disclose such risks already follows from the disclosure requirement no. 3 "Risk Factors".

Appendix J: Depository Receipts issued over shares

With regard to this building block, we do not agree with the systematic approach chosen. In our view, it would be preferable (a) to create information requirements not only for depository receipts on shares, but also on other securities, in particular debt securities and (b) to determine the disclosure requirements regarding the underlying securities on the basis of the relevant building blocks, and, in this building block, merely to provide for additional disclosure requirements to describe the issuer of the receipts and the receipts themselves.

Appendix K: Banks registration document

7.1: Due to the lower insolvency risk of banks, which follows from the supervision exercised over them, this information should not be required for banks. The item is sufficiently covered by the requirement under 11.7 to disclose a possible significant change in the issuer's position. Alternatively, the requirement suggested under no. 7.1 of the Wholesale Debt Registration Document (a statement that there has been no material adverse change in the financial position etc.) could be taken over here as well.

7.2: This mandatory information aims at providing the prospectus reader with information on any known trends which may have a material impact at least on the current fiscal year of the issuer. This information request may appear appropriate for industrial and commercial undertakings, yet due to the sheer scope involved in drawing up the necessary information it will be hardly feasible for credit institutions. As financial intermediaries, credit institutions are directly or indirectly affected by a host of local and global developments. It would appear rather impossible to put all these developments into one coherent focus, this being a task that would rather fall within the remit of economic think-tanks. The material impact does not narrow this information requirement down in any significant way, since different developments would have to be quantified and weighed against each other, similar to the forecast of outcomes. We consider such a kind of trend forecast only feasible as a voluntary component. Otherwise, a host of issuing credit institutions would be faced with a new potential penalization for incomplete description of trends.

9.2: By way of organisational measures, conflicts of interests of the credit institutions are avoided and/or reduced as a result of respective supervisory provisions under the Directive on Investment Services. A respective information requirement for investors in general does therefore not arise for bonds, especially since there is no obvious link with the debtor's risk of insolvency.

10.1: This information has no relevance for investors in debt securities generally. Under normal circumstances, disclosure about major shareholders does not help investors to assess the risk that the issuer becomes unable to fulfil its obligations under the securities. It should certainly not be required for securities issued by banks, as the supervision regime exercised over them also extends to the persons holding major interests.

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11.1 The provision contained in Nr. 11.1, second paragraph, pursuant to which the audited annual financial statements of the last two years have to be prepared in a way that is consistent with the next annual statement, is not feasible for issuers planning to switch to IAS during that year in which they also plan their IPO. These issuers do not have the respective audited IAS annual statements available for the past years. Therefore, this provision should absolutely be deleted.

11.5.2 As already remarked in the summary, the obligation for an interim reporting for companies that are not listed at the stock exchange which offer debt securities and other non-equity securities to the public without introducing them at the stock exchange is neither envisaged in the proposal for the Transparency Directive nor in the most recent proposals made by the Commission concerning capital adequacy requirements for banks. Nor is any such obligation contained in any other Directive or Regulation. If it had been the intention to introduce such an interim reporting obligation specifically for the purposes of the Prospectus Directive, then this would have had to take place at Level 1 of the Directive. In the consultation procedure, this, too, has been criticised by us *vis a vis* CESR.

We feel that such an interim reporting obligation is inappropriate because particularly smaller and medium-sized credit institutions which offer debt securities on a permanent or repeated basis, are burdened with an annual interim reporting obligation when the base prospectus or the RD are drawn up during the fourth or the 1st quarter of a fiscal year. Therefore, this provision should be deleted.

11.7 Significant change in the issuers' financial or trading position It remains unclear what is meant by significant changes in the trading position of a company and why it ought to be necessary to report the latter. From our point of view, the essential information is contained in the data on the financial position of a company. Credit institution's trading positions can be subject to major changes that depend on the respective trading strategy; yet, this does not allow any conclusions as to the company's solvency. We therefore suggest deleting the term "trading position".

Appendix L: Derivative Securities Note

3.1. The requirement to disclose "Conflicts of interest in the issue/offer" should in our view be deleted, because conflicts of interest are sufficiently dealt with by other (regulatory) requirements, and the term appears too vague. Furthermore, the wording "any interest, including conflicting ones that is material to the issue/offer" is even more vague than the previous one; there is no guidance at all to determine interests which are material to the issue/offer. It will also be especially difficult to fulfil for non-EU issuers, who might have different standards to deal with conflicts of interests. This requirement should thus be deleted. At least, a certain guidance should be provided, for example by inserting examples or restricting the obligation to cases in which there is a concrete risk of a damage for investors.

4.2.2. In terms of the information for a basket on the make-up, due to the volatility, the weighting will only be performed on the day of the issue or of the admission. Therefore, this requirement should be deleted.

Annex 2: Road map

We would like to point out that **the road map drafted in Annex 2** does not comply with this basic principle since, for instance, pursuant to this principle, the share registration document would equally have to apply to all other issues. This does not become clear from the legal text contained in the proposal. Cf. our remarks to Art. 3 paragraph 3 above.

Contrary to Art. 4 the road map does *not* envisage that the RD for debt instrument issues and derivative issues with a denomination of > or = € 50,000,- (Annex 1, Appendix D) may also be used for wholesale non-equity issues. For this it would rathermore be necessary to prepare a separate RD pursuant to Annex 1, Appendix I. In our view this is in contradiction to the basic principle that that schedule which, in terms of content, is more stringent, may always substitute a schedule that is less complex in terms of content. Since, in addition to this, allowing to issue wholesale bonds also under a retail base prospectus would also be in line with practitioners' requests on the ground, Annex 2 should provide for a corresponding more flexible solution.

Yours sincerely

For and on behalf of the Zentraler Kreditausschuss
Federal Association of German Cooperative Banks/
Bundesverband der Deutschen
Volksbanken und Raiffeisenbanken e.V.
by proxy



(Dr. Möller)



(Dr. Lange)