ZENTRALER KREDITAUSSCHUSS
MEMBERS: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN • BUNDESVERBAND DEUTSCHER BANKEN E. V. BERLIN • BUNDESVERBAND ÖFFENTLICHER BANKEN DEUTSCHLANDS E. V. BERLIN • DEUTSCHER SPARKASSEN- UND GIROVERBAND E. V. BERLIN-BONN • VERBAND DEUTSCHER HYPOTHEKENBANKEN E. V. BERLIN

Response of the Zentraler Kreditausschuss[1] to CESR Guidelines for the Consistent Implementation of the proposed Commission Regulation on Prospectus - Call for Evidence - (Ref: CESR/04-057)

April 2004

[1] The ZKA is the joint committee operated by the central associations of the German banking industry. These associations are the *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR)*, for the cooperative banks, the *Bundesverband deutscher Banken (BdB)*, for the private commercial banks, the *Bundesverband Öffentlicher Banken Deutschlands (VÖB)*, for the public-sector banks, the *Deutscher Sparkassen- und Giroverband (DSGV)*, for the savings banks financial group, and the *Verband deutscher Hypothekenbanken (VdH)*, for the mortgage banks. Collectively, they represent more than 2,500 banks.

A. Introduction

We welcome the fact that, already at this early point in time, CESR has proactively decided to examine the matter of interpretation issues arising in the context of the Regulation Implementing the Directive 2003/71/EC (hereinafter "the Regulation"). The German banking industry is closely reviewing the changes that will result from implementation of the Prospectus Directive for the issue of securities. This has already revealed numerous practical issues concerning the interpretation and application of the new European regulatory framework which, in due time before expiry of the implementing deadline on 1 July 2005, will need to be resolved. We therefore support CESR's objective of elaborating solutions for ambiguous cases at Level 3 of the Lamfalussy procedure already by the end of the year 2004.

Against the background of the Consultation Paper (CESR/04-104b) published on 6 April 2004 which deals with the forthcoming Level 3 measures from a broader perspective we would like to express our general views on the forthcoming Level 3 measures already at this early point in time.

In our understanding of the Lamfalussy procedure, at Level 3, regulators shall be responsible for ensuring that the rules and regulations established at Level 1 and 2 will be implemented in the various national legal systems and supervisory structures in a consistent manner and in a way that is neutral as far as competition is concerned. Yet, on principle, this should not require any further regulatory measures. Level 3 of the Lamfalussy process is rathermore aimed at preparing a shared interpretation of legal provisions and definitions in order to prevent, wherever possible, differences in their interpretation and application. Implementation of these agreed standard interpretations should however remain the prerogative of national prudential supervision authorities.Yet, if Level 3 were to reveal shortcomings of the Directive or of the Regulation at Level 1 or 2, and if such issues cannot be resolved through commonly shared interpretations, then the respective provisions at Level 1 and 2 would have to be reviewed and amended accordingly.

In addition to the foregoing and also due to the high practical relevance of the questions that need to be resolved at an early point in time, we feel that the competent regulatory authorities should engage in a close dialogue on this with market participants. Whilst we generally appreciate that in its Level 3 work, CESR initially waits for the finalisation of the Level 1 and 2 legislation as well as implementation thereof in the respective Member States, we feel that - unlike other Directives of the FSAP (Financial Services Action Plan) - the Prospectus Directive as well as the corresponding Regulation should be subject to an early discussion of Level 3 measures; this would allow all market participants to make an efficient use of the European Passport and to approach the authority

of the corresponding Member State subject to the discretion provided by the Directive in this respect.

In effect, we therefore welcome that CESR plans to continue the successful "tradition" of an open consultation with the industry at Level 3 of the Lamfalussy procedure.

One further aspect being helpful in this respect is that CESR has presented a preliminary timeline for the further consultation procedure. This provides market participants with a clearer idea of the way forward allowing them to use the opportunity for written and oral comments *vis à vis* CESR in a more efficient manner.

B. Issues to be addressed by CESR-Guidelines

Based on our current understanding after a preliminary review, not only practical guidelines on the individual Annexes of the Regulation but, beyond this, also further rules on the interpretation of individual provisions of the Regulation would appear helpful. These rules, obviously, would have to be agreed by the competent authorities in joint consultation with the other authorities. The forthcoming guidelines should therefore address the following issues of **a more general significance**:

- **Competent authority for multi-issuer programmes as well as for issuers with several Home Member States**

Unfortunately, neither the Level 1 Directive nor the Level 2 Regulation indicate how the Home Member State should be determined in the event of multi-issuer programmes that have a minimum denomination of less than EUR 1,000.00. Here, it would be helpful to get to know from CESR how this issue should be handled at Level 3.

Furthermore, for issuers who have two Home Member States within the EU and who issue shares or non-equities with a denomination of less than EUR1,000, the Directive gives no indication as to the competent authority. Hence, we feel that an elective right would be helpful in this respect allowing i.e. issuers whose Home Member State is the United Kingdom and the Netherlands to request approval of his prospectus at his choice from the authority either in the United Kingdom or in the Netherlands.

- **Information pursuant to Art. 10**

  Art. 10 of the Directive imposes the obligation on issuers to submit to the Home Member State authority once a year a document which lists all publications in relation to capital markets over the past 12 months. This begs the question whether an issuer with several Home Member States (due to several issues) would have to submit such a document to each competent authority in every individual Home Member State. Should this not be the case, then the question remains as to the competent Home Member State authority to which the document shall be submitted or, moreover, whether the choice of such authority is left to the issuers' discretion. Should the issuer be obliged to submit the document to each of his competent authorities, then this gives rise to the question as to the respective language. In other words: would, for instance, the French authority have to accept a German issuer's document as contemplated by Article 10, if such document is written in English or would the German issuer have to translate this document into French?

- **Transitional deadlines**

  For cross-border issues, the way in which the competent authorities handle the first-time application of both the Directive and the Regulation is of fundamental importance. This problem arises particularly with regard to offering programmes which were approved before the 1 July 2005 and under which tranches are to be issued after 1 July 2005. For these issues, could there also be made reference to the offering programme which was authorised before 1 July 2005 and which may still be geared to the old legal regime? For practical reasons, we would be very much in favour of such a solution.

- **Cooperation between authorities**

  There are many areas where the Directive requires a cooperation between competent authorities. Here, at an early point in time, CESR should investigate implementing a regime that facilitates the smooth operation of such cooperation. In addition to this, a system should be established in due course creating the mechanisms mentioned under Art. 2, paragraph 3 and 4 of the Directive which are necessary for recognition of SMEs and private individuals.

In addition to this, CESR should address the following **individual issues** in its guidelines:

- **Calculation of the EUR 1,000 - threshold**

  Pursuant to Art. 2, Paragraph 1 lit. m) ii), the right of an issuer of non-equities to elect its Home Member State also applies to securities in a different currency, if these securities have a minimum denomination of almost EUR 1,000. This gives rise to the question concerning the underlying exchange rate for such calculation. Should this, for instance, be based on the exchange rate on the date on which the approval request was filed or should this be based on the date on which the prospectus was approved? In our view, the date on which the application for approval was filed would be preferable because it provides the issuer with the necessary comfort that he has addressed the correct competent authority.

- **Working day**

  Neither the Directive nor the Regulation contains any definition of the term "working day". Here, as far as cross-border issues are concerned, it is important that this term will not be interpreted differently in different Member States (TARGET, working day pursuant to the national Civil Codes, banking day).

- **Deadlines for Reviews**

  - Neither Art. 13, paragraph 4 of the Directive nor the Regulation contain any provision on whether there is a limit to the number of possible requests for subsequent information. CESR should therefore stipulate in its Guidelines that the respective competent authority shall confine itself to *one* subsequent request for missing information.

  - In addition to this, the competent authorities should undertake to deliver to the petitioner a confirmation of receipt with regard to the submitted prospectus documents.

  - Art. 13, paragraph 4 does not contain any 'hard' deadline for notifying the petitioner of a case of incompleteness ("should"). In this instance, there should be a clear self-commitment of the competent authorities that they regard the 10-day deadline envisaged under Art. 13 paragraph 4 as binding for themselves.

  - Art. 13, Paragraph 5 lacks any deadline for the transfer of approval of a prospectus from the competent authority of the Home Member State to the authority of another Member State. Here, the competent authorities should also adopt a self-binding agreement stipulating the deadline within which a decision on a possible transfer shall be taken.

- **Publication pursuant to Art. 14**

  In the guidelines, CESR should stipulate from which point in time exactly the prospectus needs to be published in the Host Member State and as of which point in time exactly the securities may be offered for public trading. The day of the approval, the day of the delivery of the approval notice or the following working day may be possible dates for this. From a practical point of view, the latter date would be preferable.

- **Advertising, Art. 34 of the Regulation**

  Whilst CESR, in its Level 2 consultations, has focused extensively on the issue of advertising, the Regulation, in this respect, is limited to a list of inadmissible advertising means. At this stage, we would like to reaffirm, as far as the issue of advertising is concerned, our support to CESR's statements made in the document CESR 03/399. We would therefore welcome if regulators were to reach an agreement on these principles also at Level 3.

The foregoing presents our preliminary understanding of the interpretation issues which have emerged to date and which, preferably, should be addressed at Level 3. Once we have further finalised our examination of the Regulation, we will be happy to complement the foregoing non-exhaustive list.

Berlin, April 2004