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Sir David Tweedie
Chairman of the
International Accounting Standards Board
30 Cannon Street

Berlin, 27 October 2005

London EC4M 6XH
United Kingdom

137. DSR-Sitzung am 02.11.2009

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Dear Sir David

ED IAS 37amend – Non-financial Liabilities
ED IAS 19amend – Employee Benefits

We appreciate the opportunity to comment on the Exposure Draft of Proposed Amendments to International Accounting Standard 37 *Provisions, Contingent Liabilities and Contingent Assets* and International Accounting Standard 19 *Employee Benefits*. Before responding to the questions proposed for comment, we would like to discuss the new recognition concept of ED IAS 37amend as well as the amended measurement guidance.

We certainly approve of the IASB's objective to eliminate inconsistencies between IFRS 3 and IAS 37, and at the same time to bring about convergence with specific Financial Accounting Standards under US GAAP. We note, however, that the recognition concept proposed might create accounting differences in cases that under U.S. GAAP fall within the scope of FAS 5.

We agree with the ED proposal to base the recognition criteria for all non-financial liabilities on the definition of a liability as set out in the *Framework* since this will enhance consistency among current IFRS and provide a sound conceptual basis.

Furthermore, we appreciate that the accounting guidance proposed aims at eliminating an existing inconsistency with respect to contingent liabilities, namely that under current IAS 37 certain contingencies are considered present obligations for recognition purposes, although being 'contingent' would automatically exclude them from being 'present'.

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Eliminating this inconsistency has been achieved by analysing obligations into a conditional element and an unconditional element, and by introducing the concept of stand-ready obligations. We agree with this concept in principle; however, we are concerned that the ED proposes recognising a liability for certain legal stand-ready obligations that in our opinion do not (yet) meet all the *Framework* criteria of a liability.

A case in point would be an obligation that the draft describes as an “obligation to stand ready to perform as the court directs”. To the extent that an entity is not guilty of any offence and is unlikely to be convicted, we do not consider the entity to incur a liability when legal proceedings are started against it. This is because we do not think an obligating event has occurred in this case.

Furthermore, according to the new concept proposed, recognising a liability for an obligation to stand ready to perform as the court directs would require an outflow of resources in the form of some service provided by the entity in settlement of the obligation. (This is because an outflow in the form of a service provided in settlement of the unconditional obligation is required for the definition of a liability to be met if, as is the case under the new concept, probability (of the conditional obligation to occur) is not to be considered.) In our opinion, there is no such service provided by the entity with respect to these stand-ready obligations. Conceivably, a service provided as a result of legal proceedings having started might relate to the complainant receiving the benefit of having its case handled in a way that ensures impartiality and conformity with applicable law; so in analogy to product warranties, a service provided might consist in some form of ‘safety’ being granted to the complainant. However, such a service would not be provided by the entity, but by the legislator or the legal framework in which the entity operates. So even if a service is actually provided in this case, it is *not* provided by the entity defending the lawsuit and therefore cannot lead to an outflow of resources on the part of the entity. As a result, we do not agree with the Board’s conclusion that an obligation to stand ready to perform as the court directs always meets the definition of a liability once legal proceedings have been started. Rather we think that the criterion of an expected outflow of resources required to settle these stand-ready obligations will not be met – and consequently no liability should be recognised – unless an outflow of resources is to be expected as a result of the conditional obligation (an adverse court decision) becoming probable.

Moreover, the ED seems to assume that the unconditional obligation is always known with certainty. In any case, the ED discusses uncertainties with respect to *conditional* obligations only, but does not provide any guidance on how to deal with



uncertainties surrounding the *unconditional* obligation. For instance, there may be uncertainty about whether a particular obligating event has actually occurred. In Example 2 of the Illustrative Examples section ('Potential lawsuit'), the obligating event is identified to be the operation in which a mistake was made. The hospital seems to be aware that a mistake actually occurred. However, it is easy to imagine the hospital being faced with a slightly different situation, ie a patient has died during an operation, but the hospital cannot be sure whether death occurred as a result of a mistake being made in the operation. In this case, it is not clear whether an unconditional obligation actually exists, although the possibility of there being an unconditional obligation cannot be ruled out. The Board should clarify how to proceed in such a case.

In contrast to current IAS 37, the amendments will require single obligations to be recognised even if the probability of an accompanying conditional obligation to occur is less than 50%. In addition, the ED considers an expected value approach to be an appropriate basis for measuring both liabilities for a class of similar obligations and liabilities for single obligations. Given the uncertainty surrounding most of the factors entering into the calculation of the expected value, we doubt that a reliable measurement will regularly be possible whenever small probabilities are involved. This is because uncertainty seems to increase the smaller the probability of the obligating event to occur. For instance, if it is not even probable that particular cash outflows will occur, determining their amount and timing will be considerably more difficult, and therefore less likely to result in a reliable measure. Furthermore, with non-probable cash flows a slight change in the probabilities assumed has a much greater effect than if the cash flows were probable. This might be illustrated by an entity defending a lawsuit it is highly unlikely to lose. Since the maximum amount the entity might have to pay in the worst case may be immense, the unconditional obligation to be recognised may materially affect the financial position of the entity even if an adverse outcome is highly unlikely. With small probabilities, determining the probability to be 6% instead of 2% would increase the liability to be recognised by a factor of 3. We doubt that any reliable evidence showing the probability of losing a lawsuit to be 6% instead of 2% may be obtained.

As a result, we think that with small probabilities, expected value measurements may be inherently unreliable and highly subjective. Since like obligations are highly unlikely to be measured at similar amounts in these cases, the amendments will call into question the decision usefulness of the information provided by applying them.



Comments to the Questions of ED IAS 37.amend

Question 1 – Scope of IAS 37 and terminology

(a) Do you agree that IAS 37 should be applied in accounting for all non-financial liabilities that are not within the scope of other Standards? If not, for which type of liabilities do you regard its requirements as inappropriate and why?

We agree. We note, however, that the term “non-financial liabilities”, although unambiguously defined in the draft, might cause confusion in cases the non-financial liability is eventually settled in cash.

Also, we are unsure whether upfront payments not within the scope of IAS 11 would be dealt with according to IAS 37. If this is the case, “the amount that an entity would rationally pay to settle the obligation or to transfer it to a third party on the balance sheet date” might conceivably differ from the upfront payment received and consequently have an impact on profit and loss. Perhaps the final standard might clarify this point.

(b) Do you agree with not using ‘provision’ as a defined term? If not, why not?

We agree.

Question 2 – Contingent liabilities

(a) Do you agree with eliminating the term ‘contingent liability’? If not, why not?

We agree that the term is no longer needed under the new recognition concept proposed in the Exposure Draft.

(b) Do you agree that when the amount that will be required to settle a liability (unconditional obligation) is contingent on the occurrence or non-occurrence of one or more uncertain future events, the liability should be recognised independently of the probability that the uncertain future event(s) will occur (or fail to occur)? If not, why not?

We partially agree. An unconditional obligation should only be recognised to the extent it meets the definition of a liability. We agree that there are certain stand-ready obligations which meet the definition of a liability even if the uncertain future event is not probable (product warranties eg). However, as has been explained in the discussion section above, there are certain stand-ready obligations (such as an “obligation to stand-ready to perform as the court directs” of an entity that knows itself to be not guilty of the charge brought against it) that will have to be recognised under



the amended guidance although we do not think that any obligating event has occurred. Furthermore, we do not think that any obligation to stand ready as the court directs will lead to an outflow of resources *in the form of a service provided by the entity in settlement of the obligation* (which the ED assumes to be the case). Therefore, we conclude that these obligations do not meet the definition of a liability, and should consequently not be recognised (unless the uncertain future event(s) will be probable to occur).

Question 3 – Contingent assets

(a) Do you agree with eliminating the term ‘contingent asset’? If not, why not?

We agree that the term is no longer needed under the new recognition concept proposed in the Exposure Draft.

(b) Do you agree that items previously described as contingent assets that satisfy the definition of an asset should be within the scope of IAS 38? If not, why not?

We agree in principle.

We note, however, that the recognition criteria set down in IAS 38 differ from those set down in the ED. As a result, a mismatch will be created on the balance sheet due to unconditional rights having a higher recognition threshold than unconditional liabilities. To avoid this mismatch, IAS 38 would have to be changed, or the recognition criteria established in the draft be amended to correspond to those set down in IAS 38.

Furthermore, we consider that additional guidance on subsequent measurement of unconditional rights accompanying conditional rights might be required in IAS 38. We are concerned that the existing guidance on amortisation, depreciable amounts and residual value might lead to these unconditional rights being amortised or even being written up above cost. We would consider both outcomes to be inappropriate in a number of cases.

Finally, we are not sure whether an entity that on purchasing a tangible asset also acquires an unconditional right to have the asset repaired in case it develops a fault, would have to allocate the purchase price to the asset and the unconditional right, and recognise the unconditional right separately from the asset under the amended guidance. We would like to ask the Board for further guidance.



Question 4 – Constructive Obligations

(a) Do you agree with the proposed amendment to the definition of a constructive obligation? If not, why not? How would you define one and why?

We do not oppose the amendment. In our view it is unclear whether the addition “can reasonably rely on” actually has the effect of raising the recognition threshold as is obviously intended. However, the additional guidance in ED IAS 37amend.15 clarifying that for a constructive obligation to be present the entity must have little, if any, discretion to avoid settling it, as well as the related passages in the Basis for Conclusions (BC54 et seq.) make the Board’s intention to raise the recognition threshold for constructive obligations sufficiently clear.

(b) Is the additional guidance for determining whether an entity has incurred a constructive obligation appropriate and helpful? If not, why not? Is it sufficient? If not, what other guidance should be provided?

As already pointed out in (a) we think it both helpful and sufficient.

Question 5 – Probability recognition criterion

Do you agree with the analysis of the probability recognition criterion and, therefore, with the reasons for omitting it from the Standard? If not, how would you apply the probability recognition criterion to examples such as product warranties, written options and other unconditional obligations that incorporate conditional obligations?

We do not agree with the Board’s conclusion that “in all cases, an unconditional obligation satisfies the criterion”. As explained in the discussion section above, we think that the unconditional component of certain legal obligations may not satisfy the criterion unless the conditional obligation connected with it is probable.

We note that the probability recognition criterion is already included in the definition of a liability because the requirement that the settlement of an obligation is expected to result in an outflow of resources from the entity is equivalent to saying that an outflow of resources is probable in the sense given to this term in IAS 37, ie is more likely than not to occur. So, strictly speaking, requiring both the definition of a liability and the probability recognition criterion to be met would be redundant.

However, we would still recommend keeping the criterion because omitting it might encourage the false conclusion that every stand read obligation has to be recognised irrespective of whether an outflow of resources required to settle it is probable. Alternatively, it might be omitted with the omission being explained in detail and



additional guidance being given on how to decide whether an unconditional obligation actually meets the definition of a liability.

Question 6 – Measurement

Do you agree with the proposed amendments to the measurement requirements? If not, why not? What measurement would you propose and why?

We are aware that the proposed amendments effectively eliminate a measurement inconsistency of current IAS 37, namely that the individual most likely outcome recommended for measuring single obligations will usually not be equivalent to the “amount that an entity would rationally pay to settle the obligations at the balance sheet date or to transfer it to a third party at that time”.

However, we note that requiring all non-financial liabilities to be measured at this amount might be interpreted as establishing a fair value measurement basis for single obligations. On the other hand, “the amount that an entity would rationally pay to settle the obligations at the balance sheet date or to transfer it to a third party at that time” might also warrant the conclusion that non-financial liabilities might be measured based on entity specific data. We would therefore recommend that additional measurement guidance be provided.

We further note that the measurement guidance may also result in non-financial liabilities being recognised at their legal lay-off amount. This amount has just been rejected as an appropriate measurement basis for obligations incurred within a revenue-generating context in the joint project on revenue recognition. Adopting the legal lay-off approach for all non-financial liabilities but rejecting it for purposes of revenue recognition will create a measurement inconsistency. We are unaware of any conceptual reason to conclude that obligations incurred within a revenue-generating context and obligations falling within the scope of ED IAS 37amend should be measured using different measurement approaches.

Finally, as pointed out in the discussion section above, we doubt that the proposed amendments will always result in decision-useful information being provided. Establishing the expected value approach as the measurement basis for all obligations whether probable or not, will require preparers to make highly subjective assumptions. At the same time, auditors will be expected to testify their objectivity and reliability. We doubt that this will be feasible.



Question 7 – Reimbursement

Do you agree with the proposed amendment to the recognition requirements for reimbursements? If not, why not? What recognition requirements would you propose and why?

We agree because the amendment is necessary to achieve consistent treatment of stand-ready obligations incurred and reimbursement rights connected with these obligations.

Question 8 – Onerous contracts

(a) Do you agree with the proposed amendment that a liability for a contract that becomes onerous as a result of the entity's own actions should be recognised only when the entity has taken that action? If not, when should it be recognised and why?

We agree with the principle but disagree with the explanatory guidance given in paragraph 57 of the Exposure Draft which states:

For example, a contract may become onerous because the entity ceases to use the right conveyed by that contract, but continues to incur costs for its obligations under the contract. Therefore, in this example the entity does not recognise a liability until it ceases using the right conveyed by the contract.

We do not think this guidance to be an accurate application of the general principle. Applying the explanatory guidance to a lease contract terminated before its maturity for reasons of moving office, an entity would not be able to recognise a non-financial liability for future leases to be paid until it would actually cease using the office rooms, because that would be the date “it ceases using the right conveyed by the contract”.

In our opinion, however, the principle of recognising a liability when the action that makes a contract onerous has been taken, might require an entity to recognise a liability for the onerous contract before that date, eg when the lease agreement for the future office rooms has been signed. This is because we think in this case signing a second lease contracts is the action that makes the first contract onerous. (Our issue here is *when* to recognise the liability, not the amount to be recognised. The amount of the liability to be recognised will, of course, not be based on the rent to be paid after the second contract has been signed, but on the rent to be paid after the entity has actually moved office).



(b) Do you agree with the additional guidance for clarifying the measurement of a liability for an onerous operating lease? If not, why not? How would you measure the liability?

We agree. However, we would recommend including examples or some other additional guidance clarifying in which cases sublease rentals cannot be reasonably obtained. Eg we would consider sublease rentals not being reasonably obtainable if the lease contract prohibits any sublease, and would recommend including a clarification to this effect.

(c) If you do not agree, would you be prepared to accept the amendments to achieve convergence?

N/A.

Question 9 – Restructuring provisions

(a) Do you agree that a liability for each cost associated with a restructuring should be recognised when the entity has a liability for that cost, in contrast to the current approach of recognising at a specified point a single liability for all of the costs associated with the restructuring? If not, why not?

We agree.

(b) Is the guidance for applying the Standard's principles to costs associated with a restructuring appropriate? If not, why not? Is it sufficient? If not, what other guidance should be added?

It is appropriate to the extent that it clarifies that costs associated with a restructuring should be recognised on the same basis as if they arose outside a restructuring.

We are unsure, however, what kind of restructuring costs remain in the scope of ED-IAS 37amend (or IAS 37 for that matter). We note that the majority of restructuring costs will have to be accounted for according to IAS 19 and IFRS 5. We wonder whether additional guidance as to the kind of costs still being dealt with under ED-IAS 37amend might not be helpful.



Comments to the Questions of ED IAS 19.amend

Question 1 – Definition of termination benefits

The Exposure Draft proposes amending the definition of termination benefits to clarify that benefits that are offered in exchange for an employee's decision to accept voluntary termination of employment are termination benefits only if they are offered for a short period (see paragraph 7). Other employee benefits that are offered to encourage employees to leave service before normal retirement date are post-employment benefits (see paragraph 135).

Do you agree with this amendment? If not, how would you characterise such benefits, and why?

We think a definition of termination benefits should be based on whether the event which gives rise to an obligation is the termination of employment or, alternatively, any future employee service. IAS 37.132 and ED-IAS 37.132 already include guidance to this effect, so amending the definition of voluntary termination benefits to clarify that these benefits are termination benefits only if offered for a short period, seems to be not strictly necessary. However, we would still recommend retaining the amendment, not as part of the definition, but as representing a circumstance typically indicative of a termination benefit.

We would also recommend clarifying that "short term" refers to the period during which the offer might be accepted rather than the period of future service.

Question 2 – Recognition of termination benefits

The Exposure Draft proposes that voluntary termination benefits should be recognised when employees accept the entity's offer of those benefits (see paragraph 137). It also proposes that involuntary termination benefits, with the exception of those provided in exchange for employees' future services, should be recognised when the entity has communicated its plan of termination to the affected employees and the plan meets specified criteria (see paragraph 138).

Is recognition of a liability for voluntary and involuntary termination benefits at these points appropriate? If not, when should they be recognised and why?

The Board argues in paragraph BC18 that voluntary termination benefits should be recognised when employees accept the entity's offer of those benefits because the entity would typically have the discretion to withdraw the offer and, therefore, have no present obligation. We do not agree with this conclusion, because it is in disagreement with the recognition concept of ED-IAS 37amend. We think that under ED-IAS 37 guidance the entity's offer creates an unconditional obligation to stand-ready to perform if the employee accepts the offer. To be in conformity with ED-IAS 37amend an entity would have to recognise the termination benefits as soon as it has



incurred this stand-ready obligation, ie typically *before* employees accept the entity's offer of those benefits.

Question 3 – Recognition of involuntary termination benefits that relate to future service.

The Exposure Draft proposes that if involuntary termination benefits are provided in exchange for employees' future services, the liability for those benefits should be recognised over the period of the future service (see paragraph 139).

The Exposure Draft proposes three criteria for determining whether involuntary termination benefits are provided in exchange for future services (see paragraph 140:).

- 140 In some cases, involuntary termination benefits are provided in exchange for employees' future services. For the purpose of this [draft] Standard, this is the case if those benefits:
- (a) are incremental to what the employees would otherwise be entitled to receive (ie the benefits are not provided in accordance with the terms of an ongoing benefit plan);
 - (b) do not vest until the employment is terminated; and
 - (c) are provided to employees who will be retained beyond the minimum retention period.

Do you agree with the criteria for determining whether involuntary termination benefits are provided in exchange for future services? If not, why not and what criteria would you propose? In these cases, is recognition of a liability over the future service period appropriate? If not, when should it be recognised and why?

We agree, except that for clarification purposes, we would recommend an addition to criterion 140(b) to make it read:

(b) *“do not vest until the employment is terminated according to the terms of the termination agreement.”*

Yours sincerely,

Prof. Dr. Klaus Pohle
President