

Comments on CESR's Advice on possible Level 2 Implementing Measures for the Proposed Prospectus Directive

31 December 2002

Introduction

Deutsches Aktieninstitut e.V. is the association of German exchange-listed stock corporations and other companies and institutions which are interested in the capital markets with a particular focus on equity. Its most important task is to promote the acceptance for equity among investors and companies.

The BDI is the umbrella organisation for a total of 35 industrial sector associations and groups of associations in Germany. It represents the interests of 107,000 enterprises employing 7.7 million people.

The BDI calls for a rethink and reorientation of economic policy. Economics policy should once again gear itself more to the law of stability and growth.

We especially welcome the proposed Prospectus Directive and the related implementation measures as a further important step on the way to an integrated European financial market. The global competition for capital makes an integrated capital market an urgent necessity. To increase transparency in the European capital market, we need, above all, and as quickly as possible, a unification of the regulatory conditions for the raising of capital by European companies. Such a harmonisation, combined with the introduction of a genuine European passport for securities issuers in terms of notification processes, would represent a fundamental step towards an integrated European capital market.

In particular, the implementing measures proposed by CESR will have a significant impact on the future practice of the capital markets regarding the issuance of securities including the due diligence procedures and the drafting of the prospectus. The practicability of such measures will have a direct impact on the timing and the costs of an issuer for a securities issue as well as on the degree of investor protection and investors' confidence in the European capital markets. This would in turn affect the liquidity of the European capital markets and their capabilities to compete with other international capital markets.



Nonetheless, we wish to point out that the quality of the legislation should not take a back seat to the ambitious planning schedules of the Commission and lawmakers. The present Consultation Paper is evidence of that danger. The task assigned to CESR on 27 March 2002 for a Level 2 regulation is partly still based on an outdated text version of the Proposed Directive. Thus, the present consultation is neither complete nor conclusive. This can lead to misunderstandings and confusion. Precisely a transparent and consistent legislation, however, is what would go a long way towards enhancing the acceptance of the European financial area and a positive perception of Brussels activities in the public eye.

Part I: General Comments

The main principles and guidelines which the proposed Prospectus Directive is based on and which any implementation measure should respect are:

- the need to facilitating and increasing access to capital markets (including for SME's); and
- the need to ensure investor protection and market integrity.

The overriding principles above are, in our view, the essence of the more detailed guidelines set forth in recital 33 of the Prospectus Directive for the implementation measures to be taken by the Commission. Given the principles above, the costs for the issuers need to be balanced against the benefits to market participants with respect to each implementation measure. Thus, in line with Article 5 of the Prospectus Directive, the Level 2 implementing measures should provide for disclosure requirements only if and to the extent they are necessary in respect of investor protection and confidence in the capital markets. Any overregulation due to extensive (and, in many cases, irrelevant) disclosure requirements would result in increased costs to the issuers without the investors having any particular benefit from it. Moreover, such additional disclosure may even lead to a lack of transparency which would be disadvantageous to investors. Both the general and special comments below are based on these general principles.

1. Reference to the IOSCO Disclosure Standards

The IOSCO disclosure standards provide a useful reference benchmark, in principle, because the adoption of internationally accepted principles such as those passed by IOSCO would lead to a convergence of the international financial systems in regards to harmonised rules in the area of disclosure for securities. However, it should be borne in mind that the IOSCO standards set maximum requirements for disclosure obligations. The function of this IOSCO maximum standard is that, in the case of international new issues, especially

with a U.S. reference, issuers can comply with the prospectus requirements in the widest variety of jurisdictions on the basis of a single prospectus. The introduction of the IOSCO disclosure standards as the binding standard at EU level, by contrast, is an unnecessary overregulation with regard to the disclosure requirements. All the more so, in that according to the CESR Consultation Paper, the IOSCO standards are merely qualified as being a minimum standard to which further, supplementary requirements may possibly be added. In the proposed Prospectus Directive, all that is said about this in Article 7(2) is that the rules to be implemented are to be "based on the standards ... by IOSCO". Therefore, one can also not gather from the wording of the Prospectus Directive that the IOSCO standards have to be adopted one-on-one. Rather, "based on" means that the IOSCO standards are only intended to serve as a kind of guideline. This is precisely one of the main differences from the first Prospectus Directive Proposal of 30 May 2001, which had still regarded the observance of IOSCO standards as a compulsory prospectus requirement.

There is no need for all European prospectuses to be recognised also outside of the EU. It was for this very purpose that the IOSCO standard was created. Companies that offer securities to the public internationally, i.e. beyond the EU, or want to be admitted to trading on non-EU stock exchanges, can do this voluntarily on the basis of the IOSCO standards. There is no need for an obligatory introduction of these standards at EU level. In the case of small and medium-sized enterprises (SMEs) that want to restrict their offering and/or stock-exchange admission to the EU area, by contrast, there is no reason whatsoever to make them subject to the regime of the IOSCO standard. This would be much too time-consuming and costly for them.

An adoption of the IOSCO standards is also problematic because the IOSCO standards were developed for equity securities. The scope of the disclosure requirements for debt securities and derivative securities, however, differs from this in considerable measure. In fact, IOSCO itself is currently working on the development of a standard for debt securities.

Thus, on the whole, the introduction of the IOSCO standards as a minimum standard harbours the danger of an overregulation which is in no way necessary for reasons of investor protection. The further course of action, therefore, should be guided by an approach that starts with the IOSCO standards and evaluates which requirements of the IOSCO standards can be dispensed with. As far as the suggested scope of the disclosure requirements is concerned, the various types of securities will have to be taken into account.

2. Level of detail of the Level 2 Proposals

It is furthermore noticeable that the proposed implementing measures exhibit a very high degree of detail. Although, for reasons of harmonisation, a certain amount of detailed regulation is required, this must not be at the expense of the required flexibility. This is true in particular (but not exclusively) of inno-

vative financial instruments such as derivatives, which are continuously being further developed. In this connection, CESR should review in which cases joint recommendations, guidelines and common standards by securities supervisory authorities at Level 3 would be more appropriate. Rules set at Level 3 also lead to sufficient harmonisation, but can be implemented much faster and therefore enable a more flexible handling.

Annex A, VII. H 2 (Content of the interim financial statements), for instance, exhibits a very high degree of detail. Moreover, we consider the disclosure requirements relating to subsidiaries set out in Annex A, VIII.G to be dispensable in most cases so that, in our view, these detailed disclosure obligations should be replaced by a more general disclosure requirement. Also, the "building block approach" (for more details see paragraph 3 below) leads to extreme detail rules which are superfluous at Level 2 and may even be impracticable in some cases.

It has to be borne in mind that, under Article 5 of the Prospectus Directive, only such information is to be included in the prospectus which enables an investor to make an informed and reasonable assessment about the respective company.

3. Building Block Approach

With the building block approach (para. 26 of the Consultation Paper), a certain degree of flexibility and differentiation of the requirements can be achieved in terms of the contents of the prospectus, in spite of a European-wide harmonisation. In principle, this perfectly seems appropriate with regard to the various types of securities (shares, bonds and other securities such as derivative securities, for example). However, too much splitting up of the number of building blocks should be avoided since this would entail a lack of clarity and transparency. In particular, the creation of special building blocks for certain industries does not seem to make much sense. This would lead to difficult interpretation issues and to considerable practicability problems. For it cannot always be clearly determined to which industry a company belongs, either because it is active in more than one industry, for example, or because the business activity is only similar to the activities described in the building block. The Provisional Request of the Commission dated 27th March, 2002 merely refers to the "basic structure and typical main features of different types of securities"(!) and does not by any means prescribe a differentiation by industry. Therefore, building blocks for certain industries should be rejected.

Basically, the general obligation to publish all material facts automatically implies that all industry-specific peculiarities and risks also have to be included in the prospectus as a matter of course. To the extent that it is deemed necessary beyond that, or it proves necessary in the course of time for certain uniform prospectus requirements to be specified for certain business activi-

ties, this should be done in the framework of joint recommendations and guidelines. This would also give the supervisory authorities the flexibility they need.

4. Introduction of the International Accounting Standards (IAS)

The relationship between the proposed Prospectus Directive (and its implementation) and the introduction of the IAS calls for clarification. The Consultation Paper discusses IAS exclusively, although Regulation (EC) No. 1606/2002 dated 19th July 2002 on the application of international accounting standards does not provide for an IAS accounting obligation for consolidated financial statements until the business year that starts on or after January 1, 2005, in other words, not until after the Prospectus Directive is expected to come into force. We assume that the Consultation Paper presupposes the differentiation between disclosure requirements for prospectuses, on the one hand, and the respectively valid accounting principles on the other. Therefore, it should be made clear that prospectuses do not already have to contain annual financial statements that were prepared according to the IAS/IFRS accounting standards before the "official" introduction of these IAS/IFRS standards.

5. Relationship between the Registration Documents and the Securities Notes

The relationship between the registration document and the securities note should also be made clearer and overlaps avoided. The registration document should only contain information about the issuer, whereas the securities note should only contain additional information regarding the specific issue of securities. Ideally, any current information about the company, for example, should therefore be provided in a supplement to the registration document or in the context of an up-date to a registration document, but not in the securities note in reference to a specific new issue. Otherwise, this would result in a superfluous duplication of disclosure and further costs and other burdens for issuers which are not necessary in respect of the overriding principles of confidence in the capital markets and investors' protection. We, however, acknowledge that Article 12 of the proposed Prospectus Directive (as currently drafted) provides that, to a certain degree, updated disclosure regarding the issuer has to be included in the securities note. The Consultation Paper is not clear with regard to the amount of disclosure about the issuer to be provided in the securities note (and seems, on the face of it, in fact to prescribe a duplication of disclosure requirements). By contrast, Article 12 of the proposed Prospectus Directive refers to a „material change and recent development“. Thus, it should at least be clarified in the Consultation Paper that the disclosure requirements provided for in the securities note schedules are based on, and shall be construed in accordance with, the "material change"-rule set forth in Article 12 of the proposed Prospectus Directive.

Moreover, a gradation of the registration documents should be possible such that, on the basis of a registration document for debt securities, also derivative securities can be issued. In the case of bonds and derivative securities, the same issuer risks exist, although it has to be additionally taken into account that derivative securities as a general rule are issued by banks that are subject to special supervision and therefore bear a considerably reduced risk of insolvency. The special risks that are connected with derivative instruments, by contrast, have to be dealt with in the framework of the securities note.

Part II: Detailed Comments

Question 44:

As a matter of principle, the aim should be to achieve an even balance between protection for the investors and the capital market, on the one hand, and the inputs in time and expense for the issuers, on the other.

Against this background, we would like to comment on the disclosure requirements set out in Annex A as follows:

- I.A. There is a need for clarification as to whether only such natural or legal persons have to be listed as responsible persons in the prospectus who, pursuant to Article 6 of the proposed Prospectus Directive are assigned responsibility by the respective Member States with regard to the prospectus.
- I.B. This requirement is not necessary for the purposes of investor protection nor the assessment of the issuer. By contrast, the names of the investment bank arranging the relevant securities issue and the related due diligence (if such arranger exists) as well as the legal advisers (if any) in relation to such issuance should be provided in the prospectus rather than the company's principal bankers and legal advisers which have a continuing relationship with the issuer but are not involved in the drafting of the prospectus (and may therefore not assume any responsibility for the prospectus).
- II.A.2 Although the Consultation Paper does not require that the interim financial statements have been reviewed by an auditor, such a review may have indeed taken place. In this case, the result of this review should be included in the prospectus in the form of a reprint of the relevant certificate.
- III.A.4 Including the web-site address in the prospectus seems problematic. On the one hand, it is justified wanting to give the investor the opportunity to obtain more detailed and up-to-date information about

portunity to obtain more detailed and up-to-date information about the company. On the other hand, however, the information contained at the web-site is precisely not prepared with a view to the concrete issue, and therefore a reference to the issuer's web-site could be inconsistent with the purpose of a prospectus which is designed to contain all necessary information for the investment decision of each investor.

IV.D.1 Most of the disclosure requirements set out in this paragraph would only apply to producing companies. If equivalent requirements shall be fulfilled in respect of non-producing companies, this should be clearly addressed by CESR. CESR may alternatively consider whether such requirements actually need to be set out in such detail or whether the general disclosure requirement and its "materiality test" is sufficient for both producing and non-producing companies.

IV.D.2 As we understand it, the submitting of profit forecasts is voluntary (see paragraph 66-72 of the Consultation Paper). This should also be made clear in Annex A, IV.D.2.

IV.D.3 See our comment on paragraph IV.D.2.

V.A.1 It should be clarified that the disclosure requirements relating to individuals of the company's management are subject to the applicable privacy and data protection laws as well as the constitutional law in the relevant Member State. In Germany, criminal offences are, for example, registered in the Federal Central Criminal Register (*Bundeszentralregister*) but have to be removed from it after a certain period of time (5 to 20 years depending on the type of the criminal offence committed by the relevant person). After the expiry of such period and the corresponding deletion of the registration of the criminal offence, this information must no longer be asserted against the respective person nor used in a manner which is detrimental to such person. Any disclosure requirement which is not consistent with this statutory provision would violate German law and would probably also be in conflict with the German constitution.

VI.A.1 CESR should clarify that the company shall disclose any significant change in the percentage ownership held by any major shareholders during the past three years only insofar as such changes are known to the company.

VI.B The last sentence of information requirement no. 1 is not clear. Does this mean that such transactions also have to be disclosed in which the relevant agreements have already been entered into by the parties but are still subject to the fulfilment of certain conditions?

VII.A This paragraph provides for, among other things, that “any financial statements contained in the registration document ... must be audited by an independent auditor and accompanied by an audit report”. Since the detailed audit report that the auditor prepares for its client (unlike an auditor’s report, see below) is usually of a considerable volume, we do not assume that the reprint of this comprehensive audit report should be required in the prospectus; if anything, the existence of such an audit report should be required. A reprint of the audit report would be entirely impracticable.

However, this does not mean by any means that inclusion of the auditor’s report, i.e. of the official confirmation of the financial statements by the auditors as experts, can be dispensed with altogether. Therefore, we understand paragraph VII.A to mean that such an auditor’s report has to be included in the prospectus (also see comments below, on paragraph VII.F.1).

VII.B In this paragraph, there should be more detail about what kind of “notes” are to be included in the prospectus. This is all the more true in that it is unclear whether the term “accountant’s report” is referring to the “audit report” mentioned in paragraph VII.A or whether a report comparable to the “auditor’s report” is meant here.

VII.F.1 Saying that the prospectus shall merely contain a “statement that the annual accounts have been audited” contradicts paragraph VII.A, which requires that the registration document contains consolidated financial statements that have been audited and are accompanied by an audit report (the correct term is auditor’s report, see our comments on para. VII.A above).

The reprint of the auditor’s report in the prospectus is indispensable for reasons of transparency and investor protection, and is in line with common practice in regards to prospectuses for securities that are traded in the international capital markets.

VIII.C A description of the risks associated with certain material contracts is without doubt necessary and appropriate as a rule. It should, however, be more clearly established that the description of the contracts is not an end in itself, but instead always has to be oriented to the main goal of the prospectus, namely that of providing accurate and comprehensive information to the investor about the investment risks. Therefore, it cannot be a matter of a detailed presentation of all material contracts, but only about pointing out the risks resulting from them. Only from this perspective, therefore, should a summary of the relevant terms of the contract be required.

VIII.F It is entirely inappropriate to require that contracts be made available for inspection. Precisely the material contracts of a company often contain company secrets of considerable importance. This applies not only to the issuing company, which would have to allow competitors to look at internal company data. Interests of contractual and business partners that are equally worthy of protection may also be violated, depending on the content of the contract.

If, over and above that, the contracts to be made available also have to be translated into the language in which the prospectus is written, then this requirement can become an extremely time-consuming and above all cost-intensive burden for the company.

The investors are sufficiently protected by the required summary of these contracts (VIII.C), since such a summary has to be accurate and is not allowed to be misleading. In connection with the summary, however, it also has to be borne in mind that the important thing about a prospectus is the description of risks, and a summary of material contracts must not be an end in itself (see above comment on VIII.C).

Question 47:

Yes, this approach seems to be appropriate and reasonable.

Question 51:

As a matter of principle, pro forma financial information can be helpful as a supplement to annual, consolidated and interim financial statements in order to make clear what the effects of a transaction that took place during or after the end of the period for which these statements were prepared were on the financial situation of a company.

In judging the relevance of pro forma information, however, it should not be overlooked that such information regularly has a high hypothetical character and therefore can also only have a limited relevance. Ultimately, the difficulty also lies in the fact that it is often not possible to make a meaningful comparison of the financial figures, since these are based, for example, on different accounting practices, or because the same accounting principles were applied differently. Moreover, only a comparison of the figures themselves takes place, but fails to take into account precisely other factors which result from the purchase of another company, such as completely different planning or wholesale prices and conditions, for example. For this reason, there is a great danger, as also addressed by CESR in paragraph 48, that the pro forma information will be misleading. In other words, pro forma information ultimately only gives the illusion of accuracy.

Based on these problems related to pro forma statements, an obligation to prepare pro formas should not exist in every case even when there is a significant gross change in the size of a company. Against this background, it should be decided on a case-by-case basis whether the preparation of pro forma financial information is necessary because the current financial figures as such would otherwise be misleading.

As a result of this very hypothetical nature, it is especially problematic for pro forma information to be prepared also for future transactions, in other words, for transactions that are only in the planning stages. Making things depend on pro forma information that is only in the planning stages would intensify the hypothetical nature even more. Moreover, in the case of the target company in an acquisition, it will probably be extremely difficult to obtain corresponding information that allows a comparison to be made between the financial statements of the company and those of the target company. The preparation of pro forma information for planned transactions therefore has to be rejected.

Question 52:

A change in the size of a company alone should not be sufficient; rather, it has to be a matter of significant structural changes in the company.

Question 53:

As already explained in the comments on Question 51, no rule should be made for the preparation of pro forma statements for cases of significant gross change, but instead should be left to the individual case (on a case-by-case basis) whether pro formas are prepared or not.

Aside from that, the proposed threshold of 25% would be acceptable from the standpoint of size, whereas a threshold of 10% would be too low in any case.

Question 55:

No, for the reasons already explained, the inclusion of pro forma statements in the prospectus should not be obligatory. This also has to apply for other cases in which actual or future transactions can have a material influence on the financial statements of the company. The general requirement that all material information be included in the prospectus does not by any means require the preparation of hypothetical financial statements, but only the publication of the relevant material facts. This is true of actual transactions as well as for planned transactions. Accordingly, no authority of a home country can be authorised to insist on the inclusion of pro formas in the prospectus.

In addition, an administrative rule by an authority to include such pro formas in the prospectus may, under certain circumstances, even create considerable legal problems and thus pose an unreasonable demand on those who are re-

sponsible for the prospectus. Due to the hypothetical nature of pro forma information and the related uncertainties, the inclusion of pro formas in the prospectus entails considerable risks. In cases where such a rule is imposed by an authority, it should have to be clarified in any case how the responsibility is distributed if a company includes pro forma information in the prospectus against its will (e.g. information that it does not regard as "material") because it has been ordered to do so by an authority.

Paragraph 57:

Given the fact that pro forma financial information can only reflect a hypothetical situation, the statement "may not give a true picture" should be replaced by the clear statement that "pro forma information cannot give a true picture".

Paragraph 62:

We would very much welcome instructions concerning auditor's review. The standards (AICPA Professional Standards Section AT §300, especially §300.08, Reporting on Pro Forma Financial Information) promulgated by the American Institute of Certified Public Accountants [AICPA] provide some orientation for the investigative actions to be taken by an auditor).

Question 64:

With respect to the pro forma financial information set out in Annex B we would like to comment as follows:

Ad 1: The restated financial statements should be audited in any case.

Ad 2 and 3: As already stated in the above comments on paragraph 51, 53 and 55, the inclusion of pro forma information in the prospectus should not be obligatory.

Aside from that, no. 3. lit c) is not quite correct (see above remark on paragraph 57). It would be better to say: "the pro forma information addresses a hypothetical situation and therefore does not give a true picture of the company's actual financial position or results."

Paragraph 68:

As we understand it, CESR considers the submitting of profit forecasts desirable as a matter of principle (with the reservations mentioned in para. 66 et seq. of the Consultation Paper). The existing reservations on the companies' part for liability reasons about giving such forecasts could be alleviated by either having the proposed Prospectus Directive itself or, in any case, each Member State introduce a safe harbour rule for its own jurisdiction for the inclusion of profit forecasts in prospectuses. Such a safe harbour rule could exempt the company from bearing liability for deviations from such forecasts

made in the prospectus provided that the assumptions on which the profit forecast was based were reasonable and appropriate in terms of sound business practice. A clarification in this regard would give the companies the necessary legal certainty.

Question 73:

It should be made clear in the definition that the possibility of making a profit forecast by implication allows the projected profit development to be commented upon in comparison to a reference period. This would at the same time make it clear that a (voluntary!) profit forecast is also permissible without giving concrete maximum and/or minimum figures by describing the performance that is already foreseeable at present.

Question 85:

It is not quite clear what is meant by ad-hoc profit forecasts and whether these have to exhibit the same quality as the profit forecasts described in paragraphs 66 et seq. with regard to the underlying facts and assumptions. In any case, however, such ad-hoc profit forecasts should be regulated sufficiently by the existing ad-hoc disclosure requirements. The ad-hoc disclosure requirements exist completely independently of prospectus requirements and should not be confused with the latter. What information in what volume is to be given in the prospectus should always be measured by the criterion of materiality (related to the investor's need for information). In no case should an obligation to include profit forecasts in the prospectus be created indirectly by deriving such obligation from outstanding ad-hoc profit forecasts, which would reverse the principle of voluntarily providing such information and turn it into the opposite.

Question 86:

See our comments to Annex A, para. IV.D.2. Due to the highly speculative nature of profit forecasts, it should be made clear by all means that they are not obligatory but only voluntary.

Question 87:

We agree in principle that reporting by the company's financial advisor not be mandatory. However, this is in contradiction to Annex A, IV.D.2, according to which a corresponding report is required. Therefore, Annex A, IV.D.2 should be changed accordingly.

Question 89:

Yes, in principle we agree that such information may be material to an investor's decision to invest. As far as public criticisms are concerned, however, it should be described more clearly what, precisely, is meant by that. In particular, it should be made clear that a public reprimand or criticism (public criticisms) should only be included in the prospectus if a violation of capital mar-

ket laws is involved, which could be relevant for an assessment of the security and thus for an investment decision. Otherwise, the reader is referred to the comments on Annex A, paragraph V.A.1.

Question 91:

Yes.

Question 93:

No, issuers should not be required to put on display all documents referred to in the prospectus. There is no need for this, since the prospectus has to contain all material information and, to the extent required, also a summarising description of the most important documents. These descriptions have to be accurate and must not be misleading due to an omission of material information. Based on these obligations, there is no need for the documents themselves to be put on display. To the extent that such documents contain confidential information about the company itself and its legal positions worthy of protection, their disclosure in the prospectus can violate company interests that are worthy of protection, and thus the company's rights of ownership. The same is true to an even greater degree if such contracts contain company secrets of contractual partners of the issuer who are not even involved in the issuance (also see above comment on Annex A, VIII.F).

Question 95:

As already explained above in the general comments under Part I, 3., we do not consider it necessary nor helpful to create specific disclosure obligations for various industries. The decisive information can already be derived from the criteria of the respective building block for the various types of securities. It will as a rule also be possible to derive special criteria for a specific industry from the general disclosure requirements. To the extent deemed necessary, harmonisation to this effect can be achieved at level 3.

Question 96:

No further building blocks should be created. Nor will it be feasible to create a separate (specialist) building block for every single branch of industry. If anything, this would be counterproductive and would lead to confusion and a lack of transparency.

Question 100:

Nearly all of the information required of start-up companies in Annex C applies equally to issues by other companies. Therefore, in the interest of achieving a desirable reduction of building blocks, it should be considered whether a separate Annex C for start-up companies can be dispensed with. The small number of specific requirements for start-up companies (Annex C, V.A and VII) can be prescribed separately. There is no need for a separate building block for this. Moreover, it is also unclear how a building block for

start-up companies should be treated in relation to other building blocks. One question, for example, is whether an equity issue by a start-up company that is also a mineral company and an SME at the same time should be subject to four different building blocks (core equity, mineral companies, start-ups and SME's). This can hardly be CESR's intention.

Aside from this basic amendment proposal, what has been said above on Annex A., VII.A and IV.D.2 applies here as well:

- In line with the practice and law to date, the auditor's report must also be included verbatim in the prospectus itself.
- The contradiction between paragraph 80 of the Consultation Paper (no auditor's report for profit forecasts due to hypothetical nature) and Annex A, IV.D.2 has already been pointed out (see our reply to Question 87 above). The same contradiction also exists here with regard to Annex C, IV.D. Profit forecasts, to the extent that they are voluntarily included in the prospectus at all, should not be accompanied by an auditor's statement.

Question 101:

A general requirement that an expert opinion be included or summarised in the prospectus should not be introduced. The introduction of new products on the market is not specific to start-up companies alone. The main products and business activities of a company (including the material risks associated with them) have to be described anyway. It is also unclear what – in a general requirement – is meant by such an expert opinion on the products and business plan of a start-up company and who would be considered suitable to provide such an expert opinion.

In any event, such an expert opinion, which has to be specified in more detail, can only be worthwhile on a case-by-case basis if material business operations of the company affect entirely new technologies or new markets and/or markets that do not yet exist. Whether such an expert opinion should be printed in the prospectus, or the prospectus should only include a summary of it, is of secondary importance from the investor's point of view because a summary also has to be accurate and not misleading. In the absence of an independent expert opinion in the case of new products or markets, it would also be conceivable to require that the prospectus include an obligatory reference to that fact.

Question 102:

Restrictions regarding holdings by directors and senior management should be disclosed in respect of all companies. If such restrictions are not given, then this should also be pointed out in the prospectus.

Question 105:

No. All securities that are traded on a regulated market have to be subject to the same disclosure standards. This is also true for SMEs, which in other respects are no less risky from the investor's point of view. On the contrary, often they are not even as transparent as large companies listed on a stock exchange.

Therefore, a lowering of the disclosure requirements for a particular group of companies can only be considered if there is a special market segment for certain companies in which it is known that only securities subject to lower disclosure standards are traded in them.

Question 107:

We see no need for any further specific disclosure requirements for SMEs.

Question 111:

First, it should be noted that a special property building block is not required. Questions arise here as well regarding the relationship to other building blocks and the treatment of corporate groups, some of whose subsidiaries are property companies, but in other respects also encompass completely different types of business operations.

Aside from this fundamental question, the inclusion of a valuation report seems superfluous because it does not necessarily lead to a comparability of prospectuses of European property companies. As indicated in Annex D no. 1, the valuation standards differ from one country to another, which means that, relatively speaking, a valuation report is not much help to an investor. On the other hand, a description of the respective underlying valuation methods used in each case would go beyond the scope of the prospectus.

This is all the more true if it is a matter of property companies that have a large number of real-estate assets in their portfolio which, moreover, are also spread across several countries. In this case, an individual valuation of all real-estate holdings would not just be an unreasonable demand from a cost standpoint, but would also simply be impracticable. Therefore, it seems entirely sufficient if the current balance sheet is included in the prospectus, with information about the value of the company's property portfolio. Any material changes on the property markets since the last balance-sheet date have to be mentioned anyway due to the overall obligation to disclose material facts in the case of such companies in the prospectus.

Question 112:

No. A period of 42 days is totally impracticable. Both the rigid time limit and above all the extremely short amount of time are problematic here. Such a

time limit would mean that property companies would have to have the value of all their property holdings reassessed prior to every new issue. This seems impossible in every respect.

Question 113:

This question again implies that the value of the all holdings in the real-estate portfolio would have to be reassessed prior to every new issue, and in the form of a valuation report with a closing date no more than 42 days before publication of the prospectus. As described under questions 111 and 112 above, this approach is not practicable. Accordingly, an obligation to include such a valuation report in the securities note also has to be rejected. The securities note should only contain information that is important in addition to the general information contained in the registration document for the issuance of the specific security.

Question 116:

Expert reports should not be generally obligatory. Against the background of the CESR elaborations under para. 115, such a report is apparently also only envisioned for mineral companies that have not been operating for at least three years; in this case, there is indeed a lack of up-to date corporate figures, which means that an expert report can be worthwhile in a given case. But even in this case, it still seems necessary to clarify who may prepare such a report and what its content could be. Therefore, an abstract building block requirement to publish such a report should be avoided (also see our response to Question 117 below).

Question 117

As already mentioned several times, an extension of the building block approach to various sectors and branches of industry should be rejected. What information is deemed material in relation to a specific company in a given case and should thus be included in the prospectus, can only be determined for a specific issue and the respective economic framework conditions.

Question 120:

A special building block for investment companies is also superfluous.

Question 123:

No. A special Annex for scientific research-based companies is not needed. The Core Equity Building Block and the general principle that all of the information needed for the investment decision has to be included in the prospectus are entirely sufficient.

Question 129:

The disclosure requirements for debt securities should be clearly distinguished from the requirements for equity securities. In the case of debt securities, the only company-related risk factors that have to be taken into account for the investment decision are the probability of punctual interest payments and repayment of the principal. Thus, in the final analysis, it is a matter of the issuer's insolvency risk (see para. 124 and 133 of the Consultation Paper). Based on this investor perspective, which is limited to the worst-case scenario, the scope of the disclosure requirements for debt securities has to be appreciably less. This applies in particular, but by no means exclusively, to the requirements of the IOSCO standards developed for equity (see above our general comments, Part I, 1., penultimate paragraph and question 142 below).

Question 134:

No, because such information would not help the investors to assess the relevant risks of the issuer.

Question 135:

No. Knowing which bankers and legal advisers were specifically involved in the relevant issue does not make it any easier for the investor to assess the risks of the issuer and/or the risks associated with the issue, nor to assess them any better. Therefore, we consider such information irrelevant.

Question 137:

No, we do not consider disclosure about a company's past investments generally to be material for a debt investor. If such disclosure is material in specific situations for whatever reason, then it will be disclosed under the general disclosure requirement.

Question 138:

No, we do not consider such disclosure generally to be material. It should therefore only be disclosed in particular circumstances under the general disclosure requirement if, due to the specific nature and risks of the relevant investments, the current investments may have any impact on the ability of the issuer to pay interest or to repay the principal.

Question 139:

No, see question 137 and 138 above.

Question 142:

Yes, we agree (see response to question 129 above).

Question 145:

No, it is not necessary for details of form and content of financial interim statements to be stipulated. The proposed Prospectus Directive provides that (i) such information shall be disclosed in an easily analysable and comprehensible form and (ii), with respect to the content, the disclosure shall include all material information. A higher level of detail would not be appropriate. Interim financial statements are prepared in accordance with different rules in most jurisdictions. As a consequence, a high level of detail may result in an issuer not being in the position to comply with the level 2 requirements although they would be able to comply with the overriding principles set out in the proposed Prospectus Directive.

Question 146:

Yes, the same approach should be taken for equity (see general comments, Part I.2 above and our comments on paragraph H.VII.2 of the Core Equity Building Block).

Question 148:

The response to Question 93 applies here as well: Issuers should not be required to put on display all documents referred to in the prospectus. There is no need for this, since the prospectus has to contain all material information and, to the extent required, also a summarising description of the most important documents. These descriptions have to be accurate and must not be misleading due to an omission of material information. Based on these obligations, there is no need for the documents themselves to be put on display. To the extent that such documents contain confidential information about the company itself and its legal positions worthy of protection, their disclosure in the prospectus can violate company interests that are worthy of protection, and thus the company's rights of ownership. The same is true to an even greater degree if such contracts contain company secrets of contractual partners of the issuer who are not even involved in the issuance (also see above comment on Annex A, VIII.F). In the end, this would give the investor the possibility for his own, additional due diligence, which is not necessary and would undermine the actual prospectus.

Due to the different kind of information aim and interest in information on the part of bond investors (see above response to Question 129), even a summary or more precise description of contracts can usually be dispensed with. To the extent that, as an exception, certain contracts are indeed important for the solvency risks of a company, this would be sufficiently covered by the general disclosure requirement.

Question 149:

See our response to Question 148.

Question 150:

As elaborated in the above response to Question 148, an obligation to put material contracts on display is to be rejected. Aside from that, translations, which are regularly very time-consuming and cost-intensive, should not be made obligatory. If at all, in any case, only a translation into a language that is common in the international capital markets should be considered.

Question 153, 154 and 155:

The solvency risk of the issuer which is of sole interest to the investor must serve as the guideline for the scope of the disclosure requirements for debt (see question 129 above). This has to lead to a radical reduction in the disclosure requirements for debt securities.

Especially the following items of disclosure set out in Annex I are not, or only to a limited extent, necessary for corporate retail debt and the assessment of the insolvency risk of the issuer:

- I.B (company's principal bankers and legal advisers): not necessary (see our response to Question 44, Annex A, I.B and Question 135 above);
- II (Selected financial data): much too detailed and not necessary, the financial statements referred to in para. VII are sufficient.
- II.B (Risk Factors): Risk factors should only have to be described if they affect the company- and sector-specific risks that are relevant for the issuer's solvency.
- III.B (Investments): not necessary (see above our response to Question 137 to 139).
- III.C.2 (Principal markets): A "breakdown of total revenues by category of activity and geographic market" generally is not of any interest for an investor in debt securities.
- III.E (Property plants and equipment): not necessary.
- IV.A (Capital expenditure commitments): not necessary.
- IV.B (Trend information): It should be made clear here that profit forecasts are not an obligatory part of a prospectus (see above response to Question 44, Annex A, IV.D.2 as well as Question 86).
- V. (Directors and Senior Management): Disclosure requirements regarding directors and the senior management should be limited by the restrictions of the applicable privacy and constitutional laws of the

- relevant Member State (see our response to Question 44, Annex A, V.A.1).
- V.B (Management and directors conflicts of interests): Not necessary because the adherence to compliance and corporate governance rules is irrelevant for assessing the insolvency risk.
- V.C (Board Practices): not necessary (see our comment on para. V.B above).
- VI.B (Related Party Transactions): much too detailed and not necessary, because a description of the related party transactions is not necessary for an assessment of the insolvency risk and is also often very costly in terms of time and inputs for the affected company.
- VII.A (Consolidated Statements and Other Financial Information): It is not clear whether the prospectus ought to contain the "audit report" mentioned there or not. Since the term "audit report" is usually taken to mean the "long-form" report that the auditors make available to the company internally, it should be made clear that such an audit report does not have to be included in the prospectus. Instead, the auditor's report is to be included in the prospectus (see below our response to Question 156, Annex I, VII.F.1).
- VIII.C (Material Contracts): It is neither necessary to put them on display nor to summarise them, because due diligence cannot be delegated to investors. Rather, it is sufficient if any risks arising from these contracts are described in the prospectus. In the case of debt securities, above all, it is important to base the assessment on risks that can jeopardise the solvency of the company.
- VIII.E (Documents on display): An issuer must not be required to put confidential information on display. Moreover, such information is not relevant for the assessment of investments in debt securities. Also see comments on para. VIII.C and Question 148 above.

Question 156:

The following disclosure requirement should be included in Annex I:

- VII.F.1 (Auditing of Accounts): A mere "statement that the annual accounts have been audited" is not sufficient. The prospectus has to contain the so-called auditor's report (not to be confused with the "long-form" audit report, see above comment on para. VII.A), i.e. the official certification of the financial statements by the auditors as experts as the result of their audit (also see above responses to Question 44, Annex A, VII.A and VII.B). This is absolutely necessary for reasons of inves-

tor protection and in terms of the reliability of a company's financial figures.

Question 160:

In a general, derivative securities are issued by credit institutions or a finance company belonging to the corporate group of a credit institution. Since credit institutions are subject to a special supervision, their insolvency risk is much lower than in the case of other issuers. Thus, in the case of derivative securities, which also often have a much shorter maturity than corporate bonds, for example, the description of the specific products is. The disclosure requirements for the issuance of derivative securities can and should therefore be much lower than for equity or general corporate debt securities. This can be achieved through accordingly low criteria in the framework of a special derivative securities annex or by using the registration document for credit institutions (we are assuming that the disclosure requirements here are lower than for general debt securities).

Question 170:

Yes, a definition for derivative securities is necessary if a special regime shall apply to these securities.

Question 171:

Because derivative products are very diverse and constantly undergoing change, a definition that is too narrow is problematic and a relatively open concept therefore preferable. The core component of a derivative is regularly that a link exists to a certain underlying instrument. This should be expressed in the definition. However, the enumeration of certain underlying instruments and/or reference values as envisioned in paragraph 166 also leads to an impracticable narrowing of the term "derivative", like the restriction to "forward transactions". The second approach is too complex and thus also harbours the risk of – surely undesired – restrictions on the term "derivative".

Due to the above-mentioned special reasons for an independent derivatives securities building block, it seems decisive for all of those products to be covered whose peculiarities and risks lie in the structure of the product itself and not in the creditworthiness of the issuer. The relatively low relevance of the issuer risk is more or less the same in respect of both traditional derivatives such as options and futures as well as derivative certificates. Such derivative certificates, for instance, are not covered with sufficient clarity in either of the two proposed definitions. Their performance is linked to a separate underlying, which means that there is a derivative instrument. However, because the investor immediately brings in the principal by means of an initial deposit, it is not a matter of a "forward transaction" in the proper sense, but of a "spot transaction".

Therefore, it is advisable to limit the definition as a matter of principle to the above-mentioned core element of all derivatives ("linked to an underlying") and then, to the extent deemed necessary, make certain derivative securities subject to a separate regime (such as that provided for in the addendum of 19 December 2002 for asset backed securities) by means of an exceptional or special rule.

Question 172 and 173:

See our response to Question 171 above.

Question 179, 180 and 185:

No, there is no need for such sub-categorisation since the insolvency risk does not depend on whether a payment under a derivative security is "guaranteed" or "not guaranteed" by the relevant issuer. Such "guarantee" constitutes a mere economic protection mechanism but does not change the insolvency risk in respect of the issuer.

CESR may, instead, consider whether they should require particular disclosure for the unusual situation that a normal corporate issuer which is not affiliated with a credit institution intends to issue derivative securities, in particular "funded derivative securities". In this context, "funded derivative securities" shall mean securities which the investor buys by means of paying a principal amount, i.e. by making an initial deposit (such as, for example, index-linked certificates). With respect to the repayment of such deposit (whether "guaranteed" or not), the investor would, in addition to the market risk of the product, bear the normal insolvency risk of a corporate bond.

Question 190 and 192:

With respect to the registration document, only the issuer's solvency risk is relevant. As a consequence, disclosure on the issuer's senior management (or equivalent officers) is not necessary. The same applies with regard to the issuer's advisers.

Question 195, 196, 197, 199, 200

Derivative securities are almost always issued by credit institutions that are subject to a special supervision. In regard to the registration document for derivative securities, therefore, the disclosure requirements for derivative securities should remain below the criteria for debt securities as a matter of principle (see above responses to Questions 129 et seq.) and not go beyond the disclosure requirements for credit institutions.

Question 202 and 203:

Yes, a general description of the issuer's principal activities is sufficient since an investor in derivative securities does not make an investment in the equity of the issuer and, in addition, almost all issuers of derivatives securities are regulated credit institutions.

Question 205:

Yes, this should be sufficient.

Question 207:

Information on property, plants and equipment of the issuer is not relevant for debt securities nor derivative instruments and most of such information would not even be applicable to issuers of derivative securities, i.e. typically credit institutions.

Question 209, 210, 213, 215:

Derivative securities are almost always issued by credit institutions that are subject to a special supervision. In regard to the registration document for derivative securities, therefore, the disclosure requirements for derivative securities should remain below the criteria for debt securities as a matter of principle (see above responses to Questions 129 et seq.) and not go beyond the disclosure requirements for credit institutions.

Question 217:

At least the information under c) is not necessary, because such a statement does not give the investor anything more to go on for the assessment of the issuer's solvency risk that is the only relevant issuer risk in the case of derivative securities.

Question 218:

Since the issuers of derivative securities as a rule are subject to a special supervision, it is sufficient if this disclosure is made for the last year.

Question 222:

X.A.1: items a),b) and c) should be addressed in the prospectus. A reconciliation of outstanding shares at the beginning and end of the business year seems dispensable for the issuance of derivative securities.

X.A.2: Meaning is unclear.

X.A.3-6: Is not necessary because this information does not contribute anything to the assessment of the issuer's risk in the case of derivative securities.

Question 223:

X.B.1 should be disclosed. Sections X.B.2-10 are relevant for investments in the issuer's equity but not for derivatives securities issued by it.

Question 224:

The need for an obligation to summarise material contracts is already doubtful in the case of debt securities. From the investor's standpoint as well, this seems less helpful, for example, than a description of the risks that may result from certain material contracts. In regard to derivative securities, the relevance of such a disclosure requirement is not recognisable at all.

Question 225:

Exchange controls can also be important for derivative securities under some circumstances.

Question 226-228:

Because of the limited issuer risks in the case of derivative securities, this information is not relevant for the investor's assessment and decision regarding the investment, and is therefore not necessary.

Question 232-234:

A differentiation between non-guaranteed and guaranteed derivative securities is not very conducive in achieving the goal of prospectus disclosure requirements. See above comment on Question 179, 180 and 185.

Question 249:

Basically, building blocks can make an important contribution to structuring the material and the efficient preparation of the prospectus. However, only a very limited number of building blocks should be created. In particular, there should not be too many building blocks in regard to the various types, industries and objectives of issuers.

Question 250:

A duplication of information to be disclosed in the registration document should be avoided.

Question 251:

This possibility should be given for reasons of flexibility. However, there is still a need for further clarification, as to how individual building blocks are to be treated in relation to one another in terms of their practical application;

which building blocks are independent basis blocks; and which may come into consideration only as a mere supplement to other main building blocks.

Question 252:

Advisers should only be mentioned in the prospectus if they may be held liable by the investors.

Question 253:

Yes, auditor's reports constitute important information for investors.

However, beside this, it needs to be clarified which information has to be included in the securities note and which information shall be subject to an update pursuant to Article 10(1) of the Proposed Directive. There should be no duplication of required information. The Consultation Paper is not clear to this effect while Article 12 of the Proposed Directive refers to a „material change and recent development“. If audited information is contained in the registration document then this information should be accompanied by the relevant auditor's report in that registration document and no further information should be required.

Question 254:

Different persons may be responsible for each of the three documents. Hence, responsibility for each of the documents may not necessarily rest with the same persons. It should therefore be stated in each of the documents for which document and which parts of such document, as the case may be, the relevant persons are responsible.

Question 255:

Such statement should not be generally required with respect to debt and derivative securities. In respect of derivatives securities, it also has to be taken account of the additional fact that derivative securities are almost always issued by regulated credit institutions.

Question 256:

For most derivatives, such disclosure would not be of any relevance as the issuer's intention is limited to make a profit calculated by subtracting its costs (in particular for hedging transactions) from its proceeds. CESR may consider whether such disclosure is required in respect of those instruments where the investor makes an initial deposit rather than paying a mere premium or any similar amount.

Question 257:

In our view, it should not be required to include a „worst case scenario“. It is sufficient that the relevant risk factors are disclosed to the investors including a description of any facts or circumstances in which an investor may lose the value of his entire investment or in which an investor may even be subject to further liability in excess of his investment.

Question 258:

This information should generally not be required, neither for derivatives nor any other securities. Such conflicts of interest should be dealt with under the competent bodies for such experts or counselors. In addition, if any statement contained in the prospectus is not correct this may result in the responsible person being liable under the applicable law for any damages caused by such incorrect statement. This should give sufficient protection.

Question 259

Information under (b) can be useful for investors.

With respect to the rating, the second proposal is preferable as there is no general need to disclose the fact that application for a rating has not been made for the securities to be issued. If however, for example, a programme provides for the issue of securities rated by a rating agency such disclosure should be made if, with respect to a specific issue of securities under the programme, the issuer would not seek to obtain a rating from a rating agency.

Question 260:

A statement concerning the past performance of the underlying and its volatility should not be required. It is generally recognised that such information would not give any reliable information on the future performance of the underlying. Information on the past performance of an underlying, e.g. exchange traded shares or an index, could therefore even be misleading and, as a consequence, many European conduct of business rules provide that the investor should expressly be made aware of the fact that the past performance of a financial instrument does not indicate its performance in the future. It would not be consistent with such rules if the disclosure proposed under paragraph V.B.12, first indent of Annex M were required.

Question 261:

General comments with respect to all three main schedules:

There must not be any requirement to disclose information which also has to be disclosed in the registration document (including updates under Article 10(1) of the proposed Prospectus Directive). Otherwise, this would result in a

superfluous duplication of disclosure and further costs and other burdens for issuers which are not necessary in respect of the overriding principles of confidence in the capital markets and investors' protection. The Consultation Paper is not clear to this effect (and seems, on the face of it, in fact to prescribe a duplication of disclosure requirements) while Article 12 of the proposed Prospectus Directive refers to a „material change and recent development“. Thus, it should at least be clarified that the disclosure requirements provided for in the securities note schedules are based on, and shall be construed in accordance with, the “material change”-rule set forth in Article 12 of the proposed Prospectus Directive.

For equity securities (Annex K):

- I.2. (company's principal bankers and legal advisers): not necessary (see our response to Question 44, Annex A, I.B and Question 135 above).
- IV.B (conflicts of interest) The scope of this requirement and the circle of persons to whom this requirement relates are unclear. CESR should therefore either replace this with specific requirements relating to particular types of conflicts of interests envisaged by CESR or remove this requirement in whole (if such conflicts of interest are already covered by other regulatory requirements).
- V.D.4b The proposed details of the features of the underwriter agreement are not relevant for the investor's assessment of the issuer and the securities to be issued. The corresponding disclosure requirement should therefore be removed from Annex K.
- V.D.4d The requirement to disclose the terms of the agreements among the selling group members should also be removed for the reasons set out above with respect to V.D.4b.
- V.I This section is too detailed and may require the issuer to disclose confidential fee arrangements. At least paragraph V.I.2 should be removed. A statement of all major expenses with respect to each of the various expense items is of no value for the investor and could even be misleading. High fees for accountants or lawyers may result from a large number of circumstances (including a duly and proper execution of due diligence investigations) and any amount so published may result in the investors having very speculative thoughts about the reasons for such costs. Also, most of such expenses are, by their very nature, confidential. If disclosure regarding expenses, discounts and similar amounts is regarded as being necessary, then such requirement should be limited to disclosure of net proceeds.
- VI.C We strongly recommend to limit tax disclosure to withholding tax. A prospectus may not replace individual tax advice an investor may need. Information regarding taxes to which holders in the „targeted“

country may be subject could even be misleading since each tax regime has to take into account the individual circumstances and taxation of the relevant investor. By its nature, a prospectus can therefore not reflect all relevant tax issues which might be relevant for each investor individually in each country where the securities are offered. And even an attempt to cover the most important tax matters in all relevant countries would result in the cost of the issuer being huge. Such far reaching tax „disclosure“ (which would in fact be an investment advice rather than disclosure relating to the securities offered) would therefore constitute a significant barrier to the creation of a harmonised pan European capital market.

For debt securities (Annex L):

- I.2 There should be no requirement to disclose the company’s principal bankers and legal advisers in the prospectus (see our response to Question 44, Annex A, I.B and Question 135 above).
- III.A Disclosure on capitalisation and indebtedness relate to the financial condition of the issuer as such and should therefore be required for the registration document (including any updates required) rather than for the securities note.
- IV.A This is not relevant for investments in debt securities. Moreover, such conflicts of interest should be dealt with under the competent bodies for such experts or counselors .
- IV.B The scope of this requirement and the circle of persons to whom this requirement relates are unclear. CCSR should therefore either replace this with specific requirements relating to particular types of conflicts of interests envisaged by CCSR or remove this requirement in whole (if such conflicts of interest are already covered by other regulatory requirements).
- V.A.13 The information set out in the fourth intend should not be required since historical interest rates can be misleading with respect to any future developments following a change in the market for debt securities.
- V.C.6 As a general requirement, this goes beyond the information necessary for an investment in debt securities. Hence, if necessary at all, only features of those material contracts should be required to be disclosed which are relevant to the issue.
- V.F.3 It is unclear how an issuer can be in the position to specify persons in the prospectus who „may“ act as intermediaries and provide liquidity through bid and offer rates, in particular with respect to debt securities.

- V.H This is more relevant to equity issues rather than to debt securities and should therefore be removed.
- V.I This section is too detailed and may require the issuer to disclose confidential fee arrangements. At least paragraph V.I.2 should be removed. A statement of all major expenses with respect to each of the various expense items is of no value for the investor and could even be misleading. High fees for accountants or lawyers may result from a large number of circumstances (including a duly and proper execution of due diligence investigations) and any amount so published may result in the investors having very speculative thoughts about the reasons for such costs. Also, most of such expenses are, by their very nature, confidential. If disclosure regarding expenses, discounts and similar amounts is regarded as being necessary, then such requirement should be limited to disclosure of net proceeds.
- VI.A This information should be included in the registration document and not in the securities note.
- VI.C We strongly recommend to limit tax disclosure to withholding tax. A prospectus may not replace individual tax advice an investor may need. Information regarding taxes to which holders in the „targeted“ country may be subject could even be misleading since each tax regime has to take into account the individual circumstances and taxation of the relevant investor. By its nature, a prospectus can therefore not reflect all relevant tax issues which might be relevant for each investor individually in each country where the securities are offered. And even an attempt to cover the most important tax matters in all relevant countries would result in the cost of the issuer being huge. Such far reaching tax „disclosure“ (which would in fact be an investment advice rather than disclosure relating to the securities offered) would therefore constitute a significant barrier to the creation of a harmonised pan European capital market.
- VI.D Only a description of risks resulting from such contracts in respect of the particular issue should be required. Moreover, it is unclear why such disclosure is required in respect of the registration documents and in the debt securities note whereas, with regard to other types of securities, such a summary has to be given in the registration document only. Again, any duplication of disclosure needs to be avoided.
- VI.F It is entirely inappropriate to require that contracts be made available for inspection. Precisely the material contracts of a company often contain company secrets of considerable importance. This applies not only to the issuing company, which would have to allow competitors to look at internal company data. Interests of contractual and busi-

ness partners that are equally worthy of protection may also be violated, depending on the content of the contract.

If, over and above that, the contracts to be made available also have to be translated into the language in which the prospectus is written, then this requirement can become an extremely time-consuming and above all cost-intensive burden for the company.

The investors are sufficiently protected by the required summary of these contracts or of the risks resulting from such contracts respectively since such a summary has to be accurate and is not allowed to be misleading. In connection with the summary, however, it also has to be borne in mind that the important thing about a prospectus is the description of risks, and a summary of material contracts must not be an end in itself.

For derivative securities (Annex M):

- I.2 There should be no requirement to disclose the company's principal bankers and legal advisers in the prospectus (see our response to Question 44, Annex A, I.B and Question 135 above).
- II.B.8 The meaning of this disclosure requirement is unclear. Moreover, CESR should consider that derivative securities are usually not subject to a subscription period and typically such number of derivative securities are issued as have been subscribed for.
- III.A Disclosure on capitalisation and indebtedness relate to the financial condition of the issuer as such and should therefore be required for the registration document (including any updates required) rather than for the securities note.
- III.B Information on the use of proceeds is not relevant for investors in derivative securities.
- III.C.1 It is unclear which additional risk factors are addressed in this paragraph in comparison to III.C.2. All risk factors that are specific to the securities to be offered should be dealt with in the securities note as set out in III.C.2. Thus, paragraph III.C.1 should be removed.
- III.C.2 In sub-paragraph (d), a description of the worst case scenario should be sufficient. An example of the „best case scenario“ is not required with respect to investor protection and could even be misleading if the occurrence of such „best case“ is quite remote.

It is unclear which hedging instruments are referred to. In any case, hedging is not related to the issue of particular derivative securities as

such and it depends on the individual investment purposes of each investor whether hedging is relevant at all.

IV.A This is not relevant for investments in derivative securities. Moreover, such conflicts of interest should be dealt with under the competent bodies for such experts or counselors.

IV.B The scope of this requirement and the circle of persons to whom this requirement relates are unclear. CESR should therefore either replace this with specific requirements relating to particular types of conflicts of interests envisaged by CESR or remove this requirement in whole (if such conflicts of interest are already covered by other regulatory requirements).

V.A.13 The meaning of „final reference price“ is unclear. In any case, the words „if any“ should be inserted since, due to the large number of different types of derivatives, this information may not be relevant for all derivative securities.

V.A.14 The meaning of „price at maturity“ is unclear. In any case, the words „if any“ should be added as such price may not be relevant for all derivative securities.

V.B.1-

V.B.5 See comment regarding para. II.B above. It should therefore be clarified that these requirements are not compulsory.

V.B.7 There is no common practice that definitions are set out in a separate section. It should therefore be allowed to set out the complete terms and conditions which, in addition, should usually cover further requirements set out in para. V.B of Annex M.

V.B.8-

V.B.17 It should generally be made clear that all these requirements are subject to the individual structure and terms of the relevant derivative product and that some of those features may not be relevant for some types of derivative securities.

V.B.12 A statement concerning the past performance of the underlying and its volatility should not be required (see response to Question 260 above).

V.E A description of the process of the disclosure of the initial offering price as set out in section para. V.E.2 is sufficient. Para. V.E.1 which, in general, may only be relevant to shares or bonds should therefore be removed.

- V.F.3 It is unclear how an issuer can be in the position to specify persons in the prospectus who „may“ act as intermediaries and provide liquidity through bid and offer rates, in particular with respect to debt and derivative securities.
- V.H The information referred to in paragraph V.H is irrelevant for derivative securities as derivative securities are never offered as the result of a replacement.
- V.I This paragraph is too detailed and may require the issuer to disclose confidential fee arrangements. At least paragraph V.I.2 should be removed. A statement of all major expenses with respect to each of the various expense items is of no value for the investor and could even be misleading. High fees for accountants or lawyers may result from a large number of circumstances (including a duly and proper execution of due diligence investigations) and any amount so published may result in the investors having very speculative thoughts about the reasons for such costs. Also, most of such expenses are, by their very nature, confidential. If disclosure regarding expenses, discounts and similar amounts is regarded as being necessary, then such requirement should be limited to disclosure of net proceeds.
- VI.A This information should be included in the registration document and not in the securities note.
- VI.C We strongly recommend to limit tax disclosure to withholding tax. A prospectus may not replace individual tax advice an investor may need. Information regarding taxes to which holders in the „targeted“ country may be subject could even be misleading since each tax regime has to take into account the individual circumstances and taxation of the relevant investor. By its nature, a prospectus can therefore not reflect all relevant tax issues which might be relevant for each investor individually in each country where the securities are offered. And even an attempt to cover the most important tax matters in all relevant countries would result in the cost of the issuer being huge. Such far reaching tax „disclosure“ (which would in fact be an investment advice rather than disclosure relating to the securities offered) would therefore constitute a significant barrier to the creation of a harmonised pan European capital market.
- VI.E It is entirely inappropriate to require that contracts be made available for inspection. Precisely the material contracts of a company often contain company secrets of considerable importance. This applies not only to the issuing company, which would have to allow competitors to look at internal company data. Interests of contractual and business partners that are equally worthy of protection may also be violated, depending on the content of the contract.

If, over and above that, the contracts to be made available also have to be translated into the language in which the prospectus is written, then this requirement can become an extremely time-consuming and above all cost-intensive burden for the company.

The investors are sufficiently protected by the required summary of these contracts or of the risks resulting from such contracts respectively since such a summary has to be accurate and is not allowed to be misleading. In connection with the summary, however, it also has to be borne in mind that the important thing about a prospectus is the description of risks, and a summary of material contracts must not be an end in itself.

Question 281-282:

The auditor's report must be included into the prospectus itself and must therefore not be incorporated by reference since this information is necessary in order to enable the investor to make an informed assessment of the proposed investment (see paragraph 270 and 271 of the Consultation Paper). Also, it would not be very burdensome for an investor to include such information into a prospectus (for an explanation of the terms „audit report“ and „auditor's report, please see Question 44, Annex A, VII.A above).

Questions 289-290:

We agree with the approach that documents incorporated by reference should be accessible in the same way as the prospectus to which they relate.

Question 307:

In view of the different design of the various company homepages, a further-going definition of the term "easy access" would be difficult to devise. A company that wishes to sell its securities on the market has its own interest in having potential buyers have access to the information. Therefore, it will be endeavouring anyway "in the framework of his possibilities" to place the information in a way that makes it as easy to find as possible.

With regard to the rapidly changing technical standards, defining certain formats would go too far. This can – if necessary at all – be specified more precisely in a Level-3 regulation.

Question 314:

Regarding the publication of the prospectus in the press, practicability must in turn be preserved. To the extent that a public offering of securities is targeted to international institutional investors as a target group, these investors will probably get information either directly from the issuer, from the banks participating in the issue (e.g. through roadshows) or via the Internet. A pitch through the press will – if anything – primarily be aimed at the interested pri-

vate investor. In other words, only the companies that have this target group in mind will choose this means of publication. On the other hand, an investor who is seeking an investment opportunity will not read a lot of different publications; in fact, it is often only one. It can be surmised that this will be a supraregional newspaper. Therefore, the starting point that a prospectus is to be published in one of the eight largest newspapers is definitely conceivable. However, the planned description of the group of these papers based on the circulation is too formal if, at the same time, "general" newspapers are supposed to be considered sufficient. Due to the circulation criterion, tabloids would also fall into the category of newspapers designated for the publication of a prospectus. As an alternative, the creation of journals for statutory notices is worth considering. In Germany, securities-related notices currently have to be posted in the so-called "Börsenpflichtblätter" (*journals for statutory stock exchange notices*). Therefore, it should be considered whether every supervisory authority should put together a list of potential newspapers and/or journals for such notices. This would have the advantage of enabling the respective national peculiarities of the press landscape in the respective Member State to be taken into account.

Question 325:

First of all, it is important in the case of a prospectus made available to the public pursuant to Art. 14(2)(c) of the proposed Prospectus Directive for a notice to be published in one of the newspapers to be described in paragraph 313 (and possibly at the company's web-site), in which reference is made to the place where the prospectus is available. Without such a reference, no one would know how to obtain the prospectus. As already explained in the comments of Deutsches Aktieninstitut submitted in September 2002 on the Commission Proposal, a prospectus should also be available as a hard copy even if the company has decided in favour of publication via Internet as a matter of principle.

As already addressed in the reply to Question 314, publication in a newspaper should be interesting primarily for the private investor. Therefore, it does not seem necessary to include a reference to the fact that a publication will be forthcoming in the respectively different medium if the issuer is merely focusing on a specific group of investors.

Question 326:

To the extent that a notice is required, the minimum content should also be defined at Level 2. Nonetheless, the notice should be limited to the availability of the prospectus itself. An obligation to state the "intended time schedule of the offer or admission to trading", as called for in paragraph 324 lit. c), therefore, should not exist.

Question 327:

To the extent that the prospectus is included in print form (on paper) as a supplement in a newspaper, it seems practicable for the sake of completeness to include a reference to the competent authority's web-site. However, it should also point out that delivery of the prospectus cannot be requested from the newspaper, since it was merely a supplement inserted in a specific issue of the newspaper.

Question 328:

Since it is easier for the investor to inform himself at and/or from one place, than having to go through several web-sites, the publication of a corresponding list at the competent authority's web-site seems sufficient.

Question 331:

None.

Question 334:

Yes, the individual investor should not be asked to pay for the cost of distributing the prospectus.

Question 335:

No.