Response to

CESR’s recommendations for the consistent implementation of the European Commission’s Regulation on Prospectuses no. 809/2004

Ref: CESR/04-225b

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Introduction

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

Bundesverband der Deutschen Industrie e.V. (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.

A. General Comments

We welcome that, after the level 1 and level 2 on prospectuses have been completed, CESR now intends to contribute to the application of the new rules in a consistent manner. Such harmonisation at level 3 will assist both European securities regulators and market participants in the day-to-day application of the Prospectus Directive and the Prospectus Regulation. It is essential that EU law is applied and construed in a consistent manner within the EU.

Given that the scope of CESR’s mandate at level 3 is to ensure a consistent application of level 1 and level 2 rules within the EU, any guidance at level 3
should be very concise and limited to matters where a harmonised level 3 approach is needed for technical reasons because of apparent uncertainties or ambiguity in the provisions of the Prospectus Regulation. As regards the role of CESR in general, we refer to our response to the Consultation Paper relating to the role of CESR at “level 3” under the Lamfalussy process.

In particular, CESR should avoid the issuance of recommendations which themselves contain terms or requirements which are very broad and which then would need further clarification, e.g. by the issuance of guidelines at national level. Furthermore, it would go beyond the level 3 mandate if CESR would impose even new requirements in addition to those which are already contained in level 1 and 2 provisions since this may result in re-opening issues already dealt with at level 1 or 2. Where compromises have been reached on the higher levels (e.g. with respect to profit forecasts) the level 3 recommendations should not go beyond the rules issued on a higher level.

Further, IOSCO standards should not form the benchmark for level 3 advice. As discussed in connection with previous consultation processes, IOSCO standards are designed to constitute maximum standards which is only applicable to equity offerings. Instead, the benchmark for level 3 advice should be the level 1 and 2 rules. Any guidelines in relation to prospectuses should therefore solely deal with interpretation issues which require clarification, e.g. by means of providing examples in order to clarify the relevant regulatory treatment, and it should not impose any additional prospectus requirements beyond those contained in the Prospectus Directive and the Prospectus Regulation. It may well be appropriate to issue some of the recommendations only after a certain period of time after level 1 and level 2 requirements have been applied to securities issues in practice. In certain areas, it may take some time until it is sufficiently apparent where a harmonised interpretation is really necessary.

In this context, it is of greatest importance to pay attention to the needs of the market participants in order to avoid overregulation and encourage companies to go public. CESR should therefore look for close cooperation with its Market Participants Consultation Panel.

Overregulation, in particular requirements such as additional valuation or expert reports, would lead to unreasonable cost for issuers, in particular (but not limited to) small and medium sized issuers, without providing an equivalent benefit for the average investors. For investors, it is important that the risks are clearly spelt out rather than being provided with a bulk of detailed information. Obviously, overregulation in the form of detailed, burdensome and costly disclosure requirements would not enhance transparency but it would constitute a market entry barrier for many companies on the European capital markets.
As regard the required financial information, CESR should try not to com-
-mingle the interpretation of level 1 and 2 requirements with interpretation is-
-sues which should be addressed only by the relevant standard setters for the
applicable accounting standards. Level 3 recommendations should, therefore,
not deal with the interpretation of IAS/IFRS rules.

B. Detailed Comments

Financial Information Issues

The general statement that “unless specifically stated, the recommendations
relate mainly to the disclosure requirements in the share registration docu-
ment but should be adapted for other registration documents, as appropriate”
is unclear and would raise a number of questions for both regulators and
market participants when the prospectus requirements will, in future, have to
be applied in respect of a specific securities issue. To the extent that CESR an-
ticipates that recommendations will not be appropriate for certain registration
documents, it should be expressly set out to which registration documents
any specific recommendation should apply.

Selected Financial Information

Question 30 (Selected financial figures recommended):

We suggest that the meaning of “ordinary equity holders” in paragraph 26(e)
and of “total equity” in paragraph 26(j) is clarified to ensure a consistent in-
terpretation of both terms.

Question 37 (Operating and financial review):

No, we believe that it is not appropriate to include key performance indica-
tors about past performance.

The requirements for the OFR set out in the Regulation are precise enough.
There is no need to specify any further requirements such as the inclusion of
“key performance indicators”. In particular, it is odd to introduce “key per-
formance indicators” on level 3 as a new concept of disclosure which is not
referred to at all on level 2. “Key performance indicators” is a concept relat-
ing to the annual report under the Directive 2003/51/EC relating to the mod-
ernisation and updating of accounting rules. It would, therefore, lead to im-
mense confusion if, in addition to Directive 2003/51/EC (which constitutes
level 1 legislation!), the same requirements were stipulated on level 3 (!) in
relation to prospectus requirements. If nevertheless a reference to key performance indicators is regarded as useful, CESR should clarify that the description of key performance indicators in the annual report pursuant to the Directive 2003/51/EC fulfils the requirements in relation to the OFR for the purposes of the Prospectus Regulation.

**Question 42 (Capital resources):**

We do not believe that such detailed recommendation is necessary. Rather, to avoid redundancies and inconsistencies, it would be helpful if it were clarified that the information on capital resources provided in the annual financial statement in accordance with IAS/IFRS is sufficient. Beyond that, the disclosure requirements should not be almost exclusively based on IAS/IFRS since many issuers may draw up their financial statements in accordance with national GAAP.

Beside this, in our view, the prospective information such as a description of short and long terms funding plans as set out in paragraph 38 goes beyond the requirements set forth in the Regulation. Finally, if paragraph 41 will not be removed, then it should at least state that only such restrictions which may materially (!) affect the use of capital resources should be discussed.

**Question 50 (Profit forecasts and estimates):**

The question whether profit forecasts and estimates should be included in the prospectus was highly debated at level 2. It has deliberately and expressly been decided that profit forecasts should be included in a prospectus only on a voluntary basis. This was primarily because of the uncertainties and the risks involved in the publication of statements relating to future financial developments. Therefore, it goes beyond CESR’s mandate to require profit forecasts by using a broad and high level interpretation of the materiality criterion of Article 5(1) of the Directive as set out in paragraph 46 of the Consultation Paper. Whether a specific information is material or not can only be decided on the basis of the individual offering in respect of a specific issuer taking into account all relevant circumstances. By contrast, it appears that CESR intends to apply a high level interpretation of Article 5(1) in relation to profit forecasts which shall apply to any type of issue. This completely defeats the compromise reached at level 2 and is not permissible because the recommendations of level 3 regarding disclosure requirements have to remain within the boundaries set by level 2.

Beside the fact that such high level interpretation goes beyond the requirements set forth in the Regulation (which should, in any event, prevail over level 3) such mandatory inclusion of profit forecasts is not only inappropriate for share registration documents, it is even less appropriate in relation to debt and derivative securities. In the case of debt and derivative securities, only
the solvency of the issuer is of relevance and it is impossible to say, as a rule, that profit forecasts are generally material within the meaning of Article 5(1) of the Directive for assessing the solvency of a company.

If, however, paragraph 46 of level 3 were to be applied this would mean that even if the issuer chose not to insert a forecast or profit estimate into the prospectus, it would, in practice, be obliged to do so (the insertion would become mandatory!) and to include an independent accounting report, provided that the issuer had published or made such a forecast or estimate available anywhere else. This would mean that any forecast or estimate given to an analyst or in a regulatory announcement would trigger a requirement for the insertion of a profit forecast or estimate plus the independent accounting report for each new issue. Such requirement would, therefore, constitute an inappropriate burden in particular for all issuers which frequently issue (debt) securities. In addition, one can hardly imagine that auditors are able to provide a report on such profit forecasts which is of any significant benefit for investors.

**Historical Financial Information**

The general rule should be that historical financial information is to be included into a prospectus in the form in which it has been prepared under applicable commercial law. In other words, the capital markets requirements should be based on what is practice under the relevant commercial law pursuant to which an issuer may be required to draw-up its financial information under IAS/IFRS or national GAAP. To avoid any inconsistencies, level 3 recommendations should neither provide for an interpretation of IAS/IFRS rules (for which only the International Financial Reporting Interpretations Committee (IFRIC) is competent) nor should they impose IAS/IFRS rules on "national GAAP issuers" beyond the requirements set out in the Regulation at level 2.

The Consultation Paper states in paragraph 57 that the restated financial information must be “audited”. In this context, we would like to raise the question whether item 20.1 in fact requires an actual “audit” on restated historical financial information as stated in paragraph 57 given that the underlying historical financial information has already been subject to a statutory audit. Item 20.1 is not entirely clear on this matter. As CESR itself states in paragraph 81 of the Consultation Paper, the last paragraph of item 20.1 expressly differentiates between an “audit” of, and a “report” on, historical financial information. It is therefore questionable whether it is correct to say that “report” means that the restated financial information must be “audited” as set out in paragraph 81. The scope of work to be undertaken by auditors in relation to historical financial information is unclear and should be expressly discussed in the public by involving all market participants and, if necessary, this must be clarified on level 2 by supplementing the Regulation in relation
to item 20.1. In any event, the scope of work to be undertaken in this respect should not be left to discussions between issuers, banks and auditors.

**Paragraphs 62 to 64:**

It is exclusively a matter of IAS/IFRS interpretation in which circumstances a company is to be regarded as “first time adopter of IFRS”. There is no room for level 3 recommendations to elaborate on this matter. Further, the interpretation of the term “first time adopter” is not referred to and not relevant at all under item 20.1 since it clearly states that a restatement has to be made for the past two years. Similarly, other registration documents (such as the RD’s for debt and derivative securities) clearly state that a restatement of previously published historical financial information has to be made for the last year. Therefore, paragraphs 62 to 64 should be deleted in their entirety.

**Paragraphs 65 to 74 and Question 75:**

The recommendations should not provide interpretations of IAS/IFRS (including IAS 8).

Further, issuers which do not use IAS 8 would, in substance, have to apply IAS 8 to any possible change in accounting policies even if the requirements of the second paragraph of item 20.1 are complied with under national GAAP or otherwise. The Regulation as such does not give any predominance to IAS/IFRS even though, in practice, many issuers will draw-up their financial statements in accordance with IAS/IFRS.

**Question 85 (Content of historical annual financial information):**

In principle, we agree with this approach except we think that it is not necessary to repeat the requirements (a) to (e) of item 20.1 and of IAS 1 in the CESR recommendations.

**Questions 98 and 99 (Pro forma financial information):**

Indicators for a significant gross change should be key figures derived from the balance sheet or the profit and loss account.

**Question 103 (Financial data not extracted from the issuer’s audited financial statements):**

No, we do not agree with this proposal. Item 20.4.3 of Annex I to the Regulation contains a clear requirement (i.e. to state the source of the financial data and to state that this data has not been audited) which is self-explanatory. There is no need for further explanations nor any room for additional requirements. Paragraphs 100 to 102 should be deleted in their entirety.
Question 112 (Interim Financial Information):

In general, we agree with this proposal.

However, the reference to Art. 5 of the Transparency Directive should be supplemented by a reference to the grandfathering provisions of Art. 26 of the Transparency Directive. Otherwise, an issuer would be required to produce interim financial information in accordance with IAS/IFRS although it is not obliged yet to draw-up its financial statements in accordance with IAS/IFRS under the IAS Regulation. Under the IAS Regulation, an issuer will have to produce its annual accounts in accordance with IAS only from the year 2005 (such annual accounts to be published only in 2006). Certain issuers such as issuers which issue only debt securities or which benefit from the grandfathering provisions for issuers which currently produce their financial statements in accordance with US-GAAP will be obliged to use IAS only from the financial year 2007.

Paragraphs 113 to 133 and Question 134 (Working capital statements):

In paragraph 114, the term “present requirements” is defined as the working capital requirements for the following 12 months. The period of one year commencing from the date of the prospectus is not covered by the term “present”. “Present” means the date of the prospectus. Thus, the statement should refer to the need for working capital as determined on the date of the prospectus by a prudent merchant/executive officer. The statement does not need to cover any speculative future scenarios. The period of 12 months is a formal criterion to limit the validity of a prospectus. It is not related to working capital and not referred to in item 3.1.

Whether working capital is sufficient may depend on certain conditions. It may, therefore, be misleading for investors if the issuer makes a “clean” positive or negative statement where certain circumstances have to be factored in. Transparency may require the disclosure of such assumptions or circumstances. In fact, the Regulation does not require a “clean” statement. It should be possible to state that the working capital is sufficient subject to certain conditions and that, if such condition is not fulfilled, additional working capital will be provided and how it will be provided.

Question 136 (Capitalisation and indebtedness):

No, we do not agree with this proposal. It should be avoided that an issuer has to produce interim accounts only for the purpose of the prospectus and the capitalisation and indebtedness statement. In particular, the proposed requirement that the capitalisation and indebtedness table has to split-up the item shareholder’s equity into share capital, legal reserve and other reserve goes beyond the purposes and the wording of item 3.2 which only requires that, in relation to indebtedness, the issuer distinguishes between certain
types of indebtedness. By contrast, the proposed information about the different elements of shareholder’s equity would require an issuer to produce separate interim accounts if the existing interim accounts are dated more than 90 days prior to the date of the registration document/prospectus. This requirement should, therefore, be removed.

Non Financial Information Items

Question 142 (Specialist issuers):

We do not think that detailed recommendations are needed for specialist issuers. As we already mentioned in our December 2002 response to the first CESR Consultation Paper on level 2, we do not consider it necessary nor helpful to create specific disclosure obligations for various industries. Irrespective of how many special rules will be added it will be impossible to cover every industry and to ensure to have disclosure requirements that perfectly suit each issuer. Often, it will be impossible to allocate an issuer only to one specific industry and, in some cases, it will even be difficult to determine whether an issuer falls within an existing schedule rather than qualifying as a specialist issuer.

Based on the materiality principle of Art. 5(1) of the Directive, the issuer has to decide itself (taking into account the liability issues involved in a prospectus) which information appears to be necessary. Notwithstanding recital 22 of the Regulation, it would go beyond CESR’s mandate to provide a high level legal interpretation of Art. 5(1) of the Directive which is de facto binding on national regulators according to which additional information on specialist issuers has(!) to be included into a prospectus beyond the requirements set out in the Regulation. If at all, only “soft” recommendations which recognise the discretion of national regulators provided for in recital 22 of the Regulation, may be given. Further, the present level 2 items are already very comprehensive and should, in most cases, be sufficient to require “specialist issuers” to provide appropriate information to investors.

If CESR nevertheless decides that it should give further advice on specialist issuers, such advice should be based on the following principles:

- It should be clear which issuer has to be regarded as a specialist issuer and in which circumstances.
- It should differentiate between the various types of securities, especially shares and debt.
• It should take into consideration which information is considered necessary at least by professional investors under today’s existing prospectus practice.

Property Companies

Paragraph 145 and Question 150:

Similar to paragraph 46 in relation to profit forecasts, paragraph 145 states that a valuation report has to be included in the prospectus in order to comply with Art. 5(1) of the Directive. We strongly disagree with this approach which in substance allows CESR to impose requirements which are not set forth in the comprehensive schedules and building blocks of the Regulation. Recital 22 of the Regulation authorises national regulators to request additional information from specialists issuers and it states that CESR can try to reach convergence. Convergence should, however, only be reached by means of discussing this with, and convincing, national regulators but not through a recommendation which constitutes a (de facto) binding legal interpretation of Art. 5(1) of the Directive in relation to detailed prospectus requirements such as a valuation report. As stated in Recital 22, national regulators should be free to adopt certain requirements for specialist issuers and CESR may only try (!) to reach convergence.

Beside this general comment, we do not believe that it is useful to request a valuation report. The inclusion of a valuation report seems superfluous because it does not necessarily lead to a comparability of prospectuses of European property companies. 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. The proposed “condensed report” does not help at all since, first, 60 properties is quite a big number and, second, a valuation report has to be prepared and to be made available in any case and the only (very small) relieve is that solely the condensed report has to be included into the prospectus. Furthermore, the publication of valuation reports with respect to each property would result in a tremendous competitive disadvantage when for example selling a property or negotiating rents with tenants. For instance, non-listed companies would not be obliged to publish such valuation reports.
It is entirely sufficient if the current balance sheet is included into 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 of the issuer (to be determined and fulfilled in the responsibility of the issuer) to disclose material facts in the case of such companies in the prospectus. Otherwise, liability issues will arise.

Furthermore, a report on all property would discriminate a property company against a company or investment fund which is not subject to such requirement. By publishing a valuation report, the issuer would have to present confidential information to the public. For example, if the property company intends to sell a property, the potential buyer is already informed on the market value of such property according to the opinion of the issuer.

**Question 151:**

If a valuation report is requested, then such report should be produced in the form which is custom to the type of property company as required by applicable in the relevant jurisdiction.

Furthermore, there should be clearly stated that the valuation report can be prepared by the property company itself and that no external auditor has to be involved.

**Question 152:**

If a valuation report is requested at all, then a condensed report should be sufficient also in the case of a small number of properties owned by the property company. It should be not required to make any full valuation report available as a document on display.

**Question 153:**

If valuation reports are requested at all, a condensed report is sufficient. See question 152 and our general comments above. In particular, we would like to stress again that single valuation reports would reveal the company’s own valuation to competitors and prospective purchasers of the property. This would constitute a significant disadvantage for property companies which are subject to such disclosure requirements. Furthermore, properties in general are not assets with a high volatility in respect of its value so that the inclusion of the balance sheet and any interim reports of the relevant property company should, in principle, be sufficient. Therefore, if CESR retains the requirement of valuation reports, then only condensed reports should be requested.
Question 154:

Yes, we ask for a report that can be older than 60 days. Properties do not constitute assets which are particularly volatile. Furthermore, a period of 60 days is totally impracticable. Both the rigid time limit and above all the extremely short amount of time are problematic. 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 to be impossible in every respect.

Bearing in mind the time frame for selecting independent experts, preparing a report, the approval period under to the Directive (especially its possible renewal in case of missing documents or information) and possible postponement of the placement (i.e. market disruption or insufficient demand) and, last but not least, the low volatility of property, it should be sufficient if a condensed valuation report has to be provided which is not older than one year.

Question 155:

We do not believe that it is useful to request a valuation report. The inclusion of a valuation report seems superfluous because it does not necessarily lead to a comparability of prospectuses of European property companies. 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.

As mentioned above, 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. The proposed “condensed report” does not help at all since, first, 60 properties is quite a big number and, second, a valuation report has to be prepared and to be made available in any case and the only (very small) relieve is that solely the condensed report has to be included into the prospectus.

It is entirely sufficient if the current balance sheet is included into 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 of the issuer (to be determined and fulfilled in the responsibility of the issuer) to disclose material facts in the case of such companies in the prospectus. Otherwise, liability issues will arise.
Furthermore, a report on all property would discriminate a property company against a company or investment fund which is not subject to such requirement. By publishing a valuation report, the issuer would have to present confidential information to the public. For example, if the property company intends to sell a property, the potential buyer is already informed on the market value of such property according to the opinion of the issuer.

Questions 164 to 167 (Mineral companies):

We believe that detailed recommendations are not needed for specialist issuers including mineral companies. The building blocks and schedules of the Regulation are already very comprehensive. Therefore, no more high level disclosure requirements for specific issuers are necessary. See also our response to paragraphs 142, 145 and 150 above.

Question 171 (Investment companies):

The definition of investment companies is unclear and shows again that additional schedules/building blocks (whether in the form of the Regulation or in the form of recommendations on level 3) are not appropriate. The existing building blocks and schedules of the Regulation are already very comprehensive. Therefore, no more high level disclosure requirements for specific issuers are necessary. See also our response to paragraphs 142, 145 and 150 above.

If CESR nevertheless decides to give such recommendations it should at least make clear that property companies, closed-ended funds, special purpose vehicles and other issuers of structured products linked to portfolios or baskets of assets are not considered as investment companies.

Question 187–190 (Start-up companies):

Question 187:

Start-up companies are important for the growth of an economy and its capital markets, but they also bear a high risk for investors in losing the investment. Therefore, a prospectus of a start-up company should set out the risks of the business in clear words, which should carefully be reviewed and commented by the competent authorities. Again, we believe that the proposed disclosure requirements does not need to be specified expressly on level 3. In particular, the requirements regarding the business plan are too detailed and the period of the next two financial years is too long. The disclosure requirements regarding future developments should be covered by, and not go beyond, the statements relating to the current developments and the outlook as already required under the Regulation.
In general, stock exchanges should have sufficient flexibility and be in the position to establish specific market segments for start-up companies. Start-up companies should be able to use specific market segments which are tailored to this type of issuers. This possibility should therefore not be defeated by imposing too detailed and burdensome requirements for start-up issuers which wish to go public on a specific market segment of a regulated market.

**Question 188:**

Since the definition of specialist issuers including start-up companies is problematic and will result in uncertainties, we still believe that no additional information should be requested. This also applies to start-up companies. If however a “level 3 building block” will be provided in relation to start-up companies, then this term should be defined as clearly as possible. In addition to SPVs, also newly established holding companies of existing operative companies should, for instance, be expressly exempted.

**Question 189:**

We strongly support option (iv). While it is important that a prospectus clearly sets out the risks involved in an investment in start-up companies, we do not believe that an expert report on the new business should be mandatory. First, depending on the type of the new business, it will often be not possible to obtain such report. Second, for such report, it will not be possible to create general criteria to be fulfilled since the businesses are too different. And last but not least, such expert report (if an expert is eventually be found) would be a requirement which would need to be fulfilled in addition to the comprehensive requirements already set out in the schedules and building blocks of the Regulation. Therefore, new companies may be hampered in going public if the requirements for the prospectus are too burdensome due to overregulation.

Investments in start-up companies are risky and this has to be set out clearly in the prospectus. Expert reports may not assist in making such investments less risky. By contrast, such report is of limited benefit and could lead to the impression that an investment is safer than it actually is. It could create a certainty for investors, which even an expert report will never provide. Even the positive documentation prepared for the members of a syndicate by external auditors in the case of an IPO have not prevented such companies from failing. An independent expert can comment on the assumptions of the business model, but not on the probability that the companies will reach its objectives. Expert reports do not add anything to investor protection. Therefore, the report should not be mandatory. The same is true with regard to the profit forecast, which should be avoided whenever possible.
Paragraphs 207 and 208:

The use of the IOSCO standards on level 2 was criticised not only because the disclosure requirements were too detailed but also because the IOSCO standards are designed to be maximum standards and would therefore constitute relatively burdensome requirements and basically overregulation if converted into an operative legal and regulatory framework. To the extent that the IOSCO standards may assist in clarifying certain items, such clarification would be helpful. However, any additional requirements going beyond the Regulation would exceed CESR’s level 3 mandate.

Question 210 and 211 (Clarification of items):

In general, the same terms should mean same in terms of content. However, it is also the context of the respective item which decides on the relevant disclosure policy. CESR should, therefore, take into account that the investment objective of investors is different depending on the type of security issued: with regard to equity, investors focus on a positive development of the company reflected in an increase of the share price while, with regard to debt, investors focus on the interest rate payment and the repayment of the initially invested capital. Therefore, adaptations of the items will be required in accordance with the type of the relevant security.

Question 219 to 221 (Principal investments):

Paragraph 218 does not help very much in determining what “principal” means but it should not harm either. Given that the term “principal investment” can only be determined on a case-by-case basis in respect of the individual issuer, it is probably not possible (and not necessary) to provide any explanation or even definition of this term which is stricter or more objective. In particular, it will not be possible to have a numeric threshold to define what “principal” means.

Question 224 (Property, plants and equipment):

Paragraph c) of the recommendation is too detailed and no detailed information about the expenditures and financing should be required. Also existing property is likely to be subject to certain finance arrangements which, except any existing encumbrances thereon, do not need to be disclosed in such detail. If at all, only the planned encumbrances on the new property should be described.

Questions 229 to 231 (Compensation):

Paragraph 228 is too detailed. Item 15.1 only requires disclosure on the “amount of remuneration” paid but not a description of a bonus or a profit sharing plan.
Question 234 (Arrangements for the involvement of employees):

The explanation set out in paragraph 233 does not harm. However, it is not necessary either since level 2 provides for a clear disclosure requirement.

Question 238 (Nature of control and measures in place to avoid it being abused):

The comprehensive disclosure proposed in paragraph 236 and 237 is not required for debt securities. Thus, the description of the nature of control is a good example of where the recommendations should distinguish between different types of securities.

Disclosure which primarily is useful for assessing the price potential or expected volatility of shares should not be required for debt instruments. For instance, de facto control information should not be requested for debt and derivative securities.

Furthermore, paragraph 237 basically covers related party transactions which are to be disclosed in connection with equity securities but not for debt issues. Paragraph 237 (which also partly seems to go beyond mere risks of abuse) should, therefore, be deleted in its entirety.

Question 243 and 244 (Related party transactions):

The scope of paragraph 242 is not quite clear. At first sight, it appears that this recommendation just wishes to clarify what the expression "related party transactions" means if the issuer is not subject to IAS/IFRS. If so, then the recommendation is superfluous since the first sentence of item 19 of Annex I to the Regulation clearly states that, for the purposes of this item, related party transactions are those set out in the IAS Regulation (IAS 24.5 and 6). According to item 19, this definition also applies to transactions entered by issuers to which IAS do not apply. In addition, the item 19 of Annex I to the Regulation provides for a materiality threshold which has to be recognised at level 3.

If, however, paragraph 242 is designed to determine the amount and scope of the disclosure on related party transactions, any reference to IAS/IFRS would clearly go beyond the requirements for “non-IAS/IFRS issuers” set forth on level 2. The Regulation expressly distinguishes between issuers which are subject to IAS/IFRS and issuers which are not subject to IAS/IFRS (the requirements for such issuers are set out in the second part of item 19 of Annex I).
Question 247 and 248 (Legal and arbitration proceedings):

There is no need for examples in relation to this disclosure requirement for which market practice exists since a long period of time. Level 2 is clear on what is required. The proposed list of proceedings raises more questions than it answers:

- court proceedings which are the most relevant proceedings in this context are not mentioned;
- it is unclear what is meant by the proceedings set out in sub-paragraph c) ("in relation to the issuer’s business");
- bilateral composition or settlement agreements are confidential and should not be disclosed.

Question 252 (Acquisition rights and undertakings to increase capital):

The level 2 requirement is sufficiently clear and no further explanation is necessary. The detailed recommendation of paragraph 251 may even be too narrow since acquisition rights and the increase of capital are subject to national company laws within the EU and the EEA which may know a variety of legal concepts some of which may not be covered by the detailed recommendation.

Question 274 (Material contracts):

We agree with items a) to c) in paragraph 273. Item d) seems to be redundant since the description of the key terms is characteristic to any summary. Item e) should be deleted since the consideration to be paid is usually subject to strict confidentiality.

Question 280 (Statement by experts):

The recommendations for “material interest in the issuer” should either be more precise or deleted. Usually, the term material cannot be defined on a high level basis. For instance, sub-paragraph 278 a) would require a threshold because a small number of shares in a blue chip company does normally not constitute a material interest in the issuer. CESR should therefore consider that no explanation nor any examples are provided in respect of the term “material interest”.

In this context, CESR should also take into account that, in the case of bearer securities, the issuer does not know its shareholders (other than shareholders the issuer has been notified of pursuant to applicable law which could serve as materiality threshold). Therefore, CESR should, also in respect of other...
material interests, clarify that the statement required under this item can be given by the issuer “to the best of its knowledge”.

**Question 291 (Information on holdings):**

The recommendations set out in paragraphs 286 to 290 are much too detailed. As mentioned above, the IOSCO standards are maximum standards and, if converted into regulatory provisions, go, in some respects, beyond a reasonable regulation of securities issues. This clearly is the case in respect of the information of holdings.

Paragraph 286 is much too detailed and at least sub-paragraphs e) to j) should be deleted. In particular, the information set out in g) and j) should not be required since this is subject to confidentiality. This has already been indicated in paragraph 289 but we do not see any reason why the omission of this information could mislead investors. Furthermore, the purpose of paragraph 290 and its relation to paragraph 286 and 287 is unclear.

**Questions 295, 296 (Interests of natural and legal persons involved in the issue/offer):**

The wording of the recommendation set out in paragraph 294 is not precise enough. In particular, the expression “linked to the offer” is too broad in light of the examples mentioned such as advisors and experts. In the level 2 consultation, it has been agreed that, for instance, legal advisors and other advisors or experts should not be included in the list of persons involved in the offer since their involvement and remuneration are typically not linked to the success of the offer. Therefore, the recommendations should clarify that this paragraph only refers to persons which are involved in the origination and/or the distribution/marketing of the securities.

**Question 328 and 329 (Identification of competent authority for the approval of base prospectuses):**

**Question 328:**

Yes, we agree with the proposed recommendations for the base prospectus relating to different securities.

**Question 329:**

We do not agree with the proposed recommendations for the single document compiling more than one base prospectuses, i.e. base prospectuses used for multi-issuer programmes. Recital 27 of the Regulation clearly states that all base prospectuses should be approved by one competent authority. By contrast, paragraph 324 provides that each base prospectus needs to be approved by its competent authority, in other words: single documents which contain
base prospectuses relating to more than one issuer would have more than one competent authority. This does not make any sense, in particular in light of the fact that multi-issuer programmes typically provide for issuers which are affiliated. Therefore, the recommendations should expressly state that the approval by one competent authority is sufficient and that, if in respect of one issuer a different authority were competent, a transfer is appropriate in the event of a multi-issuer programme.

**Question 333 (Content of a disclaimer when prospectus is published in an electronic format):**

It is sufficient if CESR expressly allows the inclusion of a disclaimer. It is not necessary that CESR recommends a specific wording for such a disclaimer. The use of a standard format involves the risk for issuers and banks that such disclaimer may not be sufficient for the purposes of a specific foreign regulatory regime. Often legal advisors recommend more detailed disclaimers which address specific issues in connection with the relevant jurisdiction. In fact, the wording of a disclaimer has to be adapted to the relevant foreign regulatory and tax regimes, such as the US, rather than it can be harmonised at EU level.

Furthermore, the wording of a disclaimer may vary depending on where and how an issuer intends to distribute the securities, e.g. by public offer in one jurisdiction and by way of private placement in another jurisdiction. The wording proposed would not cover these scenarios.