

ZENTRALER KREDITAUSSCHUSS

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Committee of European
Securities Regulators (CESR)
11 - 13 avenue de Friedland

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CESR's Recommendations for the consistent implementation of the European Commission's Regulation on Prospectus No. 809/2005

Ref.: (CESR/04-2225 b)

Dear Sir or Madam,

The ZENTRALER KREDITAUSSCHUSS welcomes the opportunity to comment on CESR's Recommendations for the consistent implementation of the European Commission's Regulation on Prospectus No. 809/2005. It is our pleasure to enclose a document outlining our joint position to this effect.

Please feel free to contact Dr. Lars Röh (+49/30/20225-5350, lars.roeh@dsgv.de) or Dr. Carsten Nickel (+49/30/20225-5353, carsten.nickel@dsgv.de), should you have any queries relating to our comments.

Yours sincerely,

On behalf

of the ZENTRALER KREDITAUSSCHUSS

Deutscher Sparkassen- und Giroverband



Dr. Thomas Schürmann



Dr. Carsten Nickel

ZENTRALER KREDITAUSSCHUSS

MEMBER: BUNDESVERBAND DER DEUTSCHEN VOLKSBANKEN UND RAIFFEISENBANKEN E.V. BERLIN • BUNDESVERBAND
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Comments

**of the Zentraler Kreditausschuss¹ on
Consultation Paper CESR/04/225b
the Committee of European Securities Regulators (CESR)
Recommendations for the consistent implementation of the European
Commission's Regulation on Prospectus No. 809/2004**

¹

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

During the numerous consultation procedures on the technical implementing provisions for the Directive on the prospectus to be published when securities are offered to the public or admitted to trading, the Zentraler Kreditausschuss (ZKA) has always seized the opportunity to submit its comments on the Committee of European Securities Regulators' (CESR) proposals. We believe that this consultation process has in the past made a major contribution towards the highest possible degree of practicality of Level II measures. On these grounds, we welcome the fact that, also with regard to the planned Level III recommendations, CESR engages in an open consultation procedure with market participants in order to achieve the necessary closeness to practice by incorporating proposals and suggestions from market participants.

General

- **Level III shall only serve interpretation purposes – no Level II "in disguise"**

Already in our comment letter following the Call for Evidence dated April 2004, we welcomed CESR's initiative, to reach – wherever appropriate – an expeditious and uniform Level III interpretation of the requirements and nomenclature stipulated at Level II. We still subscribe to this position. The draft recommendations which have now been presented by CESR, however, partly stipulate completely new material provisions. The latter clearly exceeds the regulatory scope defined at Level I and Level II. This is not in line with our understanding of what can and should realistically be achieved at Level III. One graphical example of this is contained in the CESR recommendation concerning item 46. Pursuant to this, statements made outside the prospectus which would essentially constitute a profit forecast, will need to be included in the prospectus.^s We feel that this provision is incompatible with the Level II provision pursuant to which it shall be left to the issuer's discretion whether or not he will include a profit forecast in the prospectus (cf. item 4 in the section Financial Information Issues). Here and at other junctures, we cannot escape the impression that CESR takes legislative action which should be reserved to Level I and Level II of the Lamfalussy procedure. We feel that such an approach is unacceptable.

- **IOSCO Principles**

Also where CESR limits itself to interpretation of the text contained in regulation No. 809/2004, this interpretation is frequently too extensive and not always fit for practical purposes on the ground. We feel that this is *inter alia* due to the fact that CESR (again) takes the standards developed by the International Organisation of Securities Commissions

(“IOSCO standards”) as a point of reference thus turning them into a Level III benchmark. We have strong reservations as to whether this constitutes a meaningful approach.

One of the requests that were made particularly at the beginning of the consultation procedure was that the requirements concerning the content of prospectuses should not seek to emulate the provisions set out by the IOSCO standards in each and every respect. One argument which particularly spoke against this was that, to date, IOSCO standards had only been adopted for shares and that thus a comprehensive transfer to other securities categories should be avoided due to the different structures of the various securities and the resulting information needs. Besides, some saw these standards as minimum and not as maximum requirements. This was incompatible with the concept of the IOSCO standards.

Whilst the Directive and also the present version of the Regulation itself warrant that the prospectus information may indeed be geared towards the IOSCO principles, both the Directive and the present version of the Regulation allow derogations – notably when it comes to securities classes other than shares. We endorse this approach. Yet, the consultation paper follows an approach that is not quite as easily understood. It seeks to adjust the content requirements requested in the Annex of the Regulation by means of an enlargement of the definitions to the IOSCO principles. We have difficulties in understanding the rationale behind this approach which is difficult to comprehend not only with a view to shares but especially also in terms of other securities classes. Given the history of the Directive and its corresponding Regulation, it appears questionable whether, beyond the provisions of the Regulation, at Level III, CESR shall hold the power to stipulate further specific requirements in terms of regulatory content. Hence if the Regulation deliberately seeks to provide for a differential treatment of minimum information, it will probably not be CESR's role nor will it be covered by CESR's Level III mandate to subsequently abrogate the substance of the Regulation's provisions on minimum information. By way of example and in order to illustrate this point, we would like to mention information on material contracts.

In this regard, different requirements with regard to information that needs to be provided in terms of material contracts are, for instance, contained in item 22 of Annex 1 (shares) and Item 12 of Annex 9 (bonds and derivatives). Notwithstanding the foregoing, however, items 270 ff. present indiscriminate recommendations that would not differentiate on the basis of the individual securities categories.

- **Character of Level III measures**

The foregoing more detailed example does not prejudice our more general opinion of the character for CESR recommendations at Level III which we would like to highlight once

more at this juncture. At Level III, regulators represented by CESR should seek to ensure that the provisions taken at the upstream regulatory Levels I and Level II will be implemented in a consistent manner in different national jurisdictions and under different prudential supervision regimes in the various EU Member States. Such goal should be pursued in way that does not jeopardise a level playing field as far as competition is concerned and such goal is in line with the rationale behind the Lamfalussy process. This goal should not be pursued by means of further regulatory measures. Level III of the Lamfalussy procedure should rather facilitate a shared interpretation of still undefined wordings and legal concepts on the part of regulatory authorities. This should help to prevent differences in the interpretation and application of the prudential supervision rules. Actual application and enforcement of these agreed uniform interpretation tools and interpretation must, however, remain the prerogative of the national prudential supervision authorities. Should Level III, however, reveal weak points of the provisions that have been defined at Level I or II and if such shortcomings cannot be solved through an agreement on uniform interpretation principles, then these shortcomings would have to be solved by remedial provisions prepared at Level I and II – i.e. the logical step would be relegating them back to the respective, competent authority.

- **Not only provisions on share issues**

If and when CESR recommendations relate to the registration document, they shall be exclusively based on the share registration document (Annex I). This is problematic: Last but not least, this leads to interpretation problems in cases where the RD schedules for other securities categories contain less stringent requirements than Annex I. One example for this is the field of historical financial information: Pursuant to Annex I, a restatement has to take place every two years. This restatement must be based on the accounting standards that will be used in the next annual financial statements. Yet, under the Banks RD (Annex XI), such a restatement would only be required every twelve months. Thus, should their application to the Banks RD be mandatory, it is unclear how the corresponding presentations of CESR under items 57 to 75 should be interpreted .

The approach to substantially take the cue from the most detailed registration document is something that is utterly comprehensible. This notwithstanding – as has been pointed out earlier – a general reference to differences on "as appropriate" is not sufficient. Hence, it is absolutely essential that CESR, wherever schedules digress from the share registration document, shall issue corresponding, adjusted interpretation notes for the other schedules. Beyond this, it needs to pay attention so that these do not exceed the requirements and provisions stipulated at Level I and Level II.

- **Cooperation with the authorities**

Furthermore, it is our understanding that Level III is largely reserved to coordination and cooperation of European securities regulators amongst themselves. Yet, the paper remains silent on this matter and fails to provide any clarification thereof. Yet, with a view to the forthcoming adjustment to the new legal framework conditions, it is exactly these matters on which the paper remains silent, that loom large in the debates which market participants hold already today. For instance, particularly with a view to multi-issuer programs, after the adoption of recital 27 in the Regulation No. 809/2004, market participants would have expected that this paper would contain clear statements with regard to the course of action envisaged by CESR. The presentations under item 325, however, do not help to clarify this matter and do not provide issuers with any clue as to the competent authority to which they may turn. Here, however, in order to ensure an expeditious and stringent admission to listing procedure, it is of utmost importance for market participants to know in advance to which supervisory authority they will have to forward a prospectus for approval purposes.

The approach to substantially take the cue from the most detailed registration document is something we can absolutely comprehend; this notwithstanding – as has been pointed out earlier – a general reference to differences on "as appropriate" is not sufficient. Hence, it is absolutely crucial that CESR, wherever schedules digress from the share registration document, issues corresponding, adjusted interpretation notes for the other schedules. Beyond this, CESR also needs to ensure that these do not exceed the requirements and provisions stipulated at Level I and Level II.

- **Practical experience on the ground**

The CESR recommendations feature a high degree of detail and are very comprehensive. This may further add to the complexity of the implementation process which can also be seen in the context of the numerous further Directives and implementing procedures in the framework of FSAP. We therefore kindly request CESR to always critically review each of its recommendations in order to ascertain to which degree such recommendations on the *status quo* are necessary and/or whether it would not be possible to initially wait and see which experience is being made on the ground, i.e. in practice. This also provides an opportunity to continue using existing market standards in a modified form. Potentially, based on this, a much more realistic interpretation aid could be prepared; always provided that this will still be necessary in the individual case. This consideration is indicated under the Preliminary Statement made by Professor Fernando Teixeira dos Santos under item 20 and should, in our view, become the guiding principle.

- **Financial information issues**

In our view, the CESR proposals on the financial information issues are generally in need of a fundamental review and consolidation. Following aspects should be taken into account:

- Basically, the European guidelines on balance sheets, the accounting standards of the International Accounting Standards Board (IASB) as well as the national accounting rules and regulations form the regulatory backbone for the preparation, audit and disclosure of financial information. Of course, this obviously applies also with regard to the financial information that has to be included in the prospectus (cf. Annex I, Nr. IX. financial information of the EU Prospectus Directive). The creation of additional accounting standards and/or interpretation of the existing accounting standards can and must not be CESR's task. This role is incumbent upon the competent standard setters for accountings standards and their interpretation committees. And the implementation of the accounting standards is incumbent upon the national enforcement agencies. CESR's role is the Europeanwide coordination of the latter. Basically, the information on financial information shall be incorporated in the prospectus subject to the same rules that apply for commercial law purposes and in the same way as if they were being audited by the annual auditor. This annual financial statement prepared under commercial law will, if needs be, also be audited one more time by the respective national enforcement agency. Hence, additional regulatory need under Level III only exists for those areas which do not fall under the jurisdiction of the accounting standard setter and/or the national enforcement agency. We therefore strongly recommend to notably subject to a critical review the provisions on "Historical financial information" (cf. below point 5) and to eliminate redundant provisions.
- The Level III mission statement consists in preparation of precise interpretation aids for Level I and Level II provisions that are in need of interpretation. Hence, this rules out the possibility of Level III recommendations giving generally valid explanations of individual matters. This could potentially have a prejudicial effect: It might lead to the misinterpretation that the general remarks shall only apply to this special offering but not to each and any financial information. Under this aspect, particularly a majority of the presentations on "Selected financial information" (cf. below point 1), "Profit forecasts or estimates" (cf. below point 4) and financial data not extracted from the issuer's audited financial statements (cf. below point 7) would need to be deleted.
- In line with the rationale behind the Committology procedure, no further regulatory measures should be established at Level III of the Lamfalussy procedure. Also with a view to different national legal systems and different national prudential supervision

structures, Level III shall and must rather deal with implementation issues of the provisions established at Level I and II. It must do so in a way that is consistent and, in terms of competition, that does not jeopardise a level playing field. Particularly the presentations contained in the consultation paper on working capital statement (item 9) and on “Capitalisation and indebtedness” (cf. below point 10), however, clearly exceed the requirements stipulated at Level II.

- Furthermore, we feel the need for a careful concentration on the *Acquis Communautaire*, i.e. the legacy body of existing rules and regulations at EU level. If and when there already exist Europewide regulations for certain areas, renewed, duplicate regulation by CESR is redundant. Particularly with regard to the presentations on “Operating and financial review” (cf. below point 9) as well as on “Interim financial information” (cf. below point 8), CESR to date unfortunately failed to include a cross-reference to the Modernisation of Accounts Directive and/or the Transparency Directive. In order to arrive at a regulatory framework under the Financial Service Action Plan (FSAP) which is consistent and transparent for its users, the same regulatory content should not be covered by multiple Directives and/or Regulations.

Specific comments

We would like to submit the following more specific comments on the individual chapters:

- **Financial information issues**

- 1. Selected financial information

The presentations under this chapter essentially contain very generic requirements (e.g. the call for intelligibility, relevance and comparability of selected financial information). This is anyway a general requirement with regard to each and any kind of financial information. At this juncture, such provisions are therefore redundant. Otherwise this would give rise to the impression that such requirements only applied to the selected financial information that is being specifically mentioned. By default, this could give rise to the impression that there was a waiver for other financial information. This would be equivalent to a fatal misinterpretation. Besides, the Level III recommendations should generally be principle-based. The mention of individual examples such as given under item 26 will generally provide no value added for the prospectus producers. It should thus be deleted.

2. Operating and financial review

The operating and financial review which is called for at this juncture is basically in line with the management report which is called for under the Modernisation of Accounts² Directive. For EU issuers who are covered by the regulatory scope of the Modernisation of Accounts Directive, a reference to certain provisions under the Modernisation of Accounts Directive would hence be sufficient. We feel that any additional, parallel provision beyond this through CESR would not only be redundant but even harmful. A two tier regulatory framework for the same regulatory content would result in a huge consultation effort. In practice, the logistics of this consultation would become unmanageable. As a general rule, duplicate and renewed provisions by CESR are redundant if and when one area is already covered by a Europeanwide Regulation. At this juncture, a specification of the content of an operating and financial review would make sense only for issuers from third countries who are not subject to the EU Modernisation of Accounts Directive. Here, for the operating and financial review of a Third Country issuer, there shall and must be no different rules and regulations than for a management report of EU issuers.

3. Capital resources

Under the IFRS/IAS regulatory framework, the information required under this heading on capital resources is already an integral part of the annual financial statement. It is our understanding that the information which must be disclosed pursuant to IFRS/IAS on capital shall be sufficient in order to meet the requirements pursuant to the Prospectus Directive. Hence, a duplicate regulation of this matter under the Level III guidance is redundant.

4. Profit forecasts or estimates

Pursuant to the Implementing Regulation of the Prospectus Directive, disclosure of any profit forecasts or estimates will be purely voluntary. Hence, the interpretation under item 46, i.e. that there is a mandatory need to include statements made by the issuers in public which may be construed as a profit forecast into the prospectus, clearly exceeds the Level II requirement. This would establish an additional regulatory measure at Level III. Additional legislation, however, is not the rationale behind the Level III guidance and hence is not warranted by the mandate of the Commission. In our view, neither is such a recommendation covered by the provision envisaged in the Directive under Art. 15, paragraph 5, pursuant to which also material information which is being published before an offering will have to be disclosed in the prospectus in the event of an issue. Already the Regulation's assessment that the profit forecasts may be provided on a voluntary basis rules out the fact that such information shall be regarded as information which must be published on a mandatory basis in the prospectus. Otherwise, it would not have left such forecasts to individual discretion but, instead, it would

² DIRECTIVE 2003/51/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings.

have made them compulsory right from the outset. In this regard, the Commission has thus followed the proposals submitted by CESR to the Commission in July 2003 (CESR/03-208). Besides, the currently proposed recommendation would lead to a situation where issuers who issue on a permanent basis – generally involving non-equity securities – would no longer be capable of giving profit forecasts. After all, these would always have to be included in the prospectus or even in the form of an Annex. Particularly due to the fact that including a profit forecast in the prospectus would simultaneously incur the need for a report of a chartered accountant or of an auditor means that they will have difficulties in complying with such a requirement.

Besides, under item 49, CESR itself points out that the line between a profit forecast and an assessment of the further business development (trend information) will be difficult to draw. Particularly on the grounds of the difficulties mentioned above, the envisaged recommendation should therefore be dispensed with. Should this not be possible, then there should at least be a review. In which case we feel the need to make the presentations under item 49 more concise and to clarify that the term profit forecasts shall not include any presentations which merely provide an outline of corporate goals and envisaged successes.

5. Historical financial information

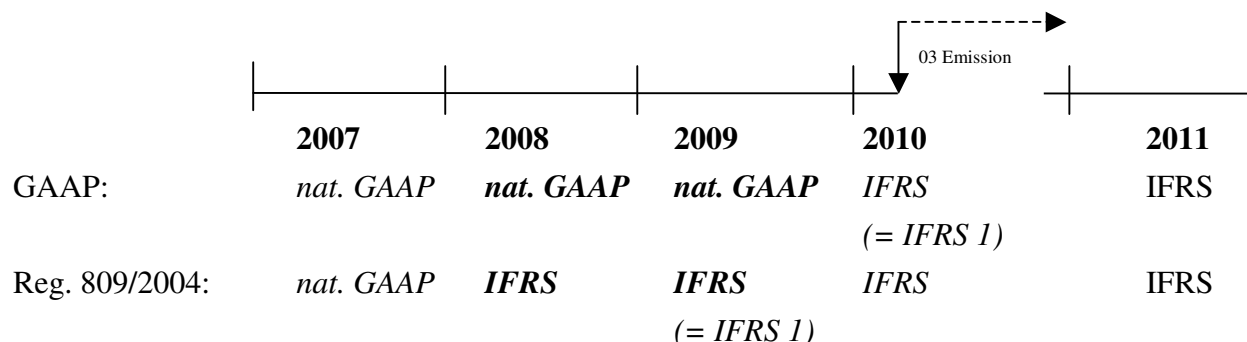
Basically, the historical financial information must be incorporated into the prospectus in the same way as it has been prepared for the purposes under commercial law. Here, the preparation of annual financial statements and interim reports required under commercial law always follows the international financial reporting standards IFRS. The interpretation of individual IFRS, however, is not incumbent upon CESR and it is not covered by the mandate to CESR, either. It rather falls under the jurisdiction of the International Financial Reporting Interpretations Committee (IFRIC). In our view, items 62 to 64 which represent an interpretation of the IFRS 1 first time adoption of international financial reporting standards, should be deleted without replacement.

Having said this, CESR should at least point out how the requirements set out under items 62 et seq. will effect an annual restatement under the Banks RD. If – as is assumed by CESR – in example (a) provided by CESR, the issuer would be regarded as a first-time adopter as contemplated by IFRS 1 in the year 2009, then this would have as a consequence, that such issuer would have to submit a restatement under IFRS 1 already for the year 2008. However, not even item 11.1 of the Banks RD foresees a restatement for the year 2008.

Also the provision under Art. 4 of the IAS-Regulation (Regulation (EC) 1606/2002), requires the first-time preparation of a consolidated financial statement in that year in which securities are admitted to trading on a regulated market. In the example given by CESR, this would be

the year 2010. Hence, pursuant to IFRS 1, benchmark figures would have to be quoted only for the year 2009.

In effect, the CESR recommendation would lead to a *de-facto* unmanageable divergence of requirements under commercial law and requirements under the Prospectus Directive with regard to the presentation of historical financial information. This is also indicated by the following time bar:



We furthermore assume that the provision pursuant to which the historical financial information for the last two fiscal years or the last fiscal year shall have to be presented on the basis of those accounting and valuation methods that will have to be applied to the next annual financial statement, constitutes a provision that refers to the entire accounting system (IFRS/IAS or national GAAP) and not to changes of individual standards within one system. The presentation of changes in the accounting and valuation methods within IFRS/IAS is based on IAS 8. Here, too, the caveat applies that interpretation of IAS 8 does not fall under CESR's jurisdiction. IFRIC is in charge of IAS 8 interpretation whilst the assessment whether IAS 8 has been adequately applied to the annual financial statement shall be incumbent upon the annual auditor or, moreover, the national enforcement agency. Annual financial statements which are published in the framework of a prospectus shall and must not become subject to a different set of regulatory provisions, lest there be a divergence between the financial statement under commercial law and the financial statement published in the prospectus.

Concerning the content of the historical financial information, the consultation paper refers to IAS 1. In our view, this reference is appropriate and, at the same time, sufficient. It would be unnecessary to repeat the IAS 1 requirements at this juncture.

6. Pro forma financial information

Pro forma financial information has to be provided if there is any material change in the property situation, the financial and earnings situation of the issuer which is due to a

management decision (e.g. takeover of a company, merger, divestment of a business division). Here, we feel that the major items on a profit and loss statement are suitable indicators as to whether a change shall be regarded as a material change or not.

7. Financial data not extracted from the issuer`s audited financial statements

The provision on financial information in the prospectus, which is not extracted from an audited annual financial statement is unambiguously spelt out in the Implementing Regulation (Annex I, No 20.4.3.) and does not require any further explanations by CESR. We therefore propose deleting this paragraph completely.

8. Interim financial information

At this juncture, we feel a general reference to the Transparency Directive³ is appropriate and sufficient. Logically speaking, for the interim financial information that needs to be included in the prospectus, there may and must not be any other regulatory provisions than those which have been laid down in the Transparency Directive with regard to the half-yearly financial information.

However, we see the isolated reference to item 107 laid down in Art. 5 of the Transparency Directive as highly problematic. Through this reference, the provision under the Transparency Directive, pursuant to which interim financial statements shall have to be prepared pursuant to IAS 34, is being incorporated by reference into the Prospectus Directive without any transitional period. Here, CESR, however, overlooks that the issuer will only have to prepare his **financial statement** pursuant to IAS if and when he is being obligated to do so under the IAS regulation. For issuers who exclusively issue debt instruments, this obligation will only come into effect as of the year 2007 provided that the respective Member State makes use of the transitional provision envisaged under Art. 9 of the IAS Regulation. The transitional provision pursuant to Art. 35 of Regulation No. 809/2004 secures that this transition period shall also apply to historical financial information. An undifferentiated reference to Art. 5 of the Transparency Directive would, by default, abrogate this transition period for the area of **interim financial information**. Hence, this reference would absolutely have to be extended to include the transition clause for interim financial information applicable pursuant to Art. 26 of the Transparency Directive.

9. Working capital statements

The requirement contained under item 114 "...and therefore present requirements should be considered to be a minimum of 12 months from the date of the prospectus." by far exceeds the regulatory scope set out at Level II. Pursuant to the Implementing Regulation, a

³ Directive of the European Parliament and of the Council on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

declaration of the issuer has to be published that the working capital is deemed sufficient for the issuers' current needs. In our understanding the term "present" relates to the date when the prospectus is issued and not to a window of time "within the next 12 months" as of said prospectus date. Furthermore, an extension of the period of validity of the statement to include those 12 months that immediately follow after the issue date of the prospectus, is not feasible in practice. This is due to the fact that the adequacy of the working capital can only be assessed with a view to a specific date and not over a longer window of time.

In this context, it is also worth bearing in mind that the prospectus is a document which may give rise to liability issues. Hence, particularly the recommendations made under items 123 and 124 should be reviewed once more. Pursuant to these items, an issuer who cannot make a clear and unambiguous statement that his working capital will be sufficient for the next 12 months will only be entitled to present in the prospectus that he does not dispose of enough working capital. The current proposal does not allow any room for statements to the effect that - at that given point in time - it is not possible to make a sufficiently reliable statement with regard to the adequacy of working capital. Since there may, however, also be circumstances where issuers will want to use the capital obtained during the offering in order to improve their working capital, issuers should also be granted the opportunity to present this uncertainty and the grounds for this.

10. Capitalisation and indebtedness

The recommendation of a presentation of the shareholder's equity broken down into the items share capital, legal reserve and other reserves exceeds the provisions under Level II. Depending on the date of the offering and in combination with the recommendation that this presentation must not be older than 90 days, the presentation of "other reserves" would give rise to the need to prepare an interim financial statement. This constitutes a clear overregulation and transgression of competencies on the part of CESR.

- **Non Financial information issues**

1. Specialist Issuers

It appears opportune to consider a waiver of the information requirements even if the Regulation foresees that CESR may stipulate additional information requirements with a view to the specialist issuers mentioned under Annex XIX of the Regulation. We feel this will be helpful given the frequent fuzziness of the definitions of the specialist issuers. Should CESR not waive this right, then we at least recommend considering a clear differentiation of the terms from the nomenclature used under the Regulation.

For instance the term of the investment company pursuant to **item 168** may also cover a Special Purpose Vehicle („SPV“) which issues **Asset Backed Securities**. For this, however, the Directive foresees its own module. Again, the question arises as to which requirements now have to be met by the SPV. This definition also begs the question as to the difference with regard to closed-ended funds – which, in turn, are covered by the Regulation.

Hence, we would like to answer the question under **item 142** as follows:

It would appear sufficient to merely stipulate generic categories for the information which would have to be published by the specialist issuers and to give enough leeway to the regulatory authorities so that they may - together with the issuers and depending on the categorization of the individual issuer – lay down further information needs based on the minimum requirements laid down by Regulation No. 809/2004.

Furthermore, it appears questionable whether, in line with item 141, the proposed minimum information shall be valid in an undifferentiated manner for each and any paper issued by a specialist issuer. For instance, the information requirements in the Regulation are, quite rightly, rather differentiated. This is due to the fact that the information need of an investor during the issue of equity securities is different to the information need during an offering of non-equity securities. In our view, this also applies to offerings of specialist issuers

Furthermore, the recommendations which gain *de facto* regulatory character by the fact that regulators subscribe to them as binding *vis-à-vis* CESR, envisage **valuation requirements** for many specialist issuers. These do not only constitute a major burden with a view to the proposed timeline (e.g. for property companies 60 days at the point where the prospectus is being approved) since, based on the approval deadlines for the prospectus they may *de facto* not be older than 40 days (60 days valuation deadline minus the 20 day approval deadline for the prospectus). Particularly issuers who, for instance, possess a large volume of real property/ships will have a difficult time in complying with this obligation. Besides, the cost-benefit ratio of the valuation requirements should be reviewed. Already due to the low volatility of the assets to be valued, the underlying valuations of the last financial statements (annual financial statement, potentially the interim financial information) may be used as a basis. Hence, there should merely be the recommendation that the respective assets have to be described. Yet, a valuation through an expert will not be necessary. Here, it also needs to be taken into account that a valuation of the assets is equally entered into the business reports of the issuers which are also included in the prospectus. Furthermore, in our view, such valuations may give rise to the potentially misleading impression of a quality seal, i.e. that the valuation meant that the investment opportunity that had passed an expert's test.

In the case of start-up companies (**items 178 et seq.**) a very cautious approach is in place. Otherwise excessive requirements might prevent young companies from drawing upon the

capital market and/or might create insurmountable hurdles for them (e.g. in the form of costs for expert statements). It is surely correct that due to their recent establishment, such companies may be subject to materially higher risks than companies that have been established for many years. On the other hand, for these companies it is, however, also important to expand their equity capital base. Hence, we would like to kindly ask CESR to review once more in how far confirmations by auditors are necessary to the extent presently envisaged. After all, on the grounds of liability issues, these confirmations may potentially be difficult to obtain. This applies particularly to the case of young companies. Alternatively, in these cases, it may be opportune to point to the additional risks of these companies. Concerning the question put forward under **item 189**, we would therefore vote in favour of the proposed alternative iv). It appears sufficient if the issuer decides on the degree to which he offers an expert report on the forecast of his products or services. Generally, this decision will be made by the market. Whenever such change does not involve a change in the corporate purpose, we assume that the recommendations for start-up companies shall not be applicable to changes in corporate structures under company law.^s

Concerning the presentations under **item 206**, we would like to briefly comment that, in terms of the description of the ships, only basic information should be mandatory. For a prospectus, the requirements envisaged under item 196 b) and c) appear no longer feasible.

2. Clarification of Items

Concerning the use of the IOSCO principles, we would like to refer to our concerns mentioned above.

Furthermore, in our view, through the implementation of different modules in the Regulation, the Commission has outlined a route which indicates that there shall be multi-tiered information requirements for different securities categories. This decision is welcomed. It shall and must not be abrogated. Hence, our answer to the question under **item 210** is negative. Only if and when a Regulation uses the same terminology for all securities classes, can a uniform interpretation – and this does not mean that we see a need for such an uniform interpretation – be conceived of. But even in this case, it will have to be weighed whether different categories would not warrant different conceptions.

Concerning the recommendations on the further definition of the term **principal investment** (items 215 to 221), the proposed definition does not contribute materially towards a clarification of the unclear definition used in the Regulation. Hence, replacing the word “principal” by the word “important” is no help, either. Yet, we are of the view, that a generalising definition would not be possible for all groups of issuers. This is because the circumstances of the individual case at hand will be decisive as to whether an investment can be regarded as a principal investment or not. Hence, in our view, a recommendation is

redundant which, after all, would only lead to further uncertainties. Given the different types of issuers, in order to decide whether an investment qualifies for a "principal investment", an upper limit in terms of quantity will probably not be helpful either.

With a view to the proposals for the explanation of the **Nature of Control and Measures in Place to avoid it being abused (items 235 to 239)** it is worth highlighting that these merely will present material information with regard to a share issues. In the case of non-equity securities, due to the outside debt capital character of these securities, this information will be of subsidiary importance. As has been pointed out under **item 210**, here we feel the need to distinguish on the basis of the respective categories and, as a consequence, to renounce to a provision in the case of non-equity securities.

Also with regard to the more detailed presentations on **Legal and Arbitration Proceedings (items 245 to 248)** we would like to call into question:

We think that no example-like recommendations on the definition of "legal and arbitration proceedings" should be given because the term "legal and arbitration proceedings" is self-explanatory. Furthermore, some examples given raise more questions than provide answers. For instance, the explanation "proceedings in relation with the issuer's business" raises the question what is meant by the "issuer's business". One could think that any proceeding is meant which relates to the business area in which the issuer is active. This interpretation (if used), however, would be far too broad. We therefore strongly recommend to use the wording "to which the issuer is a party" instead. Furthermore, it is unclear why court proceedings are not mentioned which to us would be the most evident example of a proceeding.

Besides this, we do not understand why settlement agreements should be disclosed. The purpose of the disclosure of legal and arbitration proceedings is the disclosure of a potential risk which has not yet materialised, i.e. in particular if the issuer is sued and if the proceeding has not been determined with a final judgment or agreement. In the event of a settlement, this risk, however, does not exist since the proceedings have been terminated by the settlement. In addition, the content of a settlement agreement is often confidential. Therefore, we strongly recommend not to require this event to be disclosed.

In light of the outlined problems with the examples given we suggest not to give any explanation other than "governmental, legal or arbitration proceedings to which the issuer is a party".

The more specific provisions on the **Option Agreements (items 253 to 257)** should be limited to that information on options which is guaranteed by the issuer or the corporate groups to which the issuer belongs.

The more specific provisions on the **Material Contracts (items 270 to 273)** in our view, are also only to some extent meaningful. For instance, only the information mentioned under item 273 a-c is likely to be helpful. Item 273 d appears to be identical with the information mentioned under item 273 c and a publication of the information on the compensation that has been agreed in material agreements will most likely be subject to absolute confidentiality. Furthermore, it appears problematic to mention the contractual partners in the prospectus. Hence, these recommendations should be dropped. With regard to material contracts, we would like to point out that the Regulation sets out different information needs based on the respective securities category. This was due to the fact that information on material contracts has a different priority for a stock investor than for an investor into bonds or derivatives. Hence, we feel that it would be sufficient if the information requirements contained in the recommendation would only relate to shares.

The recommendations on the information concerning **Material Interests of Experts (items 275 to 281)** should remain limited to the provision that the information shall be based on the best knowledge of the issuer. Already due to liability reasons, the issuer cannot accept any responsibility whether or not an expert mentioned in a prospectus holds securities of the issuer. With the exception for registered shares or registered bonds, there are no registers or other documents from which an issuer may see whether or not an expert holds securities of said issuer. In this context, it should also be made clear that an expert is an external third party who is commissioned with the preparation of an opinion by the issuer. Members of the own company may not be regarded as experts as contemplated by the Regulation. Also and notably with a view to the term “related”, the requirement stipulated under item 278 d, that there needs to be information whether the expert is related to any member of the financial intermediaries, appears unclear. Here, either further definitions are necessary or this recommendation should be deleted. In order to maintain a viable cost-benefit ratio in the event where there is disclosure of a material interest, we recommend introducing a *de minimis* threshold. Besides, the holding of a *single* security of the issuer would not lead to a clash of interests that would be so material as to require disclosure. Modelled on the provisions on directors dealing under the Market Abuse Directive we propose a *de minimis* threshold for securities to the amount of EUR 5,000,-- below which interests shall not be regarded as material interests. This approach would not only improve the cost-benefit ratio but it would also have a positive impact on the complexity in terms of other provisions under the FSAP.

Concerning the **Information on Holdings (items 282 to 291)** and the question put under **item 291**, we would like to point out that the requirement proposed under item 290 goes beyond the scope of this line item. The mere fact that the issuer holds 10% or more of the capital of another company does not mean that this holding has a significant effect on its own condition.

The term "negligible importance" is too vague and will in almost all cases mean that information will have to be given. Therefore we propose deleting this requirement.

Concerning CESR's recommendations on **Interests of natural and legal persons involved in the issue/offer (items 292 to 296)**, we would like to point out that the proposed details of the information may indeed be sufficient. Yet, there should be a clarification that the information should only relate to those persons who have a specific relation to the offering. Otherwise, oversight of the scope of eligible persons will no longer be feasible for the issuer. Also in this respect, the recommendations need to clearly differentiate between equity securities and non-equity securities since – due to the different characters of these security types – contrary goals (shareholder position / debtor position) will be pursued.

Concerning the Recommendations on collective investment undertakings of the closed-end type under item 300, 3rd bullet point, we would like to suggest replacing the term "widely" by the term "sufficiently". For instance, it appears sufficient that the respective index is accessible in a way that it can be viewed by the investor. "Widely", however, suggests that the index will have to be disseminated on a similarly wide basis as important corporate news.

3. Recommendations on issues not related to the schedules

Concerning the **Recommendations for documents containing information on the number and nature of the securities and the reasons for and details of the offer, mentioned in Article 4 of the Prospectus Directive (items 306 to 309)** we welcome that such documents do not have to be reviewed by or deposited with the competent authority. Also the requested content of the documents appears acceptable. It, however, strikes us that the Consultation Paper only contains references to documents pursuant to Art. 4 paragraph 1 d and e as well as paragraph 2 e and f. Similar documents are, however, also requested under Art. 4 paragraph 1 b and c as well as paragraph 2 c and d during swap offers and mergers. Here, too, it would be of interest to find out which ideas regulators have in this regard.

In our view, the language regime for such documents may be identical with the language accepted by the competent authority of the Home Member State and, potentially, in the case of issuers with an international orientation, such language may additionally be English as a generally accepted language of finance. Based on the respective choice of the issuer and in line with the different publication possibilities for a prospectus, the document could be published either before or simultaneously with the begin of the securities offering, i.e. for instance at least in the form of a public notice announcement in a national newspaper.

The presentations under items 314 et seq. appear basically correct in our view. Notwithstanding the foregoing, there appears to be an exception with regard to those cases where more than one base prospectus is being compiled in a single document: We do not

agree with the proposed recommendations for the single document compiling more than one base prospectus. If the recommendations set forth in items 325 to 327 were used, a multi-issuer programme would become much more complicated and less predictable than it currently is because one would have to talk to each competent authority and discuss with each competent authority whether it will accept a transfer to another competent authority. These disadvantages to the issuer are not outweighed by any benefit to the investor arising from this procedure. After all, there is no benefit to the investor under this procedure. We recommend that item 325 spells out explicitly that a transfer is appropriate in the event of a multi-issuer programme. Item 325 should thus read as follows:

"Therefore, recital 27 points out the procedure that shall be used in the case of a single document compiling more than one prospectus. The respective competent authorities should, where appropriate, transfer the approval of the prospectus so that the approval by only one competent authority is sufficient for the entire document. Such a transfer is appropriate in the event of a multi-issuer programme."

In particular the last sentence of our recommendation is very important. If such a sentence is not included, the approval of a multi-issuer programme will become overly burdensome, time and cost-intensive for the issuers without any benefit for the investor.

With a view to the **Disclaimer** proposed under item 332, we see no need for regulatory action. It should rather be incumbent upon each issuer to draw his own legal conclusion after weighing the pros and cons. It should be left to his own discretion to decide if and how the respective disclaimer should be conceived of and in which manner – either on a website or in a prospectus – this should be brought to the investor's attention. This way, the issuer will hold a review of the legal situation in each country and he will decide on the basis of potential restrictions (particularly, e.g. sales restrictions) whether he wishes to submit a securities offer to nationals of the respective European or non-European country. Due to the host of different regulatory regimes, a disclaimer will therefore always be geared towards the individual placement goals of the respective issuer. Furthermore, due to the fact, that a security will generally come in the form of a bearer instrument, the issuer will not be able to guarantee and preclude or prohibit – as is being suggested by the Consultation Paper – that an investor in a state that is excluded from the offer due to the legal situation, will not at least indirectly be able to purchase a security via a local bank in that country. We therefore propose to completely renounce to Level III recommendations on the Disclaimer.

Berlin, October 18, 2004
