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Position on

CESR's Advice on Possible Level 2 Implementing Measures for the Proposed Prospectus Directive Consultation Paper October 2002

for

The Committee of European Securities Regulators

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Summary

As a member of the Consultative Working Group nominated by CESR to assist in the process of implementing the Level 2 Measures for the proposed Prospectus Directive I am pleased to provide my position on the Consultation Paper and the Annexes as of October 2002.

Until now, the prospectus has lived a shadow existence in the minds of European investors. Most wholesale and retail investors seek information via other media, such as road shows presented by banks and issuers, research reports, press publications, brief explanatory brochures about an issue and - of course - advertising. They prefer these competing channels of information, because they regard the prospectus as too complicated and long-winded, difficult to understand and too voluminous.

The main goal of CESR in implementing the Level 2 Measures must therefore be to formulate the requirements applicable to the content of prospectuses in such a way that the prospectus is read and used by as many investors as possible as the central source of information and basis for making an investment decision. The proposed Prospectus Directive will create the framework, but the Level 2 Measures have to form the cornerstone for a future, in which a "prospectus culture" should substitute the present "term sheet culture".

Based on that opinion I have made my comments. I would like to summarize my main aspects as follows:

- IOSCO standards shall not be considered as a minimum, but according to the proposed Directive as the basis for any disclosure requirements.

- The disclosure requirements for issuers of debt and derivative securities shall reflect the different nature of debt compared to equity and shall therefore be less onerous.

- The disclosure requirements have to be revised especially with regard to the following topics:
  - Pro forma information
  - Profit forecast and trend information
  - Investments
  - Advisers and principal bankers
  - Major shareholders
  - Related party transactions
  - Documents on display

- The registration document (and its supplements) shall contain the information on the issuer, while the securities note shall only contain information on the issue.

- The securities note for derivative securities, including the definition and the categorisation into guaranteed and non-guaranteed products, has to be amended to allow for innovative products and a concise information of investors.

Paragraph 29 (IOSCO Disclosure Standards)

According to paragraph 29, CESR considers the IOSCO Disclosure standards as the minimum requirements, on top of which even more far-reaching requirements may be added. I do not agree with this point of view. It contradicts the wording of paragraph 7 section 2 of the Draft EU Prospectus Directive and the reasoning behind the IOSCO Disclosure standards. Paragraph 7 section 2 of the Draft EU Prospectus Directive states that the implementing measures referred to in paragraph 7 section 1 shall be "based" on the IOSCO Disclosure standards. That means that these standards shall be taken into account, but certainly not that these standards should be treated as the minimum requirements.

Furthermore, the purpose of the IOSCO Disclosure standards was to create maximum standards covering all requirements of all the countries involved, whereas the requirements of the Directive are minimum standards. If they are now imposed as minimum standards by way of implementation procedures on the Directive, this would conflict with the original purpose of the IOSCO Disclosure standards as maximum standards.

Paragraphs 33 to 38 (IAS)

With regard to paragraphs 33 to 38, I explicitly reject the requirement to make IAS reporting a binding obligation for all issuers whose securities are admitted to trading on a EU regulated market starting from 1 January 2005, above and beyond the requirements already stipulated by the Regulation on the application of IAS approved on 7 June 2002. Such a requirement is in contrast to many efforts to open the securities markets, especially for small and medium-sized companies. It should be abandoned on a European-wide basis and should not be subject to individual regulation by Member States. In Germany, for example, some hundreds of small and medium-sized companies are listed. The shares of such issuers in most cases are not the focus of investor attention; even where these companies are profitable, their growth potential is limited, their market capitalisation is small, the stock exchange turnover is negligible and their most recent securities issue was many years ago. If these issuers were burdened with additional costs, they will opt for a delisting purely on cost grounds. I would therefore expect many small and medium sized companies in Europe to delist their shares.

Annex A and Others (Section I.B)

It is unclear why the issuer's principal bankers and legal advisers with whom the issuer has a continuing relationship should to be mentioned. This information is neither relevant nor necessary for the assessment of an issuer.

- It may give the wrong impression that these persons are in any way responsible for the contents of the prospectus. Typically, investment banks and legal advisers are mandated for the preparation of a prospectus that are specialists for capital markets transactions. They are normally not identical to the banks and legal advisers that are having a continuing relationship to the company.

- Even if the legal advisers carried out a complete due diligence and were involved with the legal issues relating to the prospectus, the mentioning of the legal advisers is not to be recommended since the mentioning of their names could be interpreted by courts as the assumption of a liability for the prospectus. If this were the case, the legal advisers would have to increase their fees substantially to cover an additional insurance coverage.

- Furthermore, it should be mentioned that the "principal bankers" concept (in German: Hausbanken) is old-fashioned and no longer practised as it used to be. This is also often true for legal advisers. The inclusion of their details is of no avail to any investor.

Annex A and Others (Section VII.G)

I would like to draw attention to section VII.G of various annexes for registration documents which require that the last year of audited financial statements may not be older that 15 months from the date of the registration document. For a number of reasons, I suggest either extending this period to 18 months or, as a compromise, establishing a general rule that would allow the respective authority to extend this period on a discretionary basis. Many issuers (with a financial year ending December 31) will not be able to issue equity (in the case of a capital increase) or a bond early in the following year. Most companies will not publish their annual accounts prior to end March or end April under normal circumstances. Taking into consideration the time needed to incorporate the financial data in the draft prospectus and the approval period with the competent authority, they can only start placing new securities starting in June. In addition, frequent issuers (for MTN, other debt or derivatives) will face severe problems. The renewal of a base prospectus will become impossible if publication of the issuer's annual accounts is postponed – for whatsoever reason. In such cases, the issuer cannot tap the market for a certain period of time.

Annex A (Various Sections)

Furthermore, I would like to comment on other topics of Annex A as follows:

II.A.2 If unaudited (interim) financial statements have been reviewed by an auditor, the auditor's review opinion should be included into the prospectus.

Generally, a review of interim financial statements that are included in the document for an issuer of equity should be required. This would significantly enhance the quality of the respective financial information and thus improve the reliability of the whole document.

III.B.4 Such information can only be included if it is known to the issuer. Therefore the wording should be "Any public take-over bid known to

the issuer..."

V.A. See my remarks to the respective section of Annex I.

VI.A.1.b It should be added "as far as notified by the shareholder". A definition of "major" have to be made.

VI.B. The requirement set out under 1. is unclear in so far as it extends to transactions which are material to the company or the related party. It is difficult to see what is meant with "material"; in practice, this could have the effect that a large number of contracts is described in the prospectus. It appears questionable to require the details of transactions to be disclosed that are only material to the related party but not to the issuer itself.

The obligation under 1. should also be restricted to unusual transactions. Further, the meaning of the last sentence in 1. "Where such transactions were concluded (...) and have not been definitively concluded" appears unclear and should be clarified. 2. should be deleted altogether, as 1. will already cover unusual loans; there is no need to inform investors about the extension of credit within the scope of market practice.

VIII.C. See my remarks to the respective section of Annex I.

Paragraph 47 (Risk Factors)

The disclosure requirement for risk factors is an important feature for the protection of investors. I support the arguments that CESR should not try to create a list of specific risk factors, but should give general guidance only. As market practice in Germany has shown over the last few years, such a list will never be complete and will never reflect the complex diversity of various issuers (like the explosion risk for pharmaceutical companies with regard to the test production of new drugs).

Paragraphs 48 to 65 (Pro forma Information)

Pro-forma financial information can be helpful to show the effects a recent transaction might have with regard to the financial position of a company. However, with regard to the issue outlined by CESR under paragraph 48, pro forma financial information should not be mandatory in general. The reluctance with regard to pro forma information is based on the fact that the term "pro-forma" is not adequately or unambiguously defined either under US-GAAP, IAS or in the German Commercial Code (*Handelsgesetzbuch*, or "HGB"). In addition, some prospectuses in the past contained pro-forma figures, which did not give the investor a true picture of the company. Furthermore, they are sometimes of a highly hypothetical nature. A different view could only be taken if oth-

erwise the actual figures were misleading. However, this should be decided on a case by case basis. Pro-forma figures should only be used in the issuer's accounts,

- where substantial, legal or economic changes have occurred in the issuer's operations (the minimum threshold representing the magnitude of the change should be at least 25 per cent),

- the reporting period is limited to the last fiscal year and the current interim reporting period of the issuer (otherwise it could demonstrate a degree of exactness which it will never have)

- the pro-forma figures are prepared according to recognised accounting methods and

- an auditor's certificate is reproduced in the prospectus, which confirms that the pro-forma figures were the subject of an audit according to recognised auditing standards.

Therefore, pro forma information shall not be mandatory due to a planned transaction (paragraph 51). It shall only be required with regard to a 25 per cent threshold figure (paragraph 53). Pro forma information shall only be required on the occasions where securities are being issued in connection with the transaction (paragraph 65). In each case there must be a clear differentiation between the registration document and the securities note. Therefore, any pro forma information has to be contained in the registration document (paragraph 65).

Paragraphs 66 to 87 (Profit Forecast)

The consultation paper and the Annexes for the respective registration documents contain detailed requirements with regard to the prospects of the company. Any information on the future bears a burden of potential liability to the issuer.

I support the notion of giving investors certain information on the future of an issuer from the perspective of that issuer. Any prospective reporting should always be limited to a narrative description of the trends expected for a period of around 12 months starting from the date of issue, but in any case for no longer than until the end of the current financial year. In addition, forward-looking statements should be unambiguously identified as such by means of appropriate language. This would be achieved by using standard phraseology, such as "expects", "assumes", or "forecasts". Care must also be taken to ensure that it is made clear which assumptions were made in order to make the forecasts, which factors could lead to a failure of the forward-looking statements to materialise, and what the consequences of such a failure may be.

Any further details, particularly a detailed presentation of specific figures and tables, should be avoided, as they could be regarded by investors as having the seal of a certain degree of credibility and reliability – not least because the prospectus is officially approved. However, even so called blue chip companies all over Europe have shown over the last weeks how quickly budgeted figures can become obsolete, due to changes in the

general economic climate. To this extent, investors could be misled if too much detail is given. Profit forecasts should not mention exact numbers, but describe the major trends in narrative form.

If CESR decides not to follow this approach, which has (with the exception of start-up companies, where projections must be disclosed) been the market standard for many years in Germany, and is also one of the major sources of conflict for issuers seeking a dual listing in Germany and the U.S., but intends to be more open to concrete profit forecasts, it should make clear that such disclosures are voluntarily.

Even if the issuer opts for such disclosures, however, it should not be obliged to submit a special statement by the company's auditors or reporting accountants, but required only to supply detailed information on the assumptions and the implied risk factors which have led to the published numbers for revenues, other income, profit and loss, respectively. Any involvement of external experts will incur high costs. Based on practical experience in the IPO business over the last few years I doubt whether this will substantially raise the quality of the forecast, as such experts will comment only on the link between assumptions and profit forecasts, with no more than a limited appraisal of the assumptions.

Paragraphs 88 to 89 (Directors and Senior Management Privacy)

In principle, I support the disclosure of information about the previous history of directors. However, regarding the wording in Annex A, V.A.1, a time limit governing the reporting period of such disclosures is absolutely necessary. A period of five years could be appropriate as regards the aspect of rehabilitation of an individual. Both those cases of insolvency where the directors have been involved in a private capacity and those cases where directors have been involved in their function as board members of another company should be included.

Other than in paragraph 89, in Annex A section V.A.1, fourth section, the expression "public criticism" is qualified in order to only mean public criticism by statutory and regulatory authorities. However, it should be clarified what this means in particular. If published statements by an authority about certain breaches of applicable rules are meant and these publications have been made in compliance with applicable law, such a disclosure might be considered. Any "public criticism" which only means "publicly available information" shall not be included.

Paragraphs 92 and 93, 147 to 150 (Documents on Display)

I explicitly reject the proposal for extension of the practice for documents on display as laid down in paragraphs 92, 93 and 147 to 150 because it reduces the value of a prospectus. Previous market practice in Germany has been to allow investors to inspect general documents that relate to the issuer. Such documents usually include the annual report, interim reports, an excerpt from the Commercial Register and the Memorandum

and Articles of Association. More onerous disclosure requirements should definitely be rejected:

- Contracts with third parties generally contain trade secrets; any effective publication of such secrets would have a material adverse effect on the issuer's ability to compete and could cause real damage to the issuer. Furthermore, such publication could be a violation of insider trading law. Any provision for exemptions or allowing the issuer to conceal certain sections of the text (e.g. with black ink) would create an unacceptable administrative burden.

- In addition, making such documents available would almost certainly involve obtaining the full consent of the relevant third party, which would be almost impossible.

- The prospectus should be complete and contain all material information; additional information would lead to an "information overload", which would impair the acceptance of a prospectus.

- If investors are given access to more information, they would be able to conduct their own due diligence, which would, however, reduce the value of the prospectus and create a knowledge imbalance between the (wholesale) investors, who would inspect and evaluate the additional documents, and those (retail) investors who would rely on the details in the prospectus.

- Both the ability to conduct due diligence and the potential necessity to translate these documents into the same language as the prospectus would burden issuers with a incalculable costs for making available the relevant material and personnel resources. Furthermore, any translation requirement is not in line with the directive as the directive does not require the translation of the prospectus, except for the summary.

Paragraphs 95 and 96 (Building Blocks for Specialist Issuers)

I do not consider it appropriate to have too many building blocks for "specialist issuers". Rather, it should be remembered that small and medium-sized companies can simultaneously be property companies or scientific research-based companies, or that an issuer is organised as a holding company conducting property business, while at the same time it plans to extract mineral resources. The building bock approach should therefore at least define what a "principal activity" of an issuer is (i.e. more than 50 per cent of turnover) and stipulate that the additional requirements will only apply if this condition is fulfilled. Furthermore, I believe that any further extension of the number of building blocks is counterproductive. Irrespective of how many building blocks will be added it will be impossible to cover every industry and to ensure to have a building block that will perfectly suit each issuer.

Paragraphs 97 to 102 (Start-Up Companies)

Start-up companies should include all available information in the prospectus, particularly of course the opening balance sheet and an interim balance sheet, or a current status report (in each case including a profit and loss statement prepared according to uniform standards where the relevant accounting provisions do not apply), which also show the company's financial position. This initially inadequate information would then have to be supplemented with detailed information regarding the company's prospects and budget figures.

An involvement of the external experts will raise high cost. As for profit forecasts I have doubts, whether this will substantially raise the quality of the forecast as such experts will only comment on the link between assumptions and profit forecasts, but only to an limited extent on the assumptions. In addition, the involvement of an indepedent expert (should this be an auditor?) will raise the question of responsibility. I do not expect that external auditors are willing to take over the liability for such a statement.

Paragraphs 103 to 107 (Small and Medium Sized Companies)

As already mentioned in the Consultation Paper I would like to repeat my position that there should be no difference between “normal” companies and SMEs as long as they are listed on the same market. Less onerous requirements could only apply where the company is only making a public offering and is not seeking admission to the stock exchange. For transparency reasons issuers could not be subject to different requirements if they are traded in the same market segment.

- Due to the ability to gain a clear overview of the structure of a small to medium sized company, the information necessary for the prospectus should be compiled in a relatively straightforward manner. In any case, the issuer must have systematic accounting and controlling systems to keep such information available.

- Particularly in the case of small to medium sized issuers that offer their shares without seeking admission to the stock exchange, it is sometimes difficult to dismiss the suspicion that dubious business models expose investors to the risk of losing their capital investment (grey capital market).

- In Germany, neither the experience gained from the simplified requirements for admission to the regulated market (geregelter Markt), nor the experience gained from the stricter requirements for admission to the Neuer Markt supports the special treatment of small and medium sized companies.

Paragraphs 111 to 113 (Property Companies)

The description of an issuer "primarily engaged in property activities" needs to be defined. Many issuers have subsidiaries of material importance whose main purpose

are property activities. Therefore, it has to be made clear that an unlisted subsidiary of a holding company will not fall within the scope of these requirements unless the primary activity of the holding company itself will be property activities.

I do not consider the concept of a valuation report for appropriate.

- Such valuation reports are only justified if the short term price volatility of the respective underlying (property or ships) is extremely high. However, according to my understanding property is probably one of the least volatile assets and activities in which an issuer can do business.

- From a practioner's viewpoint, there should be a clear indication that the valuation report can be prepared in-house.

- However, the time span of 42 days is simply unrealistic from a technical point of view. Bearing in mind the approval periods 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), even a period of 90 days would not be reasonable. Otherwise the issuer has to bear the substantial cost for a newly prepared valuation report.

- Furthermore, a description of all property (property companies might own some hundreds) could extend a prospectus to a size which is not suitable for an investor. Therefore a restriction to "major holdings" with a certain threshold figures shall be made.

Paragraphs 124 to 129 (Debt Securities: Introduction)

Apart from providing information about the product, the main functions of a prospectus are to inform the investor about the issuer and reproduce the terms and conditions of issue. In this connection, a distinction should generally be made between issuers of equity securities and issuers of non-equity securities. In the case of issuers of equity securities, the investor must be able to assess whether the issuer is in a position to be able to (for an indefinite period) achieve its entrepreneurial goals and generate positive results. In the case of issuers of bonds and derivative securities, the investor must be able to assess whether the issuer is in a position to be able to pay the relevant interest rates or other returns (in most cases for a limited period of time) and to fulfil the relevant obligations within the prescribed time and in the agreed amount. Thus, the core risk for a debt security investor is the insolvency risk of the issuer, whereas the risk of an equity investor is deterioration in the performance of the issuer occurring long before insolvency.

In the case of debt securities, the assessment of the investor is that of the risks that the issuer becomes unable to fulfil its obligations: to pay interest and to repay the capital. Only information which directly contributes to this assessment should be required for the prospectus. Therefore, for an investor in bonds or derivative securities, exact details with regard to the ownership structure of the issuer, remuneration paid to the Board of

Directors, the allocation of business operations or small subsidiaries, property and plants as well as investments are not relevant. To this extent, issuers of non-equity securities should generally be subject to less onerous disclosure obligations.

Therefore, Annex I is too onerous for issuers of bonds (and derivative securities) and should therefore be significantly reduced.

Paragraphs 132 to 135 (Disclosure about the Advisers to the Issuer)

See my answer to paragraph 44.

Paragraphs 136 to 139 (History of Investments)

See my remarks to paragraphs 153 to 156, Annex I, section III.B.

Paragraphs 140 to 142 (Operating Results)

Yes.

Paragraphs 147 to 150 (Documents on Display)

See me answer to paragraph 92.

Paragraphs 153 to 156 (Annex I on Retail Corporate Debt)

Additional disclosure requirements with regard to retail corporate debt are not necessary. On the contrary, I would like to suggest reductions as follows:

I.A.1, 2 To be brought in line with paragraph 6 of the proposed Directive.

I.B. See my position to the respective section in Annex A.

II.A. The disclosure requirements in section VII. are sufficient with regard to financial data. Please avoid duplication.

III.B. The section on past, present and future investments should be revised. Such information should not be required.

Past investments are not of any relevance for the obligation of the issuer to pay interest and to repay the capital in the future. The description of present investments shall be limited to those investments which already have to be mentioned in the notes to the annual report (for example a list of subsidiaries). Distribution of these investments and method of

financing provide fat too much detail for debt investors. Furthermore, a special section on investments is confusing to the investor as investments form an integral part of the business activities and therefore have to be mentioned under III.C.1. The section on future investments shall be deleted as it has to be part of the section on trend information under IV.B. as far as it of material relevance to the issuer. Please avoid duplication.

IV.B. See my position to paragraphs 66 to 87 on profit forecast.

The requirements are far too detailed with regard to debt securities. In the case of debt issues, an investor is not interested in whether the issuer expects to make a profit of x or y million Euro, but only whether the issuer expects that it will be able to meet its interest and principal repayment obligations. A written statement outlining major trends in the business and financial position should therefore be sufficient.

V.A. All Annexes lack of a clear definition of "board", "directors", "management", "audit committee" or "remuneration committee". Under German law, a "Aktiengesellschaft" has only a "Vorstand" (executive board) and an "Aufsichtsrat" (supervisory board) as corporate bodies representing and supervising, respectively, the issuer. Other "committees" are part of the senior management and should not be considered as relevant for disclosure.

Therefore, I suggest to include a list of the names of "Vorstand" and "Aufsichtsrat" and corresponding management levels according to the law in other jurisdictions and to have a description of the articles of association relating to such corporate bodies.

V.B. This section should be deleted because the issuer generally is not aware of any potential conflicts of interest since the members of the management do not have to inform the issuer of any potential conflicts of interest, even for banks in Germany according to the German Banking Act (Kreditwesengesetz). One should not impose obligations on the issuer which it cannot fulfill. One could, however, insert a paragraph in the risk factor section stating generally that there may arise conflicts of interest which affect the price of the security. This could be a compromise.

V.C. A general remark whether or not the issuer complies with the corporate governance regime of the home country is sufficient. With regard to German law any publication of internal documents except for the articles of association is of no value to investors.

VI.A. The disclosure requirements should be deleted, as detailed information on all major shareholders will not influence the ability of an issuer to meet its obligations with regard to interest and redemption payments. Such disclosure is relevant for equity securities, as it describes the level of influence an investor might have – whether he/she could influence the

business direction together with other groups of investors or is restricted to the level of a "debt" investor with "dividend rights" solely dependent on the decisions of the major shareholders. In addition, for equity securities such information is important, as it gives decisive hints to the price potential, expected volatility and liquidity of the share. Such information is not of relevance for debt and derivative investors.

However, the issuer could be required to publish the names and holdings of major shareholders of the company as long as they have already been published according to the respective national law. Also a negative statement that no information has been published could be included.

VI.B. The section on related party transactions is far too detailed and requires information not relevant for an investor of debt securities. It should therefore be deleted.

Related party transaction should be revealed to an extent that is already required according to the applicable accounting standards and therefore contained in the annual report. Such level of disclosure will provide investors with a sufficient level of detail.

VII.G. See my remarks to Annex A, VII.G

VII.H. Interim financial statements should not be mandatory for the issuers of bonds because such interim financial statements are not relevant for the investors of debt securities, but only for equity securities. The trend information shall be sufficient.

VIII.C. The term "material contract" is too vague. One has to bear in mind that the purpose of the prospectus is not to provide a due diligence report to the investor but only to inform him about the nature and the major risks of the investment. Accordingly, it should be enough if any risk resulting from such a contract is described in the prospectus.

VIII.E. See my remarks to paragraphs 92 and 93, 147 to 150.

Paragraphs 157 to 160 (Specific Derivative Registration Document)

A specific derivative registration document is appropriate as already presented in the Addendum. The requirements regarding the issuer should be lower for derivative securities than for equity, but also lower than for debt. The most important factor for derivative securities is a proper description of the product, including the terms and conditions, which should be set forth in the securities note. I will comment on that registration document in my position on the Addendum.

Paragraphs 161 to 173 (Definition of Derivative Securities)

The approach under paragraph 167 is too specific and therefore does not provide enough flexibility. Furthermore, following aspects should be taken into consideration:

- The first sentence in 3) is unclear and incorrect. What is meant by "some form of payment payable by the investor"? For warrants and certificates, the investor must pay the purchase price for the security. Thereafter, further payments by the investor are only ncessary in the case that the warrant can only be exercised by physical delivery. If the investor holds a call warrant, he/she has to pay the strike price (and receives the underlying). If the investor holds a put warrant, it has to deliver the underlying (and receives the strike price). For cash settled warrants as well as for almost all types of other derivative securities the investor has not to make any payment.

- Furthermore, derivative securities - once bought by the investor - generally only contain obligations of the issuer, but do not impose any obligations on the investor. Therefore, the investor has an obligation only from an economic point of view – with regard to reverse convertibles and discount certificates he/she is "obliged" to take the underlying if the issuer "decides" to deliver the underlying or instead to pay a cash amount. From a legal point of view the investor has no "obligation", because he/she could refuse the delivey of the underlying. In this case he/she would receive nothing at exercise or redemption.

- The feature in 4 a) is only applicable to warrants. Warrants, however, represent only a part of the world of derivative securities which has become less important over the last years. To say that "The instrument will give the investor rights – normally in the form of exercise rights …" is therefore incorrect. Certificates representing a significant proportion of derivative securities are not exercised. The feature in 4 b) makes no sense, as all derivative securities provide some sort of entitlement to the investors without imposing any obligations on them. The feature in 4 c) is misleading as the issuer can make use of any discretion only according to the predetermined terms and conditions of the product.

- The features in 5) are misleading as 5 a) repeats 1) while 5 b) introduces a new aspect. Therefore, if CESR decides to use such terminology 5) should substitute 1).

As a consequence, a more general and shorter approach should be chosen to reflect the deversity of derivative securities. I support the definition proposed by the German Commission of Stock Exchange Experts (Börsensachverständigenkommission) and the EUWAX exchange in their positions which is as follows:

"Derivative securities are securities where the payment and/or delivery obligations are linked to an underlying [(including but not limited to the price of one or more securities, indices, commodities, energy, yields, currency (rates), weather events etc.)], unless the underlying is merely a recognised inter-bank interest rate."

The second part of the sentence starting with "unless" should be inserted to make it clear that plain vanilla floating bonds with EURIBOR or LIBOR interest payments are not regarded as derivatives. All other linkages to an underlying should qualify the product as a derivative. The text in square brackets is not absolutely necessarily, but rather that it might serve as a compromise for Member States who have a preference for detailed rules. In any event, if it is used, it is absolutely necessary for the words "including but not limited to" to be stated.

Paragraphs 174 to 185 (Broad Categorisation of Derivative Securities)

Although I am in favour of three types of registration documents (one for equity securities, one for debt securities and one for derivative securities), the differentiation in "non guaranteed" and "guaranteed" derivatives is misleading. There is no need for any further sub-categorisation. Several reasons should be taken into consideration:

- In both cases, the issuer is liable for the fulfilment of certain obligations. The investor bears the risk that the issuer might not be able to meet its obligations under the derivative securities.

- Almost all issuers of derivative securities are offering "non guaranteed" and "guaranteed" products at the same time. In effect, all prudent issuers will prepare a prospectus unter the disclosure requirements of a "guaranteed" derivative. A special building block for "non guaranteed derivatives" will merely used by issuers.

- Only the index certificates on the German "Neuer Markt" have provided the investors with a loss of up to 95 per cent, while index certificates on the DAX or the Eurostoxx have provided the investors even under the crash scenario in 2002 with a maximum loss of up to 50 per cent, if bought at the top and sold at the bottom. However, index certificates are certainly not to be considered as "guaranteed derivatives", despite their partly "capital guarantee".

- Reversible convertibles do not provide the investors with a guarantee with regard to the capital, but provide an interest payment of up to 30 per cent (the higher the risk regarding the underlying, the higher the "minimum return").

- In case of warrants doubling or quadrupling their value compared to the selling price, the investor must also be sure that the issuer is able to meet its obligations.

- Qualifing a security with a capital guarantee of less than 80 to 75 per cent as "guaranteed" and therefore implicitly "less risky" is misleading with regard to investor protection. The public will not understand why a security which offers a "capital guarantee" of less than the mentioned threshold figure is "less risky".

Paragraphs 186 to 187 (Disclosure Requirements for Derivative Securities)

See my answer to paragraphs 157 to 160.

Paragraphs 188 to 190 (Directors and Senior Management)

See my position to paragraphs 153 to 156 (Anex I, V.A.) With regard to derivative securities only the members of the executive board (and the supervisory board, if deemed to be necessary) shall be mentioned. It does not make any sense to disclose for instance the senior management level as these persons neither have the ultimate business power nor are known to the public.

Paragraph 191 (Advisers)

See my answer to Annex A, section I.B.

Paragraphs 193 to 195 (Risk Factors)

The section misses a clear distinction between risks concerning the issuer (which have to be included in the registration document) and the risks concerning the securities (which have to be included in the securities note). Overall, I would like to make reference to my answer to paragraph 47.

Paragraphs 196 to 234 (Registration Document for Derivative Securities)

With regard to paragraphs 196 and 197 I would like to make reference to my forthcoming position on the Addendum to the Consultation Paper. Reference is made to my position on paragraphs 157 to 160.

Paragraphs 242 to 251 (Building Block Approach)

I welcome the building block approach as long as it helps the competent authorities to provide a flexible response to new products. However, it should not be CESR's aim to develop a building block for each individual product category. The wide variety of products means that such a strategy would be excessively rigid and not transparent. For more complex products, I therefore endorse an approach whereby the competent authorities can combine requirements from various schedules so as to achieve the greatest possible degree of flexibility.

I believe that the classification into equity, debt and derivatives (and guarantees, subscription rights and asset backed securities) provided for in paragraph 246 as well as a preceding list of all common items applicable to all classes of securities is logical.

Paragraphs 253 to 255 and 259 (Information contained in the Securities Note, Rating)

I recommend to strictly differentiate between the registration document and the securities note. The registration document has to contain the information on the issuer, the securities note the information on the security. According to the Directive a registration document can be updated by a supplement disclosing relevant changes regarding the issuer. Therefore, it is misleading to include updated information in the securities note.

Any mixture between both documents will create the danger of duplications, do not allow for an independent inspection of the registration document, make it more complicate to investors to find the relevant information or simply confuse them. Under certain circumstances, the investor could come to the conclusion that enough relevant information on the issuer is contained in the securities note.

Any information on the rating of the issuer has to be contained in the registration document, on the rating of the issue in the securities note.

Paragraph 256 (Use of Proceeds)

The paragraph highlights one of the major issues in connection with the building block approach. Any list of "common items" will lead to information to be disclosed in the prospectus which in reality contains simply no information. If information on the proceeds of an issue is required in the case of derivative securities all securities notes will contain the same wording ("use for general business purposes and the hedging of the product"). Therefore, it should be deleted.

I agree with the blanket clause approach laid down in the Addendum.

Paragraph 259 (Rating)

Despite reservations about their subjectivity, ratings have become an important tool in investment decisions. To this extent, ratings published by a recognised and independent ratings agency and made known to the issuer should be included in a prospectus. This should be irrespective of whether the rating was commissioned by the issuer or not. Ratings that do not originate from such rating agencies or are prepared by other institutions should therefore not have to be published so as to discourage possible attempts to influence the market in any particular way.

Paragraph 260 (Information on the Underlying)

A statement concerning the past performance of the underlying and its volatility should only be required, if the underlying is specifically construed by the issuer (for example baskets).

- The past performance of the underlying does not give any reliable information with regard to the future performance of the underlying.

- Conduct of Business rules in many EU countries require that investors are made aware of the fact that past performance is no indicator for future performance in any marketing material. It does not make sense to require such information even in a legal document which should used by investors as the main source for making investment decisions.

- Various websites offer investors free of cost a variety of opportunities to analyze the past performance of almost any underlying (for example price and turnover charts for various time spans) which a prospectus could never present. Therefore, a mere reference to public sources should be sufficient.

- In the case of issues on various underlyings at the same time, as it is market standard in various European countries (for example warrants or discount certificates on 15 to 20 Eurostoxx shares at the same time), such requirement would cost a lot of time and size up the securities note without providing the investor with helpful information.

- Trading on a regulated market should not be used as a criteria. Indices or currencies are not traded on such markets, but the information on their past performance and their volatility could easily be found.

Paragraph 261 and 262 (Annexes on Securities Notes)

I would like to comment on common items of the securities notes as follows. In addition to the following sections you find comments relating to the annexes in the remaining parts of my position.

A blanket clause as suggested in the Addendum is of major importance as many clauses are not applicable to various types of securities.

I.3 to 5	To be deleted, but included in the registration document only.
III.A	To be deleted, but included into the registration document only.
IV.A	Which threshold is material to a person? The clause is not applicable to derivative securities.
V.C and D	Not applicable to certain types of securities. However, the issue can be solved by allowing the blanket clause.
V.F.2	The term “securities of the same class” has to be specified.
V.G	Is a duplication of V.F.

V.I Only the total costs of an issue, divided into banks' commission and external costs, should be included in a prospectus. A more detailed breakdown, particularly in relation to the percentage commissions of the other intermediaries involved or the cost for lawyers, advertising agencies or accountants, would have no additional informative value. In addition, the detailed division of expenses can only be determined after an issue, because the sales commission is determined according to the actual number of placements achieved by the individual intermediaries.

VI.A. To be deleted, but included in the registration document only

I would like to comment on specific items with regard to the securities note on derivative securities as follows:

III.C.1, 2 For derivative securities the section C.1 will not be applicable due to the special section on risks regarding derivative securities.

III.C.2.c, d The disclosure requirement should be made clear. There should be one general example for each product in a prospectus describing various scenarios based on theoretical assumptions and values. It would not be applicable to have concrete examples for each security issued for example under a base prospectus. As it is market practice in various European countries securities of the same type, but on various underlyings and with different strike prices and maturities will be issued at the same time. It will not only be time consuming for the issuer but also sizing up the final terms with no additional value for an investor (see also my answer to paragraph 260). Examples of the "best case scenario" will be misleading as they suggest a profit potential which might become reality under extraordinary circumstances only.

III:C.e This requirement shall be deleted. No objective criteria exist for instruments qualifying as an optimal hedge for a specific derivative security. Furthermore, the optimal hedging instrument for a derivative security (if such a qualification were at all possible) would depend essentially on the individual composition of investors' portfolios and their investment strategy.

Furthermore, it is important to understand that investors explicitly enter into an open position with a certain structure. Issuers of derivative flow products typically undertake continuous market-making efforts over the lifetime of the products. The investor will therefore always be able to close the position held by selling the respective securities. Almost any hedge to neutralise an existing position will raise higher cost than selling the security. In many cases such hedges are only available in the OTC market to which a typical retail investor has no access.

IV.A, B As not relevant to derivative securities, they should be deleted.

V.A, B Section V.A. shall only deal with certain legal aspects of a security, V.B shall describe the economics of an issue.

The disclosure according to V.A.14 should be moved to section V.B. Under the present proposal the "exercise price" (V.A.13) is contained unter V.A., while the "maturity" – which is an information of the same importance – has to be disclosed under V.B.15 and V.B.16. Does "reference price" or "reference date" refer to those derivative securities which are redeemed at a certain value depending on a specific value of the underlying (like for index certificates or discount certificates?).

V.B.8 is identical to V.A.7.

V.B.8 and V.B.9 require more or less the same information; clearance shall be made. V.B.9 contains the wording "cashless exercise" which shall be deleted as it is not common to the markets. The sentence shall be read "...for physical settlement how holders are to receive or deliver the underlying instrument and make payment."

Furthermore, I would like to emphasize that the issuer shall be obliged to reprint the complete conditions of warrants (or "conditions of derivative securities") in the securities note, as these conditions are the only legally binding document for the relationship between the issuer and the investor. Practical experience over the last twelve years has shown, that misunderstandings can only be solved in due course when the investor has an immediate access to these conditions.

V.E.1 The section is not applicable with regard to issues under a base prospectus. Neither the expected prices are known nor the method of determining the price nor the amount of any expenses charged to the subscriber or purchaser.

V.E.2 For derivative securities and bonds issued on a tap basis the wording should be "Process for the disclosure of the initial offering price".

V.F.2 The requirement of describing the similar subscriptions, creations or placements of securities of the same class is not applicable to issuers of derivative securities, as they are frequent issuers. According to the present market standards, big issuers launch up to 3,000 securities per year. The decision for a specific issue is done very quickly, often within hours. Furthermore, derivative securities are not in competition with each others as they do not hamper the value of an investment in another security of the same class.

Paragraphs 263 to 290 (Incorporation by Reference)

Incorporation by reference does simplify the process of drawing up the prospectus, but should nevertheless only be used to a limited extent. Financial statements (including interim reports) as well as information about the issuer may be incorporated by reference only where the latest version of the relevant information has been contained in an earlier prospectus as it is a cornerstone for the information of the investor.

Press releases shall not be allowed for any incorporation by reference, but directly included in the text of a registration document or a supplement. On the one hand, press releases in general are part of the "marketing sphere" of an issuer which means that almost all issuers will accept liability according to the terms of the directive only for a certain number of their press releases. On the other hand, the number of press releases is normally very high compared to other kind of documents as well as the content seldom exceeds more than two pages.

Paragraphs 291 to 335 (Availability of Prospectus)

The prospectus shall be available in printed as well as in electronic forms. Member states should make use of paragraph 14 section 2 last sentence of the proposed Directive and require issuers to publish any prospectus at least on the internet as this has already become the main source of information for investors. As various surveys in Germany has shown people who invest in securities, like equities or derivatives, are above average in using the internet.

The documents should be made available for download as pdf files. Other file types and hyperlinks should not be contemplated at the present time due to technical standards, but this should remain subject to change. However, the supervisory authorities should draw up a disclaimer that particularly protects issuers from prosecution in other countries with important financial markets, such as the U.S., Canada, Australia, Japan, Hong Kong and Switzerland, e.g. because the relevant prospectus is deemed a violation of the provisions relating to public offerings in those countries. If it is not possible to reach a mutual agreement with the other relevant supervisory authorities, the prospectuses should only be made available on the website of the competent supervisory authority in order to avoid conflict for issuers.

The selection of the nationwide newspapers (see paragraph 313) shall not be restricted to "the 8 national newspapers .... as ranked by an independent entity". The competent authorities shall have a certain degree of discretion in determining newspapers, which should be based on the total circulation, but also on the circulation among the financial industry and investors.

As the internet is accessable by investors at any time the competent authority shall publish a list of all prospectuses, independent of the fact whether a notice shall been published in a newspaper or not.