

ZENTRALER KREDITAUSSCHUSS

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Response
of the *Zentraler Kreditausschuss*
to
the Consultation Paper
on
CESR's Advice on possible Level 2 Implementing Measures
for the Proposed Prospectus Directive
October 2002

We are pleased to take the opportunity, as the Zentraler Kreditausschuss (ZKA), to comment on the Consultation Paper on CESR's Advice on possible Level 2 Implementing Measures for the future Directive for the prospectus to be published when securities are offered to the public or admitted to trading.

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.

EXECUTIVE SUMMARY

Before we reply to the questions you specifically raise and comment on some of your remarks, we should like to make the following general observations.

➤ The building block approach

In our comments sent to you on 17 May 2002, we both basically welcomed the building block approach proposed by CESR and suggested that, where innovative products that cannot be covered by the CESR rules are concerned in future, the disclosure requirements for various types of securities should prevent a new building block approach first having to be drawn up before the prospectus can be approved. CESR kindly accommodated this request in its consultation paper, pointing out that it did not regard the disclosure requirement models as exhaustive and that, where necessary, there was to be scope for producing a prospectus tailored to a specific product together with the relevant supervisory authority.

We nevertheless fear that the present consultation paper will result in a high degree of inflexibility. A feature of all building blocks proposed to date has been not only a high level of detail but also allowance for numerous particularities, both in respect to issuers and types of securities. Up to now disclosure requirement models have only been drawn up for three types of securities (equity securities, debt securities and derivative products – though only for the securities note in the latter case). CESR has announced that it intends to draw up further models, however. The building blocks for certain types of issuer already included in the paper (start-ups, mineral companies, property companies) suggest there is likely to be an even greater level of detail, especially when further types of securities are addressed. As far

as derivative products are concerned, in particular, drawing up even more detailed building blocks seems to produce such a rigid framework that it is doubtful whether all derivative products can be covered. Care should be taken to ensure admission to trading is as flexible as possible, particularly with new, as yet unknown, products in mind. It is highly doubtful whether this can be achieved by drawing up rules governing the most minor detail. We therefore suggest that, when drawing up further building blocks, a certain amount of scope should be allowed to ensure a more flexible approach.

Given the large number of building blocks that is to be expected, we should also like to point out that to make the shelf registration system workable, there should be a clear ranking between the different registration documents. In its October consultation paper, CESR only published registration documents for equities and corporate retail debt; it also announced publication of registration documents for derivative securities. A registration document is also to be drawn up for banks. If it is borne in mind that a base prospectus will be additionally possible under Article 5 (4), issuers will possibly be faced with the problem of determining which building block should be used for their issue. Clear-cut rules and lines of demarcations should therefore be drawn up to give issuers the necessary legal certainty. This will probably also raise the question in many cases of whether an issuer can use an already prepared and approved registration document for issues of other types of securities as well. For example, a bank which has prepared a future registration document addressed to banks for equities should be able to issue not only debt securities but also derivatives on this basis.

➤ **IOSCO standards**

It is pointed out in paragraph 29 that, when issuing its provisional mandate in March this year, the Commission stipulated that the 1998 IOSCO standards were to be regarded as minimum requirements. In its proposals for the registration document and the description of the securities for the share prospectus model, CESR therefore adopted the IOSCO standards verbatim as well as proposing further-reaching rules. While changes were made for the bond prospectus model and for the securities note for derivative products, this model is also based largely on the IOSCO standards, which were designed only for shares. This is why there are numerous requirements that only appear to make sense for debt securities and derivative products to a limited extent.

May we draw attention in this context to the modified wording that was adopted at the suggestion of the European Parliament (Amendment 29 of 14 March 2002). Whilst the Commission's proposal of May 2001 still stipulated that the prospectus "*shall be in accordance with the information requirements set out by the IOSCO*", this wording was

changed to read “*the rules **shall be based on the standards in the field of financial information set out by international organisations, and in particular by the IOSCO***”. We believe that this change to the wording of Article 7 (2) is intended to make clear that the IOSCO standards are not to be adopted verbatim but are intended to provide (only) a basis for the information requirements. We understand this to mean that the purpose is actually to allow deviation from the IOSCO standards – at least on certain individual issues.

In effect, the proposed Registration Document (RD) and Securities Note (SN) for equities have been drafted using the IOSCO standards as a minimum level. This not only contradicts the relevant provision of the Commission’s revised proposal, which, after massive objections to the provision in the Commission’s first proposal, under which the IOSCO standards were to be used as a minimum level, now requires the measures only to be *based on* standards like the ones developed by IOSCO. It also contradicts the fact that the IOSCO standards have been drafted with the aim of creating maximum harmonisation, i.e. creating disclosure standards acceptable to all national authorities by gathering the requirements in effect in all countries and so allowing – but not forcing – issuers to use a single prospectus as the basis for an offer in different countries.

Using the IOSCO standards as minimum requirements would put a heavy burden especially on smaller issuers, and in many cases prevent them from issuing securities. CESR itself should determine the appropriate level of disclosure for equities. This level should be lower than the “maximum” disclosure level required by the IOSCO standards. Subsequently, the standards laid down in Annex A should be amended accordingly.

➤ **Debt Securities**

The proposed RD and SN for debt securities have been created by deleting certain items from the IOSCO standards for shares. Whilst no objection can be raised against this method of creating the requirements, it seems that the appropriate level of disclosure for such securities had not been determined beforehand. In the case of debt securities, the investor has to be able to assess (on the basis of the prospectus information) whether the issuer will become unable to fulfil its obligations under the offered bond. Only information which directly contributes to this assessment should be required for the prospectus. For example, information on the issuer’s investments, principal markets and property plants and equipment does not under normal conditions contribute to the investor’s ability to make an assessment of the issuer’s insolvency risk. Again, the proposed requirements should be amended on the basis of an appropriate level of disclosure.

➤ **Accounting and interim financial reporting**

It is essential to ensure that the implementing measures at stage 2 of the Prospectus Directive are consistent with the corresponding requirements in the EU Commission Regulation on the application of international accounting standards and the future Transparency Directive (Directive of the European Parliament and of the Council harmonising core requirements for providing information about issuers whose securities are admitted to trading on a regulated market and for communicating with securities holders).

The same applies to interim financial reporting: credit institutions which make a public offer of retail debt securities only without having any securities issued which are admitted to trading on a regulated market will presumably not be subject to an interim financial reporting obligation under the forthcoming Transparency Directive. On no account should such an obligation be imposed on such issuers under Level 2 implementing measures for the proposed Prospectus Directive.

➤ **Derivative products**

The prospectus requirements for derivative products are tremendously important for the German capital market in particular, as the German market has had plenty of experience with these products for many years. We therefore basically welcome it that CESR has drawn up a separate building-block approach for derivative products, even though these are largely identical in nature with traditional debt securities. CESR puts forward two proposals for definitions of derivative instruments. Neither is totally convincing, since certain aspects have not been taken into account. The question arises, however, whether an “exhaustive” definition of this term should be included at all. There is a danger that the development of new products will be prevented if they cannot fit into the definition of derivative and thus lack a prospectus model. If a definition of derivative is included at all, it should therefore be as broad as possible. Our reply to the question raised in paragraph 170 contains a proposal for a definition.

No difference should be made between guaranteed and non-guaranteed derivative securities, as the issuer risk is exactly identical in both cases (insolvency), and such a differentiation would cause huge practical difficulties. A differentiation would also seem unjustified in view of the fact that a capital guarantee within a derivative structure is usually equally financed on the basis of hedging transactions, as the pure derivative features within such a structure. If any differentiation in the disclosure requirements can be justified, then only one which is based on the question of whether the proceeds from the issue of a security are used to finance hedging transactions, or if they are used to fund the company’s general or special business

activities. In the latter case, the purpose of the issue would be the same as for a bond. Even in this case, however, higher disclosure requirements would only be justified with regard to the description of the intended use of the issue proceeds; in addition, differentiation on this basis would be virtually impossible in practical terms.

➤ **Base prospectus**

There is another point regarding the proposed building block approach for derivative products. The base prospectus currently envisaged under Article 5 (4) will usually be used for these products. CESR has not yet been instructed by the Commission to consider this format. Since it will be highly important, however, the building block approach now proposed for derivative products should therefore also be revised against the background of the requirements which must be drawn up for a base prospectus. We therefore consider it essential – also in view of the tight timeframe you repeatedly referred to at the hearing – to develop valid disclosure requirements for base prospectuses so as to give market participants as well enough time to contribute to the search for a practicable solution for all market participants during the consultation process.

➤ **Definition of “Securities”**

We would also point out that the definition of “security” on which CESR has based this consultation paper no longer corresponds to the definition which will be included in the directive. Although great importance must generally be attached to consistency between the directive and the technical implementing measures, it should be possible to deviate from this definition where disclosure requirements are concerned. Non-equity securities, for example – at least in the most recent draft version of the Directive of 5 November 2002 – are also regarded as equity securities if the issuer uses its own securities as the underlying instruments. As a rule, however, these will normally be bonds or derivative products, for which the equity building block would be unsuitable on account of the nature of this security. In our view, such a deviation would also be perfectly feasible. The main reason for the definition of “security” adopted in the directive and particularly the definition of equity securities and non-equity securities was the rules on the choice of regulator.

➤ **Documents on Display**

It is not necessary, in our view, to allow investors access to documents of the issuer which are referred to in the prospectus. Should CESR nevertheless come to the conclusion that this cannot be dispensed with, it must be ensured that the requirement to disclose documents referred to in the prospectus should on no account stipulate that documents must be disclosed

which are subject to confidentiality obligations vis-à-vis third parties or which the company has a legitimate interest in keeping secret.

➤ **Risk Factors**

In its introductory comments on advising risk factors, CESR states that it has rejected the idea of a list of various risk factors since this might give rise to the impression that the list is exhaustive. Instead, CESR wants to reserve the right to decide at a later date whether such a list is necessary. Nevertheless, the securities note for derivative products (Annex M III C) contains extensive rules on how risk factors are to be presented and what areas have to be covered. This contradiction should be eliminated. There should, in particular, be no requirement to describe scenarios, as these can only give a very limited picture of the special features of individual derivative products. This can better managed by a comprehensive description of each product.

➤ **Conflict of Interests**

Almost all the models contain the proposal that the prospectus should indicate any conflicts of interest. The question arises whether this issue should be dealt with in a prospectus, and there is also no indication in the directive that CESR is authorised to formulate such a requirement.

Disclosure of conflicts of interest only appears to make sense in any case for equities. Consequently, the requirements set out in section V.B in Annex I and in section IV.B of Annexes L and M should be deleted.

➤ **Information on taxation**

It is envisaged under VI.C of the proposed securities notes that the issuer should include extensive information on the taxes to which investors may be subject. In view of the stark differences in the tax regimes across Europe, this should be dispensed with – not only for reasons of liability, but also because of the considerable amount of research involved in providing such information.

QUESTIONNAIRE

We should now like to reply specifically to your questions as follows:

Question 44: Do you agree with the disclosure obligations set out in Annex A?

As explained above, we have serious reservations about adoption of the IOSCO standards. In particular, we believe that adoption of these standards for debt securities and derivative products is inappropriate, as we shall explain below in connection with the proposed disclosure obligations for these types of securities. We wish to point out that the IOSCO standards are currently designed for equities only. Regardless of the legitimacy of these standards, CESR should only take them as a guideline for equities. As already explained above, this should not, however, mean adopting the IOSCO standards as a whole but weighing up the sense and purpose of their adoption on a case-by-case basis. With this in mind, we wish to suggest the following changes to individual disclosure obligations set out in Annex A:

I.B. Advisors

The obligation set forth in Annex A I. B. should be deleted. It is unclear why the company's principal bankers and legal advisors with whom the company has a continuing relationship need to be mentioned here. We do not see why this information is relevant (or even necessary) for assessing the company. Furthermore, this information may give the wrong impression that these entities are in some way responsible for the contents of the prospectus. Such a responsibility is very unlikely, as the preparation of a prospectus is usually entrusted to investment banks and legal advisors that are specialists in securities laws. They are normally not identical with the banks and legal advisors that have a continuing relationship with the company. It is inappropriate to mention them publicly in connection with the prospectus if they have not assumed responsibility for it (in full or in part).

II.A.2 Interim financial statements

If unaudited (interim) financial statements have been reviewed by an auditor, the auditor's review opinion should be included in the prospectus (see also Annex A. IV. D. 2, where an auditor's report on trend information is required to be set out in the prospectus).

IV. B. 1. a Liquidity and Capital Resources

The last part of the sentence (".. and a brief discussion of any material unused sources of liquidity.") should be deleted.

IV. B. 1. b. Liquidity and Capital Resources

There should only be a requirement to describe the sources and amounts of the company's cash flows. A correct evaluation of the cash flows seems to be quite difficult. With respect to the liability for the prospectus the issuer has to mandate a financial expert (for example an auditor) to evaluate the sources and amounts of its company's cash flows. That measure entails considerable expense. Therefore the requirement for an evaluation of these sources places a great burden upon the issuer.

IV.D.2 Issuer's prospects

Obviously, it is difficult to make any concrete statements as to future prospects. Even more, it appears highly risky and thus also potentially misleading to make specific forecasts. Thus, in practice, issuers are usually reluctant to make such statements. Therefore, it should be clarified that making profit forecasts, profit estimates (and so forth) is voluntary (the sentence starting with "*Where...*" can be understood in this sense, but this is not entirely clear). A clarification might be helpful (There is no obligation to give profit forecasts and estimates).

The willingness to make specific forecasts could be supported if there was a safe harbour as regards prospectus liability where these forecasts are based on reasonable and appropriate assumptions and reliable data.

IV.D.3 Profit forecast

It should be set out more clearly also in section IV.D.3.a that making profit forecasts, profit estimates (and so forth) is voluntary (e.g. by saying – as in section IV.D.2 – "*If a (voluntary) profit forecast...*")

V.A.1 Directors and Senior Management

It should be clarified that the disclosure obligations are limited by the restrictions of the applicable privacy or data protection laws in the respective country. For example, in Germany a criminal offence is deleted from the Federal Central Registry after expiry of a certain period. If an offence is deleted, it can no longer be held against the person concerned or used to such person's detriment. However, for the protection of the investor it should be sufficient to limit the disclosure obligations to offences with reference to the capital market which occurred during the five preceding years. Furthermore, it is difficult to understand the need for differentiation between directors, managers and senior management, at least from a German point of view.

VI.B Related Party Transactions

The meaning of the last sentence in no. 1 “*Where such transactions were concluded (...) and have not been definitively concluded*” appears unclear and should be clarified.

VII.A Consolidated Statements and Other Financial Information

The reference to the “*audit report*” is apparently supposed to mean the “*auditor’s report*”, i.e. basically the entire wording of the official expert statement made and published as a result of the audit, including the audit opinion (see, for example, AICPA Professional Standards, AU Section 508; IFAC Handbook 1999, ISA 700.28). The prospectus must indeed also contain the (entire) auditor’s report. This helps to ensure the intended high level of transparency. It is also already standard practice and prescribed by applicable law (especially also in the U.S.); the EU can by no means fall behind already existing and accepted international practices.

The expression “*audit report*”, on the other hand, is usually understood to mean the auditor’s “long” report on auditing that is given internally to the client only. This long audit report is not suitable for inclusion in a prospectus. It is confidential and usually of a length (sometimes up to more than 1,000 pages) that actually rules out publication.

VII.B Notes to the accounts

It is unclear what “*notes to the accountant’s report*” is supposed to mean. In the headline, it appears that this provision addresses the “*notes to the financial statements*” (IAS 1 para. 91 et seq.).

“*Accountant’s report*” is apparently something different. If the auditor’s report is meant, the wording is inconsistent. Also, this is already covered by section VII. Thus, CESR should clarify what section VII.B intends should be stated in the prospectus.

VII.E True and Fair View

It is unclear what an “*equivalent standard*” is if such standard does not meet the “*true and fair view*” requirement.

VII.F.1 Statement of Auditing

The mere “*statement **that** the annual accounts have been audited*” is not sufficient. Rather, the auditor’s report issued in relation to the annual accounts must be included in the prospectus, as it is common practice and required by applicable laws in the internationally leading capital markets (see above comments on section VII.A). Section VII.A already

stipulates this. CESR should rephrase section VII.F.1 in order to clarify that it is not intended to qualify section VII.

VII. G. 1. Age of latest annual accounts

The last year of audited financial statements should be allowed to be as old preparation / approval of the financial statements is too short.

Furthermore, in exceptional cases an extension of the period should be possible at the request of the issuer.

VII.H.2 Interim Financial Statement

Consideration should be given to requiring a review of interim financial statements that are included in the document. This would enhance the quality of the respective financial information and thus improve the reliability of the whole document and, as a result, the entire market.

VIII.F Documents on Display

A requirement that material contracts be put on display is inappropriate. They often are of a confidential nature, and the secrecy at least of their technical contents may be crucial to the company's business. Furthermore, it does not appear necessary to protect investors' interests by providing access to the agreements themselves. A summary of their contents (it being understood that this can reasonably only be those issues that are essential for assessing the company and the issued securities) will be contained in the prospectus anyway (see section VIII.C).

Question 47: Do you agree with this approach?

We agree with CESR that no exhaustive list of risk factors should be drawn up yet. There is no disputing the fact that it is essential for investors to have information on the risks they incur. At the same time, it will ultimately be difficult to compile a list of risk factors, particularly as every issue is likely to involve different risks. With possible legal disputes in mind, such a list could also wrongly lead those responsible for a prospectus to believe that they have explained all the risks to investors. It should therefore ultimately be left to the issuer to decide which risks they wish to draw attention to.

The requirement to include risk factors should therefore be limited to such risk factors that are specifically relevant for the business operations and business environment (sector, industry) of the issuer and that could have a substantial negative influence on the financial

situation of the issuer. General business risks which apply equally to all types of business operations and / or business environments should not be presented as risk factors.

Question 51: Do you agree that pro forma should be mandatory in case of a significant gross change in the size of a company, due to a particular actual or planned transaction?

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 problems outlined by CESR under no. 48, pro forma financial information should not be mandatory in every case of a significant gross change. The increasing reservations with regard to pro forma financial information are based on the difficulties in preparing pro formas that became apparent in the past and on their (sometimes) highly hypothetical nature. A different view could only be taken if otherwise the actual figures were misleading. However, this should be decided on a case by case basis.

Extending pro forma information to even reflect the effects of a future transaction that is only planned appears even more problematic. It is extremely difficult to give estimates as to future developments. Obviously, such a scenario is even more hypothetical than showing the effects if changes that actually occurred are assumed to have taken place earlier. Due to their highly hypothetical nature, pro forma information to reflect the effects of planned transactions could be regarded as misleading. Additional problems might be caused by different accounting standards and accounting policies of the company itself and the target of the acquisition. It is crucial for the preparation of pro-forma financial information to be based on data that has been prepared in accordance with the same accounting principles and policies. However, before a target company is acquired it will hardly be possible to gain sufficient information to be able to “harmonise” the financial statements of the company and the target in order to be able to prepare pro formas. Thus, there should be no requirement to include pro forma financial information in order to reflect the hypothetical effects of a future significant gross change.

Question 52: Do you agree that pro forma financial information should also be required in all cases where there is or will be a significant gross change in the size of a company?

A mere change in the size of a company does not seem to be sufficient to justify pro forma adjustments of financial information. Rather, a requirement to include pro forma financial information should be limited to structural changes in a company.

Question 53: Do you agree that 25% is the correct threshold figure? Would a different figure, say 10%, be more appropriate?

A 25 % threshold figure should be acceptable. A lower threshold would lead too quickly to a requirement for issuers to provide pro forma information even where only small structural changes are involved. The idea to introduce a 10 % threshold should therefore be dropped.

Questions 55: Do you agree that the competent authority should be able to insist on pro forma information being included where this would be material to investors?

The competent authority should not be allowed to insist on the inclusion of pro forma information. Cases are always conceivable in which the inclusion of pro forma information would be very difficult to manage and where a material benefit for investors would not be easy to explain. When setting pro forma information requirements, CESR should always bear in mind not only that these inevitably involve considerable costs, but that the information value is often only limited.

Comment on paragraph 57:

It should be clear that pro forma financial information cannot give a true picture of the company, simply because it shows a hypothetical scenario.

Comment on paragraph 61:

The auditor's opinion should not only be limited to proper compilation (the word "*complied*" in no. 61 should probably read "*compiled*") and compliance with the company's accounting principles.

Comment on paragraph 62:

Instructions with regard to the auditor's review are highly welcome. More specifically, the auditor should examine and state in his opinion whether:

- the pro forma financial information has been based on the historical amounts in the audited financial statements included in the prospectus and that necessary reconciliation from other accounting standards has been properly made,
- the management's underlying assumptions providing the basis for those pro forma adjustments provide a reasonable and appropriate basis for presenting the significant effects directly attributable to the transaction concerned,
- the related pro forma adjustments give appropriate effect to these assumptions,

- the pro forma financial information reflect the proper and consistent application of those adjustments to the historical financial statements, and
- the pro forma financial information has been prepared in conformity with the applicable accounting standards and on a basis substantially consistent with that of the audited financial statements included in the prospectus.

(similar: AICPA Professional Standards Section AT §300 Reporting on Pro Forma Financial Information)

Question 64: Do you agree with the disclosure requirements in respect of pro forma financial information as set out in Annex B, in particular with the obligation of an independent auditor's report?

1. To ensure their reliability, the restated financial statements should be audited.
2. A mandatory requirement to prepare pro forma financial information should be avoided, especially if the changes to be reflected therein have not yet occurred at all (see above).
3. As a matter of fact, the statement under c) is misleading. Pro forma financial information can by no means give a "true" picture of the issuer's financial position or results, as it reflects a fictitious scenario that is clearly not consistent with the real situation in the respective reporting period.
4. The auditor's report should not be limited to the proposed statements, but also report on the items set out in the comment on paragraph 62 above.

Question 65: Would it be more appropriate to restrict the disclosure of pro forma information to the occasions where securities are being issued in connection with the transaction and hence require pro forma information in the securities note?

Pro forma information should only be required in the case of a corresponding transaction and where securities are being issued in connection with that transaction.

Question 73: Do you have any comments at this stage about this preliminary definition of a profit forecast?

Generally, it appears questionable to provide for profit forecasts – although voluntary – as they are extremely difficult if not impossible to make. If a voluntary statement to this effect is to be mentioned at all, an indication of the likely level of profits or the trend of its development compared to a reference period should be sufficient. A suggestion that a

minimum and maximum level could be stated should be avoided. In any event, the voluntary nature of profit forecasts needs to be highlighted.

Comment on paragraph 80:

It is unclear what CESR means by the expression “*the Company’s financial advisor*”, as this term is not specific enough. Paragraph 80 also appears somewhat contradictory to Annex A, section IV.D.2. It does not appear realistic to expect a substantial statement from any kind of expert as to forecasts or estimates. Rejection of such a requirement is thus reasonable.

Question 85: Should issuers be required to repeat or update outstanding ad-hoc profit forecasts in the prospectus?

This should already be covered by the existing ad hoc disclosure requirements and must in any case be qualified by materiality for the assessment of the company and the securities issued by the company.

Question 86: Do you agree with the disclosure requirements in respect of profit forecasts set out in disclosure requirement CESR reference IV.D.3 (a) and (b) of Core Equity Building Block (Annex “A”)?

If a (voluntary) “*profit forecast*” or “*profit estimate*” are included, the disclosure obligations set out in Annex A should be acceptable. However, if these are to cover general statements about business prospects, the obligations are likely to go too far.

More specifically, references IV. D. 3 (a) and (b) suggest that profit forecasts should be made. For the aforementioned reasons, we do not support this idea. Realistically, profit forecasts are highly speculative and thus potentially misleading.

Question 87: Do you agree with the arguments set out regarding mandatory reporting by the company’s financial advisor?

In principle, yes; see above reply to Question 80.

Question 89: Do you agree that such information may be material to an investor’s decision to invest? Would the provision of such details breach privacy laws in your jurisdiction?

It should be carefully considered whether “public criticism” should really be disclosed. Public criticism clearly has a different quality compared to convictions for criminal offences. Public criticism may both be unjustified and irrelevant for the assessment of the

securities by the investor. Further, it may be assumed that “public” criticism is already common knowledge. Whether public criticism should nevertheless be mentioned in a prospectus should be decided by the persons responsible for the prospectus on a case by case basis. This should only become relevant if the fact that public criticism was raised as such appears material to enable the investor to make an informed assessment of the issuer and the securities. This will most likely only be the case if the subject matter of the criticism is still current, relevant also for the issuer (and not only the respective person) and may also have a substantial effect on the respective securities of the issuer. We believe that this will only be the case in isolated instances. Thus, the general rule that all information that appears material for the assessment of the issue and the offered securities should be sufficient (see Art. 5 para. 1 of the Directive and our comment on item 39). As to privacy laws, see the above comments on Annex A, item V.A.1.

We should also like to point out in this context that the term “senior management” is not known under German law so it will be virtually impossible to define which individuals are affected by such requirements.

Question 91: Do you think that the additional disclosures of any limiting measures should be required?

Given the different company law regimes in Member States and the resulting differences in the definition of the “*control of a company*”, such a requirement should only be set by national supervisors at Level III.

Question 93: Do you feel that issuers should be required to put on display all documents referred to in the prospectus (as set out in CESR reference VIII in Annex A)? Would this cause problems due to privacy laws or practical problems as a result of having to review lots of documents for commercial information?

Only the documents relating solely to the issuer and not to any third parties should have to be disclosed. An amendment is therefore required here. See in this connection also our reply to Question 44 (section V.A.1). The summary proposed in Annex A, section VIII C should be sufficient. When setting such a disclosure obligation, CESR should bear in mind that this is information that is of interest not only to investors (for their investment decision) but also to the issuer’s competitors. This obligation should therefore be restricted to the issuer’s articles of association and its annual and interim reports.

Question 95: Do you believe that the building blocks in Annexes D, E, F, G and H are appropriate as minimum disclosure standards?

As explained above, it is to be feared that the large number of building blocks will result in a lack of flexibility. There is also the question of whether company-specific prospectuses are necessary, as classification could prove difficult in practice if a company operates in various fields of business for which different building blocks are to be used. This is why we are not convinced that the disclosure standards set out in Annexes D – H are appropriate. However, these standards should be reviewed for other reasons too (see below).

Question 96: What other specialist building blocks (if any) should CESR consider producing in the future?

As already explained in our reply to question 95, the number of building blocks should not get out of hand. Instead a certain degree of flexibility should be preserved which, even after the directive together with its implementing measures have entered into force, allows prospectuses to be issued without CESR having to create a new building block every time the securities that are to be issued do not fit into the existing building blocks.

Thus, we believe that, as far as equity securities are concerned, a further extension of the number of building blocks is counterproductive. Irrespective of how many building blocks are added, it will be impossible to cover every industry and to ensure there is a building block to perfectly suit each issuer. Moreover, a further increase in the number of building blocks will make the transformation into national law more burdensome and will negatively affect the flexibility of the competent authority if a specific building block does not fit an issuer one hundred per cent.

Question 100: Do you agree with the specific disclosure requirements set out in the building block for start-up companies?

See above reply to Question 95 in general.

The information required under Annex C is not necessarily limited to start-up companies. Thus, the items listed in Annex C should be integrated into Annex A and there is therefore no need to have a separate Annex C.

I.C The auditor's report is an expert statement that is important for investors and must therefore, as is standard practice and prescribed by presently applicable law, be included in the prospectus; see above comment on Annex A, section VII.A.

- II. A The requirement to include the business plan of a start-up company has to be deleted because of the liability for the statements made in the prospectus. The inclusion of the business plan even of a start up company is not currently required and is totally out of line with international practice. The business plan of a company only provides forecast information. As CESR recognises, there are obvious hazards attached to such information (see no. 75). It may be totally misleading for investors. Furthermore, the issuer cannot guarantee that the forecast information provided in the business plan will become reality as a company's growth/performance depends on certain factors which cannot be influenced by the issuer. In the United States it is therefore forbidden to include any forecast information in the prospectus. In Europe, the US practice regarding the use of forecasts has become increasingly widespread.

Besides, according to Annex A. IV. D. 2, and Annex C IV. D., the business plan has to be examined or reported on by the reporting accountants or auditors of the start-up company (Annex A IV. D. 2 and Annex C IV. D set forth the requirements for an examination of the forecasts included in the prospectus). It is not realistic, in our view, to expect any auditor to make such an examination.

- VII.A. A mere statement that the information has been audited is not sufficient as it may leave the auditor's scope of responsibility towards the investors who rely on the auditor's opinion unclear. This would also be contrary to current practices and to international standards.

Question 101: Do you feel that additional disclosure requirements should be included, for example, an independent expert opinion on the products and business plan?

The proposed requirement is much too unspecific, in our view. It is unclear what kind of expert should be able to give such an opinion. Even if such an opinion were given, its scope and content is entirely unclear. An opinion (issued by an auditor, for example) will probably be limited to the question of whether a business plan has been based on correct financial information. Before introducing such a requirement, it should be clarified what kind of statement can be expected from what kind of expert.

Question 102: Do you feel that disclosure of restrictions regarding holdings by directors and senior management etc should be applied to all companies through the core building block? Or should this only be required for all companies where there are such restrictions?

Restrictions on holdings by management board and supervisory board members should only be disclosed in cases where there are restrictions. Thought could, however, be given to whether such information should not be disclosed for all issues.

Question 105: Do you believe that SMEs should only be required to provide details for two years under disclosure requirement II.A?

No comments.

Question 106: If so, do you believe that all historical information should be restricted to this two year period?

See Question 105.

Question 107: Bearing in mind the materiality tests in the disclosure requirements contained in the Core Equity building block, if you believe that there should be some specific disclosure requirements for registration documents for SMEs, please list them.

See question 105.

Question 111: Do you agree that valuation reports as set out in Annex D should be required for property companies?

No. We doubt that it is realistic to require a valuation report for inclusion in the prospectus as set out in Annex D. The regulations applicable to property experts are, as Annex D already indicates, different in the various member states. Thus, there will be different standards governing the contents of a prospectus that will be recognised by all EU member states. Furthermore, it is unclear what “country of origin” means. The home member state of the issuer, of the property expert or of the respective property?

As regards the date of the inspection, the relevant details and the 42-day deadline under no. 4 of Annex D, it is unrealistic to obtain this information within this timespan and in a format that is suitable for prospectus disclosure. Property companies may have a real estate portfolio of several hundred different properties in different countries. The inclusion of valuation details of each property would inflate the size of a prospectus to a volume that is neither acceptable for investors nor feasible to be prepared as regards time and cost.

Once again, CESR should consider that the value of an individual property is not necessarily relevant if there is a portfolio of several hundred properties. What actually counts is the total value; this should already be reflected in the balance sheet. We therefore believe that a valuation report is neither necessary nor can it actually be delivered in an acceptably harmonised standard and in a size suitable for prospectus disclosure.

Moreover, we believe that the definition of “property company” is not sufficiently clear cut. We feel it should, for example, be clarified – at least in the event that CESR decides to create a separate building block for property companies – that the disclosure requirements only apply if the property company is itself the issuer, but not if a company’s group interests merely include a property company.

Question 112: Do you consider it appropriate that the date of valuation must not be more than 42 days prior to the date of publication?

Bearing in mind the – in our view, far too long – periods currently proposed in the directive for examining and approving the prospectus, which naturally precede publication, the 42-day period is cut to 12 days in the case of an IPO and to 27 days in other cases (if these 42 days are actually taken to mean business days). Obtaining an updated valuation in this time is impossible in our opinion. Deadlines should therefore definitely be dropped.

Question 113: Do you agree that it would be more appropriate for such reports to be required when securities are being issued by a property company and hence should form part of the securities note?

No. We believe that the value of the property portfolio is an issue that is a characteristic of the company and only as a result thereof of the respective security. We therefore think the registration document is a more appropriate document to include a valuation report than the securities note. Having said that, we should like to refer to our comments on item 111 and emphasise that we have serious doubts as to whether a valuation report should, and even can, be required for any kind of prospectus.

Question 116: Do you agree that expert reports should be required for mineral companies? Do you agree that it would be more appropriate for such reports to be required when securities are being issued by a mineral company and hence should form part of the securities note?

No. It is unclear what the contents of the expert report should be. Before such a report can be required, this must be specified. Furthermore, both the quality of these reports and their suitability for a prospectus recognised throughout the EU necessitates at least a framework of common standards. Finally, we believe that while the requirement to disclose all the information necessary to enable investors to make an informed assessment of the issuer (Article 5 para. 1 of the Directive) has to be interpreted with regard to specific industries, this should be dealt with on a case by case basis and not by an increasing amount of additional building blocks for lots of different kinds of companies (see above).

Question 117: Do you agree with the disclosure requirements in registration documents for mineral companies set out in Annex “E”?

Apart from our general comments on the extension of the building block approach to various industries, we wonder whether the information set out in Annex E is always necessary to enable investors to make an informed assessment of the issuer (and the securities). This also applies to the expert’s report required under Annex F. In particular, the arguments made in relation to the valuation report for property companies apply here. We strongly doubt that the location of wells, platforms, bore holes and so forth is of any relevance for the investor’s assessment. Also, the sheer size of such a report will make the prospectus unsuitable for informing the investor. Thus, the general description of property, plants and equipment as set out in Annex A under III. E should suffice.

Question 120: Do you agree with the disclosure requirements in registration documents for investment companies set out in Annex “G”?

No. We do not believe that the additional disclosure requirements set out in Annex G justify a separate building block.

Question 123: Do you agree with the disclosure requirements in registration documents for scientific research based companies set out in Annex “H”?

No. The contents of Annex H are much too detailed. Details of patent application and the progression of testing may often be confidential. Even if they are not, a requirement to disclose is not necessary as this is positive information that the issuer will want to insert in the prospectus anyway. Furthermore, this is already covered by Annex A, item IV. C. Thus, a separate building block is not necessary.

Question 129: Do you consider that the disclosure requirements for debt securities should be identical to those for equity, as set out in Annex “A”?

No. The disclosure requirements for debt securities should be simpler than those for equity securities. The same goes for derivative securities, whereas the disclosure requirements for derivative securities can be even simpler than those for debt securities.

When establishing a building block for debt securities, it should be ensured that, no matter whether the corporate retail debt contained in the consultation paper or other types of debt securities are involved, a prospectus for these types of securities is designed to inform the investor about the solvency of the issuer and any insolvency risk. The picture is different for equities, where the investor is more interested in the issuer’s business prospects. We should also like to draw attention to the above-mentioned application of the IOSCO standards, the 1998 version of which was designed for equities only. We therefore believe that is of very little help to use the IOSCO standards, which apply to equities, for all types of debt securities.

We therefore believe that in the case of debt securities, the assessment which the prospectus information is meant to allow the investor is an assessment of the risk of the issuer becoming unable to fulfil its obligations. Only information which directly contributes to this assessment should be required for the prospectus. For example, information on the issuer’s investments, principal markets and property plants and equipment does not normally enable investors to make an assessment of the issuer’s insolvency risk.

In addition, the proposed requirements should be amended on the basis of an appropriate level of disclosure (see introductory remarks above).

Question 134: Do you consider disclosure about the issuer’s bankers and legal advisers to the extent that the company has a continuing relationship with such entities to be relevant for corporate retail debt?

General disclosure of the issuer’s bankers and legal advisers is inappropriate; see also reply to question 129.

Question 135: Do you consider that disclosure relating to the bankers and legal advisers who were involved in the issue of that particular debt instrument to be relevant?

No. Investors would not be better able to assess the issuer risk if they knew which bankers and legal advisers were involved in the issue.

Question 137: Do you consider disclosure about a company's past investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?

For the reason set out above regarding question 129, such information should not be required, as it would not help investors to assess the relevant issuer risk.

Question 138: Do you consider that disclosure about a company's current investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?

For the reason set out above regarding question 129, such information should not be required, as it would not help investors to assess the relevant issuer risk.

Question 139: Do you consider that disclosure about a company's future investments in other undertakings to be material for an investor to make an investment decision about investing in the company's debt?

For the reason set out above regarding question 129, such information should not be required, as it would not help investors to assess the relevant issuer risk.

Question 142: Do you agree that these different interests should be reflected by different disclosure standards and in particular that retail bondholders do not need the same disclosures as shareholders in respect of these sections of the IOSCO IDS?

Yes, for the reasons set out in the answer to question 129.

Question 145: Do you consider it necessary for a disclosure requirement that stipulates when interim financial statements should be disclosed in the registration document, to also stipulate what the form and content of these statements should be?

There should not be specific rules on the form and content of such statements. It may be inferred from the purpose of the statements, together with the general rules on form (easily analysable and comprehensible) and content (all material information), what has to be contained in such statements.

In addition, it should be ensured that no requirements regarding interim financial statements are established which go beyond those set out in the IAS or the future Transparency Directive.

Question 146: If you consider that the reduced level of detail is more appropriate, should the same approach be taken for equity?

See answer to question 145.

Question 148: Do you feel that issuers should be required to put on display all documents referred to in the prospectus (as set out in CESR reference VIII in Annex A)? Would this cause problems due to privacy laws or practical problems as a result of having to review lots of documents for commercial information?

The proposed obligation to make all documents which the prospectus refers to available to investors should be abolished. The relevant documents will often contain information whose publication would be highly detrimental to the issuer's business activities. Investors have no legitimate interest in inspecting such documents, given that the prospectus itself must provide a summary of the relevant details of the documents. This obligation should therefore be restricted to the issuer's articles of association and its annual and interim reports.

Question 149: On review of the list of documents set out CESR ref. VIII.E of the corporate retail debt building block in Annex "I", please advise with reasons: (1) Whether or not there are any documents that are listed that you consider do not need to be put on display? (2) Whether or not there are any documents that are not listed that should be put on display?

See answer to question 148.

Question 150: Please give views on which if any of the documents that are not in the language of the country in which the public offer or admission to trading is being sought should be translated.

A translation of the documents should not be made mandatory, given that only a summary of the prospectus will have to be translated and that the material content of the documents will have to be disclosed in the prospectus. If a translation should be required, it should only have to be made into a language customary in the sphere of international finance.

Question 153: On a review of the equity disclosure requirements (CESR ref. VIII.G of the Core Equity Building Block) set out in Annex “A”, please advise which if any of these requirements you consider to be relevant for retail corporate debt. Please give your reasons.

For the reasons set out above regarding no. 129, such information should not be required at all, as it would not help investors to assess the relevant issuer risk.

Question 154: Do you agree with the CESR disclosure proposals for corporate retail debt as set out in Annex “I”?

For the reasons set out for no. 129, only information which directly contributes to assessing the risk of the issuer becoming unable to fulfil its obligations with regard to the respective security should be required for the prospectus. On this basis, the following points should be deleted from the proposed RD (in addition to those already discussed above):

- I.B (does not contribute to the assessment of the relevant risk)
- III.E (does not contribute to the assessment of the relevant risk)
- IV.A (capital expenditure does not affect investors in debt securities)
- V.C.1 (does not contribute to the assessment of the relevant risk)
- V.C.2 (does not contribute sufficiently to the assessment of the relevant risk – if the issuer does not comply with corporate governance rules, this alone does not make it more likely that it will become insolvent)
- VI.A.1.a (does not contribute to the assessment of the relevant risk)
- VI.A.1.b (does not contribute to the assessment of the relevant risk)
- VI.A.2 (does not contribute to the assessment of the relevant risk)
- VI.B (transactions with third parties do not normally contribute to the assessment of the relevant risk; the fulfilment of such obligations would also be highly burdensome for issuers)
- VIII.C (material contracts do not under normal circumstances contribute to the assessment of the relevant risk; the fulfilment of such obligation would also be highly burdensome for issuers)

The above requirements under VII E, III B and V B should also be dropped for the reasons mentioned above.

In addition, the proposal in VII G 1 to reduce the age of the latest annual accounts from 18 to 15 months should also be dropped.

Question 155: Please advise which if any items of disclosure should not be required for corporate retail debt. Please give you reasons.

See answer to question 154.

Question 156: Please advise if there are any items of disclosure for corporate retail debt that are not set out in the schedule, but should be. Please give your reasons.

No comments.

Question 160: Do you consider it necessary to have specific derivative registration document requirements, or do you consider this unnecessary as the registration document requirements for debt securities should be used for derivative securities as well? Please give your reasons.

We think it is advisable to have a specific registration document for derivative securities, as the disclosure requirements with respect to the issuer of derivative securities are much lower than for the issuer of equity or debt securities. Even though derivative securities do not in principle differ from bonds and other debt securities with regard to the issuer risk, it should be considered that derivatives are almost always issued by credit institutions, which, due to the supervision to which they are subject, do carry a lower insolvency risk. It would therefore seem logical if the special registration document for banks, which, as we understand, will contain lower disclosure obligations, would also be used as a registration document for derivatives (see introductory remarks above).

Question 170: Do you think it is useful to provide some form of definition for these securities?

The definition of derivative securities that is used for setting the minimum requirements should be established independently from the definition in the directive. The classification made in the directive of own stock-based derivatives as equity securities is designed primarily to prevent circumvention of the home country principle when determining the competent authority. When determining the disclosure obligation, on the other hand, the derivative character of the security should be the only decisive factor, at least for the determination of the applicable SN. For the RD it would be possible, though not desirable, to apply the standards in effect for the respective kind of underlying, but only to the extent that the issuance of the derivative in economic terms corresponds to the issuance of the respective underlying (for warrants linked to shares of the issue, therefore, the RD for derivatives should generally apply).

Question 171: If so, which of the two approaches set out above do you prefer? Please give your reasons.

Both proposed definitions do not seem convincing. The first one does not go far enough, as it refers to “forward transactions” – which would exclude e. g. index certificates – and only specifies certain types of underlying. The second one is too diffuse and subsequently would also exclude certain kinds of derivatives. Preferable would be a definition which is based on the linkage of the payment or delivery promised under the securities to a certain underlying asset or value, if and to the extent such linkage is not limited to the simple payment of interest on a nominal amount (as bonds provide for).

The definition of derivative securities could read as follows:

“Derivative securities are securities where the payment/delivery obligations of the issuer as determined in the terms and conditions of such derivative securities are linked to an underlying.”

It is unclear whether the features described in No. 2) to 6) are meant to apply cumulatively or alternatively. Furthermore, the features described are unnecessary and in a number of cases redundant. For example

- the features described in 3 a) - c) do not provide any added value to the feature described in 1);
- the feature in 4 a) is only applicable to warrants which represent only a part of the derivative securities. Therefore, to say that *“The instrument will give the investor rights - normally in the form of exercise rights...”* is incorrect.
- the feature in 4 b) is meaningless, as all securities give an entitlement to the investors;
- the feature in 5 a) is a repetition of what is said in 1);
- the feature in 5 b) is unnecessary, as the performance of the described securities still depends on the value of the underlying instrument. There is no reason for a differentiation between derivative securities which partly guarantee a certain return and derivative securities where the investment is totally at risk. This is a question of proper risk warnings, which are in any case in the interest of the issuer;
- the feature in 6) is not necessary to qualify securities as derivative securities.

Question 172.: If you prefer the approach based on a wide definition of derivatives, do you have any comments on the proposed definition?

See answer to question 171.

Question 173: If you prefer the approach based on fundamental features, are there other features that should be but are not included in the above list?

See answer to question 171.

Question 179: Do you agree with the above broad sub-categorisation of derivative products?

Although we are in favour of three types of registration documents, one for equity securities, one for debt securities and one for derivative securities, we disagree with the sub-categorisation into guaranteed and non-guaranteed return derivative securities.

There is no need for the sub-categorisation. In both cases the issuer is liable for the fulfilment of the obligations under the derivative securities. Consequently, the investor is at risk that the issuer might not be able to meet its obligations under the derivative securities. In this connection, it is of no relevance whether this risk exists with respect to the fulfilment of the guaranteed or the non-guaranteed obligation of the issuer.

We would like to give an example: The purchaser of a deep in-the-money call warrant is at risk that the issuer of such warrant will not fulfil its payment obligation upon expiry. If the same warrant would guarantee a minimum payment, there would be no reason for the guaranteed product to require more or different information on the issuer as in the case of the non-guaranteed product.

Such differentiation would also contradict the fact that a capital guarantee for derivatives is usually equally financed by issuers with hedging transactions, as the other features of the respective derivative. If the intention is to treat certain derivatives like bonds, the necessary differentiation could only be made on the basis of the question of whether the issuer wants to use the proceeds from the issue for hedging transactions or wants to spend them on general or particular corporate purposes; such a differentiation would however not be very practical, and would only justify additional information in the RD on the purpose of the issue.

Question 180: Do you agree with the approach of having two distinct registration document building blocks to reflect this sub-categorisation?

We disagree with the approach of having two distinct registration document building blocks for guaranteed and non-guaranteed return derivatives (see our comment on question 179).

Question 185: Do you agree that the nature of the decision that an investor is making about the issuer in the case of a non guaranteed derivative is different to the one an investor is making in the case of a guaranteed derivative? Please give your reasons.

We disagree, see answer to question 179.

Question 190: Do you consider that disclosure about the issuer's senior management, as set out in IOSCO reference I.A, is relevant for these products? Please give your reasons.

The proposed information about the issuer's senior management does not help investors in their assessment of the – solely relevant – issuer risk. This requirement should therefore be deleted, as should the corresponding requirement for debt securities. Furthermore we strongly object to any personal liability of any of the employees of the issuer (including senior management). Therefore we see no added value for the investors in disclosing the senior managers in the registration document. In addition, the term “senior management” is unknown under German law. Consequently, clarification would be required as to which level of management should be disclosed, if any.

Question 192: Do you consider disclosure about the issuer's advisers, as set out in IOSCO reference I.B, to be relevant for these products? Please give your reasons.

We do not consider disclosure about the issuer's advisers to be relevant information for investors. The registration document has to enable the investor to obtain a clear understanding of the financial situation of the issuer. This will normally include audited financial statements of the issuer. Any further information on other advisers of the issuer will not result in any added value for the investor in evaluating the financial situation of the issuer (see also our arguments for question 129).

Question 195: Do you have any views at this stage about CESR's provisional guidance in this area?

There is no specific risk connected with the issuer's ability to meet its obligations under the derivative securities. The evaluation of such risks should be possible on the basis of the description of the financial situation of the issuer at the time of issuing the derivative securities.

The specific risks connected with the structure of the derivative securities are described in practice in a separate “risk warning section” in the derivative securities prospectus. As it is in the best interests of the respective issuers of derivative securities to include in the prospectus risk warnings which cover all possible risks connected with the derivative securities, there is no further need to regulate the content of the risk warning section in the prospectus.

Question 196: Are there any other sections of Key information section at section III of IOSCO that you deem as being relevant disclosure for these products? Please give your reasons.

The requirements in section III. A should be lowered considerably due to the lower issuer risk of credit institutions.

Question 197: Are there any sections of key information section at section III of IOSCO you consider superfluous as regards the disclosure of these products? Please give your reasons.

Due to the difference in focus between investors in equity and investors in debt securities already discussed, disclosure requirements should be less for debt securities. Therefore, Annex I should be regarded as a basis, including our comments thereon. In addition, issuers of derivative instruments are mostly banks, which are subject to the supervision of their respective governmental authorities. This again leads to a reduction of risk. For this reason, disclosure requirements for derivative products could be even less than for debt instruments.

Question 199: Do you consider the level of detail set out in IOSCO disclosure standard IV.A to be inappropriate for these products? Please give your reasons.

See answer to question 200.

Question 200: Which particular items of IOSCO disclosure in this section do you consider to be relevant for these products? Please give your reasons

The information required in section IV.A.1. - 3. seems to be appropriate information provided by the issuer of derivative securities.

The information in section IV.A.4. should only be required if the described events are occurring at the time of the issue of the derivative securities; a description of the history of the issuer should not be required, as it is of no interest to the investor when evaluating the ability of the issuer to fulfil its obligations under the derivative securities.

Unlike in the case of an investment in the *equity* of the issuer, the information in section IV.A.5. - 7. does not have to be disclosed in the case of a derivative securities issue, as the described events do not have any direct impact on the issuer's ability to fulfil its obligations under the derivative securities.

Question 202: Do you consider that a general description of what the issuer's principal activities are is a more appropriate level of disclosure for these products? Please give your reasons.

As the purchaser of a derivative securities is not making an investment in the equity of the issuer, a very general description of the issuer's principal activities is sufficient.

Question 203. Please advise what, if any, other items of Section IV.B of IOSCO you consider to be of relevance for these products. Please give your reasons.

Section IV.B.1. should be limited to the past financial year (instead of the last three financial years) because the history of the issuer is not of major relevance for an investor of derivative securities.

Section IV.B.2. should be limited to the description of the principal markets in which the issuer competes. The breakdown should be deleted.

Section IV.B.3.-8. should be deleted completely because these items do not apply to issuers of derivative securities (e.g. seasonality of the business, raw materials, instalment sales, manufacturing processes).

Question 204: CESR questions the appropriateness of the level of detail set out in IOSCO disclosure standard IV.C relating to the company's group structure for these products.

This requirement should be dropped.

Question 205: Do you consider that a brief description of the issuer's group and the issuer's position within it, as set out in IOSCO reference IV.C, to be an appropriate disclosure requirement for these products?

A brief description is an appropriate disclosure requirement.

Question 207. Do you consider Section IV.D of IOSCO to be relevant disclosure for these products? Please give your reasons.

The requirements in section IV.D. are not applicable to banking institutions. As the majority of issuers of derivative securities for the retail market are banks, this requirement does not seem to be of any relevance.

Question 209: Do you consider Section V.D of IOSCO to be relevant disclosure for these products? Please give your reasons.

Not relevant for banks issuing derivative securities.

Question 210: Please advise what, if any, other disclosure requirements set out in Section V of IOSCO you consider to be relevant for these products. Please give your reasons.

For the reason set out above, all the disclosure requirements set out in V.B should be dropped.

Question 212: Do you consider that the name and function of the directors of the issuing company to be the appropriate level of disclosure for these products?

Detailed disclosure about directors of the issuing company do not help investors to assess the – solely relevant – issuer risk. Disclosure of their name and function is therefore sufficient.

Question 213: Please advise what if any other items of Section V of IOSCO you consider to be of relevance for these products. Please give your reasons.

No further information is required, as investment in derivative securities is not an equity investment in the shares of the issuer.

Question 214: CESR questions the appropriateness of detailed disclosure about how the issuer is controlled for these products as set out in Section VII of IOSCO.

As far as issues of securities by banks are concerned, we would refer again to the public supervision of banks, which also covers shareholders. These disclosure requirements should therefore be dropped completely.

Question 215: Do you consider that a statement setting out whether or not the company is directly or indirectly owned or controlled by another entity and the name of that entity to be the appropriate level of disclosure for these products?

Mentioning the controlling entity (if any) is the appropriate level of disclosure.

Question 217: At this stage do you have views about whether the following types of financial information about the issuer are relevant and as such should be disclosed in the registration document for these products? Please give your reasons.

- a) balance sheet
- b) profit and loss account
- c) statement showing either (i) changes in equity other than those arising from capital transactions with owners and distributions to owners; or (ii) all changes in equity (including a subtotal of all non-owner items recognised directly in equity)
- d) cash flow statement
- e) accounting policies
- f) related notes and schedules required by the comprehensive body of accounting standards to which the financial statements are prepared.

Balance sheet, profit and loss account and accounting policies can be provided. All other information appears to be unnecessary, as derivative securities are not investments in the equity of the issuer. The disclosure requirement under c) should, in particular, be dropped, as it is of little help in assessing the issuer risk that exists in these cases. The same goes for the requirement set out in section VIII.A.1.(f).

Question 218: For how many years should the above disclosure be given?

- a) for the last year, or
- b) for the last two years.

For the reason set out above, disclosure should only be required for the last year.

Question 219: Do you think that there should be a disclosure requirement that the notes to the accounts be included in the registration document for these products? Please give your reasons.

No. The notes to the accounts provide detailed information on the financial statements of the issuer which are of no relevance for the decision of an investor in derivative securities. In any event, a situation should be avoided where the information already contained in the notes needs to be restated in other sections.

Question 220: Please advise which (if any) of the other CESR disclosure standards set out in Sections VII.C-VII.I of the Corporate Retail Debt building block at Annex “I” you deem to be relevant disclosure for these products. Please give your reasons.

No additional disclosure requirements are necessary, in our view. At most, those in VII.D and VII.E could be applied since they are of a general nature.

Question 222: At this stage do you have views about which of the following sections of IOSCO regarding the issuer's share capital you consider to be relevant information to be disclosed in the registration document for these products? Please give your reasons.

- a) Section X.A.1**
- b) Section X.A.2**
- c) Section X.A.3**
- d) Section X.A.4**
- e) Section X.A.5**
- f) Section X.A.6**

X.A.1. Information in a), b) and c) should be provided. Any reconciliation of outstanding shares at the beginning and the end of the year seem not to be required for derivative securities

- X.A.2. not to be disclosed
- X.A.3. not to be disclosed as such holdings neither have any influence on the price of derivative securities nor on the ability of the issuer to fulfil its obligations under the derivative securities.
- X.A.4. as issue of derivative securities cannot be not compared to an equity issue the information on authorised capital is not relevant for the price of the derivative securities and has no effect on the ability of the issuer to fulfil its obligations under the derivative securities.
- X.A.5. see reasons above.
- X.A.6 see reasons above.

Question 223: At this stage do you have views about which of the following sections of IOSCO regarding the issuer's Memorandum and Articles of Association you consider to be relevant information to be disclosed in the registration document for these products? Please give your reasons.

- a) Section X.B.1**
- b) Section X.B.2**
- c) Section X.B.3**
- d) Section X.B.4**
- e) Section X.B.5**

f) Section X.B.6

g) Section X.B.7

h) Section X.B.8

i) Section X.B.9

j) Section X.B.10

These disclosure requirements should be judged by the extent to which they are necessary for assessing the issuer risk. This is only the case to a very limited extent:

- X.B.1.: to be disclosed.
- X.B.2.: not to be disclosed, only relevant for investments in issuer's equity.
- X.B.3.: not to be disclosed, only relevant for investments in issuer's equity. It is irrelevant for an issue of derivative securities whether the issuer's capital is divided in ordinary and preferred shares.

- X.B.4 – X.B.10.: not to be disclosed, only relevant for investments in issuer's equity.

Question 224: In relation to Section X.C of IOSCO which sets out the Material Contracts disclosure requirements, at this stage do you have views about which material contracts for these products should be summarized in the registration document for these products? Please give your reasons.

There is no necessity to include any material contract disclosure requirement, as such contracts will generally not have any impact on the issuer's ability to fulfil its obligations under the derivative securities.

Question 225: Do you consider Section X.C of IOSCO which sets out the Exchange Controls disclosure requirements to be relevant for these products? Please give your reasons.

There is no necessity to include any exchange controls disclosure requirement as such exchange control requirements with respect to the issuer's capital transfers will generally not have any impact on the issuer's ability to fulfil its obligations under the derivative securities. Furthermore, derivative securities do not entitle its holder to any dividend payment from the issuer of such securities.

Question 226: Do you consider that the information about the issuer's dividend policy as set out in Section X.F of IOSCO to be relevant for these products? Please give your reasons.

The dividend policy of the issuer of the derivative securities is of no interest to the holder of such securities, as the holder is not entitled to any dividend payment from the issuer of the derivative securities.

Question 227: In relation to Section X.H of IOSCO which sets out the Documents on display disclosure requirements, at this stage do you have views about which documents should be put on display for these? Please give your reasons.

The proposed obligation to make all documents which the prospectus refers to available to investors must be dropped. The relevant documents will often contain information whose publication would be highly detrimental to the issuer's business activities. Investors have no legitimate interest in inspecting such documents, given that the prospectus itself must provide a summary of the relevant details of the documents. However, the following documents, if any, could be put on display to the public:

1. most recent annual report of the issuer;
2. published interim figures of the issuer;
3. articles of association of the issuer;
4. paying agency agreement, if any;
5. calculation agency agreement, if any.

Question 228: Do you consider that information about the issuer's subsidiaries as set out in Section X.I of IOSCO to be relevant disclosure for these products? Please give your reasons

There is no necessity to require information concerning subsidiaries in addition to the information already required by the accounting principles applicable to the issuer of the derivative securities.

Question 232: Should all guaranteed derivative securities, irrespective of the percentage return they offer an investor, be treated in the same way, or should there be some form of minimum return that is guaranteed for these instruments in order for the product to be classifiable as a guaranteed return derivative as opposed to a non-guaranteed return derivative?

Irrelevant, as we do not see any reason to differentiate between guaranteed and non-guaranteed derivative securities.

Question 233: If you consider that a percentage benchmark should be set to distinguish between those products where the return is high and therefore additional disclosure about the issuer is justified, please specify what this percentage of return should be, and give a reason for your answer.

See arguments above.

Question 234: Do you consider that in addition to the percentage return on the investment, the life of the product should be taken into consideration, so that an instrument that has a 100% capital guarantee return with only a 6 month life cycle should be treated for disclosure purposes differently than a product with 100% capital guarantee but with a 10 year life cycle? Please give reasons for your answers.

See arguments above.

Question 249: Do you consider it an appropriate approach to obtain flexibility by creating specific building blocks on particular characteristics of some issuers, offers, markets and securities?

The building block approach must generally be seen positively. It does, however, involve the danger of detailed rules being created for every single sub-category of issuer, offer, market and security; in this case, the requirements would no longer have the required flexibility, and the concrete requirements will in many cases no longer fit any slightly different sub-categories. It should therefore be made sure that the building blocks do not go into too much detail.

As with the registration document, however, it is essential to indicate to the issuer in a manner offering legal certainty which securities note the issuer may use for the issue.

Question 250: Format of the Schedules - Is the format of the three main schedules suitable? These schedules are composed of (i) common items and (ii) specific items for each type of securities, amalgamated in one single document. Is this approach sensible or should the common items and the specific items form distinct blocks?

In principle, we support the three main schedules. However, although we support the system of common items in principle, it has to be considered that a great number of common items stated are only applicable for equity securities.

Question 251: Complex financial instruments - In order to ensure adequate disclosure for securities that do not fall within just one of the three main types, do you agree that the Competent Authority should (as envisaged by Article 21(4)(a) of the amended proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, be able to add specific items of another schedule to the main schedule chosen, that it considers necessary having regard to the characteristics of the securities offered, as opposed to their legal form?

The right of the competent authority to demand, in certain cases, additional information which either derives from other building blocks or seems necessary in the respective case due to the particular circumstances of the security is a direct consequence of the need to create flexible building blocks (see remarks in reply to question 249).

Question 252: Section I.2. - Should advisers be mentioned in all cases, or only if they could be held liable by an investor in relation with the information given in the prospectus?

Advisers should only be mentioned if they can be held liable. This should only be the case if they have been involved in the drafting of the prospectus/securities note and are responsible for the entire document or parts of it (especially for own statements like audit opinions; consequently, this is already provided for in Annex K, section VI.D).

In particular, we cannot see why the identity of company's principal bankers or legal advisers that have a continuing relationship with the company needs to be disclosed. It appears unlikely that their identity is material information for the investors' assessment of the securities. Furthermore, the impression that these parties might have any responsibility for the contents of the prospectus/securities note although they were not in fact involved in its preparation must be avoided under all circumstances. Even worse, this might be misleading, as the Prospectus Directive requires the disclosure of the identity of advisers only if they are (among other things) the persons responsible for the drafting of the prospectus.

Mandatory identification of the legal advisers to the issue in the securities note is also unnecessary. They basically just support preparation of the prospectus but – unlike auditors – do not appear as experts with statements of their own forming the basis for the investor's decision.

On the other hand, identification of the auditors is necessary, as their audit and their consent to have the auditor's report included into the prospectus (see above note) is clearly at least a

strong indication of the correctness of the financial statements of the company and thus an essential building stone of investor confidence. It is common practice and already mandatory under applicable law to include their names and addresses in a prospectus (as is also provided for in Annex K, section VI.D).

Question 253: Section I.5. - Under Section I.5., the securities note should mention any other information in the prospectus besides the annual accounts, which have been audited or reviewed by the auditors. Should the securities note contain the “auditors report relating to this information”?

Yes, as also the report as such is an important basis for investor confidence. The fact that the auditor agrees to have the report included is an important sign that the auditor has no indication that the reviewed information is incorrect.

Question 254: Sections I.6. and I.7. - Sections I.6. and I.7. both concern the responsibility attached to drawing up a prospectus. Although under the proposed directive it is possible to choose a format consisting of three documents (Registered Document, Securities Note and Summary), these three documents are considered as making one prospectus. Is it therefore correct to assume that responsibility for each of these three parts must rest with the same persons?

Although it may well be that the same persons are responsible for each of the three documents, this might also be different. Thus, each of the documents should clearly state who assumes the responsibility for which parts or for the entire document.

Question 255: Section III.A.- Under Section III.A., all securities notes must contain a statement of capitalization and indebtedness. Is such a statement necessary for derivatives?

No, this information is not important. In any event, such information should only be part of the Registration Document and not of the Securities Note.

Question 256: Section III.B. (III.B.1. for the derivatives schedule) - Section III.B. asks to list the reasons for the offer and the use of proceeds. While this is an important item for shares and bonds, is it also the case for derivatives?

Where derivatives are concerned, reference could only be made to the issuer's intention to make a profit on each offer (the amount after deduction of the issuer's costs, particularly the cost of hedging, from the proceeds of the issue). This information is of no importance to investors, however, and should therefore not be required for derivatives.

Question: 257: Section III.C.2.(d) – Section III.C.2.(d) requires inclusion of a worked example of the “worst case scenario”.

- 1) Does this information provide material information for investors?**
- 2) Are there circumstances in which an example of the worst case scenario is not appropriate?**
- 3) Would the disclosures as set out below be an appropriate alternative:**
 - a) a risk warning to the effect that investors may lose the value of their entire investment, and/or**
 - b) if the investor’s liability is not limited to the value of his investment, a statement of that fact, together with a description of the circumstances in which such additional liability arises and the likely financial effect.**

We object to the requirement of best and worst case scenarios, as it is extraordinarily difficult (if at all possible) to summarise the criteria for a best/worst case scenario with respect to the performance of derivative securities. This is particularly the case, as the number of factors and their interdependencies influencing the performance of derivative securities cannot ultimately be defined.

However,

- a) we do not object of course to clarification (if applicable) to the effect that investors may lose the value of their entire investment, as we think that this information would in any case be part of a proper risk warning and as we feel it is in the best interests of an issuer of derivative securities to mention this risk warning in order to avoid any compensation claims by an investor;
- b) we see no obligation to provide information about the investor's liabilities, as derivative securities do not foresee any such liabilities on the part of investors.

Question 258: Section IV.A. – Under Section IV.A., the interests of experts in the issue or the offer must be disclosed. These interests encompass those of any expert or counsellor who “has a material, direct or indirect economic interest in the company”. Is it necessary in the case of derivatives?

This disclosure requirement appears questionable in general and not only for derivatives. The holding of an interest in the company by an expert does not yet imply a conflict of interests which justifies a disclosure obligation.

Furthermore, conflicts of interest are dealt with by various regulatory requirements. A number of potential conflicts of interest cannot be disclosed under the law due to the confidential nature of potentially conflicting transactions or customer relationships. As far

as financial institutions are concerned (apparently being the main focus of the provision), the issue of conflicts of interest is sufficiently dealt with by the appropriate compliance measures (Chinese walls, etc.). Thus, section IV B. should be deleted.

259. Section V.A. - Section V.A. lists the items to be disclosed in -order to give a description of the securities that are offered or admitted to trading. Should the following additional items be added to Section V.A.:

a) Legislation under which securities have been created; b) Court competent in the event of litigation; c) Redress Service available for investors, if any”?

Should information about the rating of the issuer or of the issues be mentioned under that item?

If yes, which one of the following wording would be more appropriate:

- “Rating assigned to the issue or to the securities by rating agencies and /or commercial bank lenders pointing out the name of the rating organization whose rating is disclosed and explaining the meaning of the rating. If a rating does not exist, to the knowledge of the issuer, it is required to disclose the fact that there is no rating”, or

- “Rating assigned, at the issuers requests or with its co-operation, to the issue or to the securities by rating agencies and /or commercial bank lenders, pointing out the name of the rating organization whose rating is disclosed and explaining the meaning of the rating”.

The information under a) and b) can be regarded as useful, at least for derivatives. The same applies to disclosure of the issuer’s rating; here the second alternative is preferable, as it would go too far to require the disclosure of the absence of a rating.

With regard to other disclosure obligations set out in Annex K. item IV and V., we would like to comment as follows:

Annex K. IV.B: Conflicts of interest are dealt with by various regulatory requirements. A number of potential conflicts of interest cannot legally be disclosed due to the confidential nature of potentially conflicting transactions or customer relationships. As far as financial institutions are concerned (which are apparently the main focus of the provision), the issue of conflicts of interest is adequately dealt with by the appropriate compliance measures (Chinese walls etc.). Thus, IV B. should be deleted.

Annex K. V.A.12: In order to have a prospectus/securities note concentrating on the material information regarding the issue in an easily understandable manner, a general

description of the applicable legislation appears neither necessary nor useful. In this respect, there is a variety of generally available sources of information.

Annex K. V.D 4 b: The details of the underwriting agreement and the underwriting quotas are irrelevant for the investor and immaterial for the assessment of the company or the securities. Thus, there is no reason to disclose this information.

Annex K. V.D 4 d: The terms of the agreements among the selling group members are irrelevant for the investor and immaterial for the assessment of the company or the securities. Thus, there is no reason to disclose this information.

Annex K. V.D 6: The price history of securities is publicly available from many sources. Thus, there is no need to include this information in the prospectus/securities note.

Annex K. V.I: Discounts and commissions agreed with the underwriters or members of the selling group are irrelevant for the investor and immaterial for the assessment of the company or the securities. It is obvious that the underwriters and selling group members will be paid a certain amount for their services and thus have an interest in the success of the issue. Thus, there is no reason to disclose this information.

The same applies to the expenses incurred in connection with the issue; as transparency is not a purpose in itself, it should only be extended to the information that is material for the investor's decision.

Question 260: Section V.B.12, first indent of Annex M – Section V.B.12, first indent of Annex M requires a statement concerning the past performance of the underlying and its volatility. Is this disclosure necessary? Should the requirement for disclosure vary depending upon whether the underlying instrument is admitted to trading on a regulated market and the nature of the market? Should the requirement for disclosure vary depending upon the nature of the underlying instrument?

We regard this requirement as inappropriate for the following reasons:

(i) in the case of an investment decision in derivative securities, the investor has already a clear understanding of the underlying to which the derivative security is referring. He has already decided that he wants to have a certain exposure to the specific index or share, etc.

and is therefore only interested in the mechanics of the respective derivative securities. Any further information on the price and volatility history of the underlying in the securities note is superfluous.

(ii) the performance of the underlying in the past does not give any reliable information with respect to the performance of the underlying in the future. Consequently, the information on the past performance of the underlying is of no additional value to the investor; such information could be even misleading, and

(iii) the implementation of the current figures have a negative impact on the flexibility of the issuing procedure and the information included is already out of date when the securities note is published.

Question 261: For the three main schedules, please identify those items that you deem unnecessary.

For derivatives:

- a) The information set out in section II. B should be shortened considerably for derivatives. There is usually no subscription period for derivatives. In addition, it is obvious that the proposed disclosure requirements have been developed for the issuance of shares, for which usually a part of the subscriptions cannot be accepted, whereas in the case of derivatives, usually the number of securities issued matches the number subscribed for. At least the information under 3. and 8. should therefore be deleted. – The same applies to the information in sections V.B.1 to V.B.5.
- b) Section III.C.1 should be deleted. Disclosure about the specific risks of derivatives is required under Section III.C.2.
- c) Section IV.B should be deleted. There is no guidance at all to determine the existence of a “conflict of interest” in this sense. Such guidance should at least be provided here, e.g. by inserting examples or restricting the disclosure obligation to cases in which there is a concrete risk of a damage for investors.
- d) Section V.A.13 should be amended by the words “*if any*”, as the terms mentioned do not become relevant for all derivatives. It is not clear what is meant under Section V.A.14 by “*price at maturity*”; this point should be deleted.
- e) There should be no requirement, as proposed under Section V.B.7, to list the definitions in a separate section, because the composition of the product conditions differs from issuer to issuer, and the product conditions do not always contain a separate section with definitions. The composition of the product conditions must be left to the issuer.

- f) V.B. 10): In the case of cash settled derivative securities, there is no obligation by the holder to make any further payment in addition to the price paid for the derivative product.
- g) V.B. 12): The information required about the past performance is unnecessary as such information does not allow for a reliable assessment of future developments. This requirement should be deleted.
- h) Sections V.B.13 – 17 should each be amended by the words “*if any*”, because not all securities have the features mentioned.
- i) The information under section V.C should not be required, as it only makes sense for the issuance of shares. The same applies to the information under section V.H.
- j) Disclosure of the information mentioned under section V.I does not make sense for derivatives, as they are usually placed by the issuer itself and disclosure of the cost spent in the “*bulk business*” of issuing derivatives does not provide the investor with any valuable information.
- k) The required information regarding taxation should be limited to the description of applicable withholding taxes; the first sentence and the second half of the second sentence should accordingly be deleted.
- l) This information should not only not be required for derivatives, it should also not be required in general. The holding of an interest in the company by an expert does not yet imply a conflict of interests which justify a disclosure obligation.

Question 262: For the three main schedules, please list those items that are missing and that should be in the securities notes.

None.

Question 281: Do you think that the above illustrative list is acceptable?

For press releases which are mentioned as one of the documents that can be incorporated by reference, it remains doubtful in which cases these are published on the basis of the Prospectus Directive or Directive 2001/34 (to which cases Art. 11 restricts incorporation by reference). A general reference to all documents published to comply with the obligation laid down in Art. 10 of the Prospectus Directive would be preferable; press releases could then be mentioned as one example.

However, the auditor’s report should not be incorporated by reference as it is a material cornerstone of the investor’s reliance on the financial information contained in the prospectus. Rather, it should be repeated in the prospectus (this is also required in Annex A VII.A).

Question 282: Should further technical advice be given on the documents that can be incorporated by reference in the prospectus? In the case of an affirmative answer please indicate which technical advice should be given.

No.

Question 289: Should other aspects concerning the accessibility of the documents incorporated by reference be considered?

We basically endorse the proposals.

Question 290: Should CESR give other technical advice on further aspects of incorporation by reference? In the case of an affirmative answer please indicate which technical advice should be given.

No comments.

Question 307: Should there be technical implementing measures at Level 2 further defining what is deemed to be “easy access” and which specific file formats are accepted for this purpose?

No comments.

Question 314: Are there any additional factors and/or requirements that should be taken into account at Level 2 concerning the availability via the press?

No comments.

Question 325: Do you consider appropriate the requirement to publish the said notice in the absence of a specific provision in the Directive proposal?

Question 326: Should the minimum content of the notice be determined at Level 2 legislation?

No comments.

Question 327: When the prospectus is made available by its insertion in one or more newspapers or in the form of a brochure, besides the publication of a specific notice, should the list available at the web-site of the competent authority (see Introduction) mention where the prospectus is available?

No comments.

Question 328: In case of an affirmative answer to the previous question, should the indication in the website of the competent authority be considered enough and, consequently, should it be considered as an alternative to the publication of a formal notice by the issuer/offeror?

No comments.

Question 331: Which other issues regarding the availability of the prospectus in the form of a brochure should be covered by CESR's technical advice?

No comments.

Question 334: Do you agree that the issuer should not ask the investor the payment of the deliver or mail costs?

Deliver or mail costs should not have to be borne by issuers, because issuers otherwise would be worse off than if the prospectus were made available as a brochure. Issuers should at least be allowed to specify that the prospectus is available to investors and can be obtained at a certain address.

Question 335: Should additional issues regarding the delivery of a paper copy of the prospectus be dealt with by Level 2 legislation?

This is not necessary.