

**Comments Regarding the Consultation Paper
June 2004 relating to**

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

October 15, 2004

Please find in the following our comments regarding the Consultation Paper June 2004 relating to CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses no. 809/2004.

EUWAX (European Warrant Exchange) is a trading segment of the stock exchange in Stuttgart specialised in the area of warrants and certificates (about 45,000 warrants and certificates are listed on its exchange). Therefore our comments focus on the recommendations applying to derivative securities because this is where EUWAX/boerse-stuttgart has the most experience.

Generally, we think that recommendations for a consistent application of the provisions agreed upon on levels 1 and 2 are very important to promote a common market. In doing so, the following principles should be observed.

Levels 1 and 2 are superior to level 3. Therefore, any level 3 recommendations should not broaden the requirements laid down on the superior levels 1 or 2 but should stay within the borders agreed upon on level 1 and 2. Where compromises have been reached on the higher levels (e.g. regarding profit forecasts, see below re. no. 50), these should be respected on level 3. IOSCO rules should not be introduced on level 3 where they have been dismissed on level 2 as not being suitable in various situations, and in particular as not being suited for debt and derivatives issues since they constitute a maximum standard for equity offerings only. In addition, the provisions on level 1 and 2 which are ambiguous, should be made clearer on level 3 by concise recommendations avoiding vague terms themselves. Furthermore, it should be avoided giving non-exhaustive examples on level 3 and leaving it to the judgement of the reader whether other cases could be added. If examples are given, it should be stated that the list of the examples is exhaustive. Otherwise the risk of an inconsistent application of the provisions and the shopping for the most user-friendly Home Member State would be rather increased than decreased.

The market for derivative securities has been booming in Germany since its inception about 14 years ago. Part of the success story is that the legal situation for the offering of such securities has been pretty straightforward and the disclosure requirements in a prospectus have been well balanced between (i) the interests of the investors on the one hand who are mainly interested in a disclosure about the derivative security and its terms and conditions and (ii) the timing concerns of the issuers on the other hand. With our comments on the Prospectus Directive, the Prospectus Regulation and now also on level 3 we would like to contribute in a way that this balance continues to exist and that the disclosure requirements are as clear as possible.

In particular, we would like to comment on the following items/answer the following questions:

III. FINANCIAL INFORMATION ISSUES

The current sentence in the first paragraph of this section that the following recommendations relate "mainly" to the share registration document but "should be adapted for the other registration documents, as appropriate" is not helpful in the application of the Directive and/or the Regulation since it only raises questions as to how the adaptation shall be done. In order to be clear either it has to be explained how the adaptation shall work or it should be stated that the following recommendations relate "only" to the disclosure requirements in the share registration document.

4. PROFIT FORECASTS OR ESTIMATES

50. *Do you agree with the above approach in relation to profit forecasts and estimates? If not, please state which particular aspects you do not agree with and give your reasons.*

We strongly disagree with the statements made in no. 46 and think the text of no. 46 should be deleted.

The Annexes of the Regulation expressly provide that only "if an issuer chooses to include a profit forecast or a profit estimate", the registration document must contain certain information, such as, for instance, a report prepared by independent accountants stating that the forecast or estimate has been properly compiled. "Chooses to include" means "chooses to include a profit forecast or a profit estimate in the registration document". Thus, as long as the issuer decides not to include any profit forecast or profit estimate into the prospectus, no further statements or accounting reports with respect thereto have to be prepared and included, regardless of whether or not the issuer publishes such a forecast or estimate somewhere else.

Whether or not accounting reports in connection with forecasts and estimates are necessary was a highly debated issue on level 2. The compromise achieved was that such reports are only necessary if the registration document itself contains a forecast or a profit estimate and that the issuer may choose whether the registration document contains such a forecast or estimate. This is made clear by the word "chooses" (see above) as well as by the wording "if a profit forecast in a prospectus has been published ..." in paragraph 13.4. of Annex I. Pursuant to level 2, the inclusion of the forecast/estimate thus is voluntary. If,

however, no. 46 of level 3 were to be applied this would mean that even if the issuer chose not to insert a forecast or profit estimate into the prospectus, it would be obliged to do so (the insertion would become mandatory!) and to include an independent accounting report, provided that the issuer had published or made such a forecast or estimate anywhere else. This would mean that any forecast or estimate given to an analyst or in a regulatory announcement would trigger a requirement for the insertion of a profit forecast or estimate plus the independent accounting report for each new issue. This completely defeats the compromise reached at level 2 and is not permissible because the recommendations of level 3 have to remain within the boundaries set by levels 1 and 2.

Furthermore, we do not agree that an outstanding forecast made outside of a prospectus would inevitably be material information pursuant to Article 5.1 of the Prospectus Directive. Issuers, together with their advisers, should be allowed to consider whether any profit forecast made outside of a prospectus is material or not, taking into account all the circumstances they believe are relevant to that judgement. One aspect to be considered is the level of certainty of an information. Profit forecasts or estimates made outside of prospectuses often constitute "soft" information due to the lack of certainty that characterises it and in this event are not material. In addition, the materiality of a profit forecast or estimate depends upon whether such information is inconsistent with information disclosed in the prospectus. For example, if the prospective disclosure included in the capital resources and trend information or other sections were consistent with any profit forecasts or estimates that had been published in the market, we believe it is reasonable for an issuer to conclude that such specific profit forecasts or estimates are not material.

In addition, we are of the view that any requirement to repeat in a prospectus any profit forecast or estimate that had been made in the market (and especially to have that forecast or estimate reported on by accountants) would have severe repercussions on the willingness of issuers to voluntarily produce such information.

51. *Do you consider that it is appropriate to provide examples of what may or may not constitute a profit forecast or estimate? If so, could you please provide some examples?*

We do not believe that examples are necessary.

8. INTERIM FINANCIAL INFORMATION

Recommendation no. 104 seems unnecessary given the clear wording of paragraph 20.6.1 of Annex I of the Regulation. If CESR nevertheless decides to retain an explanation, the word "disclosed" should be substituted by the word "published" to make the terminology consistent with the one used in paragraph 20.6.1 of Annex I of the Regulation and to avoid a broadening of application. The term "disclosed" is broader than "published" and is not covered by the Regulation.

IV. NON FINANCIAL INFORMATION ITEMS

1. SPECIALIST ISSUERS

142. *Recital 22 of the Prospectus Regulation invites CESR to produce recommendations on the adapted information that competent authorities might require to the categories of issuers set out in Annex XIX of the Regulation. Do you think detailed recommendations are needed for specialist issuers or do you think the special features of these issuers could be addressed mainly by the disclosure requirements set out in the schedules and building blocks of the Regulation?*

We think detailed recommendations are not needed for specialist issuers. The schedules and building blocks of the Regulation are already very comprehensive. Therefore, no more disclosure requirements are necessary.

1d. INVESTMENT COMPANIES

Regarding no. 168, it should be made clear that the issuer of an instrument which is linked to the performance of another asset or pool of assets which the issuer owns does not qualify as an investment company as long as the investor of this instrument only has a payment claim against the issuer but does not have a direct claim against the underlying or if the purpose of the ownership of the assets or pool of assets by the issuer is not done merely to spread risks or if the underlying is not actively managed. The need for such a clarification arises because otherwise there is a great risk that the issuer of asset backed securities, bonds, notes or certificates linked to the performance of such assets is regarded as an investment company.

2. CLARIFICATION OF ITEMS

210. *Where there are common information requirements according to the Prospectus Regulation to equity, debt or derivative securities, do you think that the same recommendations are valid?*

We think one should differentiate between equity on the one side and debt and derivative securities on the other side. Investors of debt and derivative securities are more interested in the terms and conditions of the investment than in information on the issuer. Therefore, it is justified that the information to be given on the issuer is less broad than for equity. An example where a distinction might be made is in recommendation no. 237, unless it is deleted entirely (see our explanations below to question no. 238) or no. 273 (see our explanations below to question no. 274).

Our suggestion is in line with Article 5.1 of the Directive which specifies that different information may be needed depending on the nature of the issue and of the securities offered or admitted to trading in order to enable investors to make an informed assessment. Furthermore, Article 7.2 of the Directive specifically provides to take account of various types of information needed by investors relating to equity securities as compared with non-equity securities. Thus, even where the Regulation uses the same language for a requirement in each Annex, the particular level and content of the disclosure should be tailored to the particular type of security rather than taking a "one size fits all" approach.

2a PRINCIPAL INVESTMENTS

219. *Do you think recommendations are needed on this matter? If not, please state your reasons.*

Recommendations on "principal investments" are only helpful and thus "needed" if they are concise enough so that a consistent application of the interpretation is ensured.

220. *Do you agree with the proposed recommendations? If not, please state your reasons.*

We do not agree with these proposals. They are too vague and therefore would not ensure a consistent application and interpretation of the term "principal investment". For instance it remains unclear which amount and which expected return are considered "principal". The same is true for the term

"importance" in c) which is only another word for "principal" but does not give any concise guidance.

221. *Would you prefer a stricter and more objective approach to determine whether an investment should be regarded as a "principal investment", such as a numeric one? Which level would you choose and why?*

Yes, we would prefer a more objective approach such as a numeric one. This would make the recommendation concise and ensure a consistent interpretation. We suggest a threshold of 10% of the issuer's assets or expected returns, whatever is higher.

2e NATURE OF CONTROL AND MEASURES IN PLACE TO AVOID IT BEING ABUSED

238. *Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.*

The issues of ownership and control are not very relevant for investors in debt and derivatives products. Therefore, the information to be given in a prospectus on these topics should be scarce and be limited to "legal" ownership and control. It should not be expanded to "de facto". A description of a de facto control would complicate the drafting of the prospectus further without any benefit for the investors of debt and derivatives products. Thus any recommendation on ownership and control should state that only "legal" ownership and control should be described but not any "de facto". Furthermore, legal ownership and control should be defined. We suggest the following definition: "Legal ownership means owning more than 50% of the voting rights" and "Legal control means the existence of a domination agreement".

The recommendations given in no. 237 as to the non-abuse of control are not clear (maybe some words are missing or got misplaced?). Besides this, we think one should not request information on transactions and relationships because the Regulation in Annex IV on purpose does not require a disclosure of related party transactions for debt and derivative securities (unlike in Annex I for shares). If the requirements of no. 237 stayed as they are, the purpose of the lower requirements in Annex IV regarding no disclosure of related party transactions as opposed to Annex I would be completely reversed and defeated. Therefore, the recommendations contained in no. 237 should be deleted entirely (at least to the extent debt and derivative securities are concerned).

239. *Do you think other information is needed to clarify the nature of control or mechanisms in place to avoid control being abused? Please state your reasons.*

Yes. We think other information is needed. The information to be given should be limited to "legal" ownership and control. For the reasons and a suggestion for a definition see our answer in no. 238.

2g LEGAL AND ARBITRATION PROCEEDINGS

247. *Do you agree with the level of detail being provided? If not, please state your reasons.*
248. *Do you agree with the proposed recommendations? If not, please state your reasons.*

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

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

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

2m MATERIAL CONTRACTS

274. *Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.*

The recommendations contained in no. 273.a)-c) are useful.

The recommendation contained in no. 273.d) ("key terms and conditions") does not seem necessary because this should be covered already by no. 273c) ("object of the contract") and because it is unclear what is meant by "key". One should avoid using any vague term. The more concise the more helpful is level 3. Otherwise it adds only to other vague terminology used in level 1 and 2.

The recommendation contained in no. 273.e) ("amount of any consideration paid") should be deleted because the amount of the consideration is often an information which is not intended to be given to the public by the contracting parties.

In addition, we would like to mention that the recommendations contained in no. 273 do not take into account that the Prospectus Regulation on purpose provides for a different level of disclosure on material contracts in item 22 of Annex I (RD for Shares) and item 15 of Annex IV (Debt and derivative securities RD) depending on the kind of security, i.e. debt and derivative securities needing only a "brief" summary. In order to take into account of such distinction, the recommendations of no. 273 should apply only to shares, whereby (as outlined before) no. 273d) and e) should not apply to any kind of security but should be deleted.

Furthermore, we suggest to insert guidance on the term "material" contracts. A recommended interpretation could be "material with respect to the performance of the security to which the prospectus relates". The reason for this is that the purpose of a prospectus is not to provide a due diligence report relating to the entire business of the issuer but only to inform the investor about the nature and the major risks of his investments. Accordingly, it should be enough if any risk resulting from such a contract is described in the prospectus. At least this should be true for derivative instruments where the investor is much more interested in the investment, its structure and terms and conditions as in the issuer itself.

2n STATEMENTS BY EXPERTS

280. *Do you agree with the usefulness of the proposed recommendations and with the level of detail being provided? If not, please state your reasons.*

We think that the recommendation for "material interest in the issuer" should be more concise. For instance, the words "among others" should be deleted so that the list of items being considered as a "material interest" is conclusive. Furthermore, a threshold of the ownership of securities should be inserted in a) (e.g. 5%) and it should be stated that this applies only if the ownership is known to the issuer. Furthermore, it should be specified what is meant with "related" in d). In addition, any recommendation on "material interest" should be limited to the present situation and not be extended to the past. Therefore, an employee relationship as set forth in b) should be mentioned only if it is a current employee relationship and not a former one. In addition, only options currently held should be mentioned under a) and not also options which have been granted in the past and have been exercised already.

Besides this, we are of the opinion that an expert can only be a third party not belonging to the issuer. Therefore, an employee cannot and should not be mentioned as an expert. Accordingly, we would like to have b) deleted and to have expressly stated " that an expert can only be a third party not belonging to the issuer" to avoid misunderstandings.

Furthermore, the recommendations should contain the following text: "If the issuer has received the information on a material interest from a third party, it shall state the source." This text should avoid that an investor reading the prospectus interprets the information as an information as to which the issuer has done its own due diligence and avoids that the issuer is held liable for the information if it is not correct.

Finally, the issuer should only be required to disclose information that it has knowledge of since the experts are third parties.

281. *Are there other circumstances that would qualify as "material interest" in the issuer? Which ones?*

No, there are no other circumstances that would qualify as "material interest".

2p INTERESTS OF NATURAL AND LEGAL PERSONS INVOLVED IN THE ISSUE/OFFER

295. *Do you agree with the level of detail provided for? If not, please provide reasons for your answer.*

Recommendation no. 294 is too broad and exceeds the requirements set forth in level 2. The only circumstances about another person's interest in the issuer or the offer which investors should be concerned about is if those persons are making experts' statements in the prospectus. Accordingly, the recommendations should be restricted to such statements.

If the foregoing approach were not followed, it should at least be clearly spelt out that legal advisors or advertising agencies are not considered to have any "interest that is material to the issue/offer", unless they receive a contingent fee which is wholly dependent upon the success of the issue/offer. This would reflect what had been agreed in the level 2 consultation process. To avoid any ambiguities on level 3, such an additional wording seems necessary.

Similar to our answer to question 280, we think that the recommendations for 2p (interests of other persons) should contain the following text: "If the issuer has received the information from a third party, it shall state the source." This text should avoid that an investor reading the prospectus interprets the information as an information as to which the issuer has done its own due diligence and avoids that the issuer is held liable for the information if it is not correct.

296. *Do you agree with the proposed recommendations? If not, please state your reasons.*

Please see for the recommended changes our answer to question 295.

3. RECOMMENDATIONS ON ISSUES NOT RELATED TO THE SCHEDULES

3b IDENTIFICATION OF THE COMPETENT AUTHORITY FOR THE APPROVAL OF BASE PROSPECTUSES COMPILED IN A SINGLE DOCUMENT AND BASE PROSPECTUS COMPRISING DIFFERENT SECURITIES

328. *Do you agree with the proposed recommendations for the base prospectus relating to different securities? If not, please state your reasons.*

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

329. *Do you agree with the proposed recommendations for the single document compiling more than one base prospectus? If not, please state your reasons.*

We do not agree with the proposed recommendations (324-327) for the single document compiling more than one base prospectus. These recommendations contradict Recital 27 of the Regulation. Recital 27 of the Regulation clearly provides that all base prospectuses should be approved by "only one" competent authority. In contrast thereto, the recommendation no. 324 states that each base prospectus requires an approval by "its" competent authority. In addition, if the recommendations set forth in nos. 325-327 were used, a multi-issuer programme would become much more complicated and unforeseeable as it currently is because one would have to talk to each competent authority and discuss with it whether it will accept a transfer to another competent authority. These disadvantages to the issuer are not outweighed by any benefit to the investor arising from this procedure because there is no benefit to the investor under this procedure. We recommend that no. 325 spells out explicitly that a transfer is appropriate in the event of a multi-issuer programme. No. 325 should thus read as follows:

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

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

Furthermore, we recommend to state that a transfer to a competent authority of a Member State is valid until the issuer applies for and has been granted a transfer to another Member State. The issuer should not have to make an application for a transfer each year because this would be unnecessarily onerous for the issuer without giving any benefit to the investor. However, the transfer should not be permanent since circumstances might change in the future.

**3c CONTENT OF A DISCLAIMER WHEN PROSPECTUS IS
PUBLISHED IN AN ELECTRONIC FORMAT**

333. *Do you agree with the proposed recommendations? If not, please state your reasons.*

Disclaimers or legends should not be required or "expected to be included" but should simply be permitted. A requirement would be beyond the scope of levels 1 and 2.

If CESR nevertheless decides to retain the wording "expected to include a disclaimer" and to give recommendations as to the context of such a disclaimer the following should be observed:

In recommendation 323(a) the words "of specified jurisdictions" should be deleted because it is often impossible for an issuer to specify in advance all the jurisdictions in which an offer will be made. Often one starts with an offer in a few jurisdictions but adds more jurisdictions at a later stage if the offering in the initial jurisdictions has not resulted in sufficient orders. The only aspect CESR should be concerned about is that any offer which is made, is made in accordance with the laws of the jurisdiction in which an offer occurs.

Recommendation no. 332(b) should be deleted entirely. First, the words "the securities will not be transferred or sold .. in any other jurisdiction" is misleading because the issuer or offeror cannot control any sale or transfer if the securities are bearer securities (which most securities –at least in Germany- are) and if the sale or transfer is carried out via another bank, the exchange or electronically. The proposed wording of CESR rather reads like a representation (that such transfers will not take place) rather than a disclaimer and would raise wrong expectations which might even lead to a liability of the issuer/offeror. Second, the words "the securities will not be offered .. in any other jurisdiction" is wrong if the offer falls under an exemption of Article 3 of the Directive.

Thus, if a disclaimer "is expected to be included" it should be permitted to be drafted by the issuer as deemed appropriate by itself.