

Comments

Submitted by HeidelbergCement AG

Concerning

ESMA's Consultation Paper dated 1 October 2012 for further amendments to ESMA's Recommendations for the consistent implementation of the Prospectus Regulation regarding mineral companies (reference 2012/607).

1. Introduction

- 1.1 In March 2011 ESMA updated and revised Articles 131-133 of the Recommendations which address the information that should be disclosed by mineral companies in prospectuses. ESMA's update of these provisions represented a significant reform for this area, harmonizing mineral reserves and resources disclosure in prospectuses drawn up in accordance with the prospectus directive for the first time.
- 1.2 Since the new Recommendations were adopted in March 2011, the definition of "mineral companies" has been interpreted as potentially including in scope also large, diversified mineral companies such as cement companies. As a consequence of this interpretation HeidelbergCement, in collaboration with other European cement producers, submitted a Position Paper to ESMA in September 2011 arguing such an approach to be inappropriate and disproportionate whilst not contributing to an effective investor protection. Following a hearing at ESMA with HeidelbergCement and other European cement producers on 10 November 2011 ESMA has published its open letter dated 6 January 2012 to cement companies exempting them on an interim basis from the obligations detailed in Articles 132 and 133 of the Recommendations.
- 1.3 With the Consultation Paper dated 1 October 2012 ESMA intends, amongst other things, to permanently implement the findings gained in the conversations with the cement industry (and documented in the open letter dated 6 January 2012) into the Recommendations. HeidelbergCement appreciates the opportunity given to submit comments on these proposals for amendments in the context of the consultation procedure.
- 1.4 HeidelbergCement expressly welcomes ESMA's intentions and largely agrees with the statements in the Consultation Paper and the derived proposals thereof for the adaptation of the Recommendations. This concerns in particular the envisaged specifications on the materiality test.
- 1.5 HeidelbergCement, however, holds the opinion that in order to prevent misinterpretations while applying the Recommendations in the future, further modifications should be made selectively. Therefore, HeidelbergCement will comment on each question of the Consultation Paper hereafter and, if necessary, submit wording proposals which shall clarify its comments.

2. Question 1 – Should the NAEN code be added to the list in Appendix I of the Recommendations of mining reporting codes suitable for use in prospectuses?

- 2.1 Adding the NAEN Code to Appendix I is being welcomed. After the NAEN code was adapted to the CRIRSCO template, a comparability of the reports that are prepared in accordance with the different Codes is ensured. The addition of the NAEN Code enables companies, which intend to publish a prospectus at a stock exchange within the EU, to report on their material mineral projects in Russia and, if necessary, in neighbouring countries according to the NAEN Code. Thus, an additional reporting according to another Code (e. g. PERC) only for the purpose of a prospectus is not required.
- 2.2 HeidelbergCement would like to point out that an issuer having material mineral projects in several regions of the world, shall be allowed to prepare its reporting on reserves and resources as well as its Competent Person's Reports ("CPR") according to one or more applicable Code(s) in accordance with Appendix I of the respective region(s) in which the material mineral project is situated. This possibility that raw material reserves disclosures were prepared in a prospectus according to various different Codes, all listed in Appendix I, might not be made sufficiently clear in Article 133(i)(c) and 133(ii)(b), when stated „in accordance with one of the reporting standards“. Thus, HeidelbergCement suggests the wording to be modified (see below under point 7. Annex):

3. Question 2 – Do you agree with ESMA's proposed Recommendations on how the materiality of the mineral projects should be assessed?

- 3.1 As already explained at the beginning, HeidelbergCement supports the suggested amendments and specifications for the materiality test in Article 131(c). Notwithstanding, HeidelbergCement has the following comments in this respect:
- 3.2 The clarification in the first paragraph of Article 133(c) indicating that for an assessment of the materiality, an investor's point of view is crucial is absolutely consistent with HeidelbergCement's conception and corresponds with the arguments set out in the Position Paper of September 2011. However, it should also be made clear that the benchmark for this materiality test cannot be an investor who expects, prior to his investment decision, not only significant but also any and every insignificant or immaterial piece of information to be disclosed. It should rather include reference to a "typical" or "reasonable" investor. HeidelbergCement proposes a modified wording for this (see below under point 7. Annex).
- 3.3 In Article 133(c) Paragraph 2, two rebuttable presumptions are set out, which if applicable assume that an issuer has material mineral projects. Here it is striking that the first presumption is already fulfilled when the mineral extraction is done solely with the purpose of reselling (i.e. without any processing), disregarding in this case that in addition, there is also an "uncertainty" about the existence, etc. of the raw materials. Whereas this "uncertainty" is part of the requirements of the second presumption. These differing requirements are contradictory to the explanations given in paragraph 14 on page 9 of the Consultation Paper. For this differentiation, there is no objective justification, so that the uncertainty criterion should apply for both rebuttable

presumptions. HeidelbergCement submits a proposal for the wording on this (see below under point 7. Annex).

- 3.4 In the second rebuttable presumption of Article 133(c) Paragraph 2 it should be made clear that this presumption comprises all cases in which the exploited mineral is determined as input for *one or several* industrial production processes, however, without the requirement that these industrial production processes must be carried out up to the end product for the consumer. For example: the materiality of a mineral project "iron ore extraction" will be assessed by the second presumption, in case that pig iron will be melted in an industrial production process (in a blast furnace) of the issuer. That fact that the pig iron will not be further processed by the issuer but by another company into steel and then into a car, does not result in the materiality of the iron ore extraction project being assessed by the first presumption. HeidelbergCement submits wording suggestions for the purpose of clarification (see below under point 7. Annex).
- 3.5 The rebuttable presumptions in Article 133(c) Paragraph 2 presume that, among others, an „uncertainty“ exists, however, without a clarification how the existence of such „uncertainty“ should be proved to the respective regulator that is to decide on the admittance of a capital market prospectus. Whether an „uncertainty“ exist or not, depends in the end on a probability assessment. The Recommendations, however, neither reveal the criteria nor the person that are crucial for such an assessment. Therefore, difficulties are suspected while applying the Recommendations. On no account it can be accepted that a "kind of CPR" must be prepared in order to be able to prove that one does not have material mineral projects and accordingly, no independent CPR is required. HeidelbergCement is of the opinion that the question of "uncertainty" has to be answered by a traceable self-assessment of the issuer that enables the regulator to decide whether or not the presumptions have been properly applied. A wording proposal is submitted (see below under point 7. Annex).
- 3.6 In paragraph 14 on page 9 of the Consultation Paper ESMA declares:

"It is not necessary for an informed assessment of the prospects of these particular companies because they are large, highly diversified and exploit mineral resources that are, relative to other types of minerals that are exploited, low-cost and abundant. The uncertainty, as to either the existence of the resources in economic quantities or the technical feasibility of its economic recovery that is characteristic of companies like oil exploration and production companies, and which is the ultimate reason why reserves and resources reporting occurs, does exist also in these companies, but only to a far lesser degree. Therefore, EMSA accepts that, in the case of these particular companies, evaluation of their mineral reserves and resources is insufficiently salient for its inclusion to be necessary for an investor's informed assessment of the company."

Unfortunately, this substantial finding of ESMA that HeidelbergCement is absolutely supporting, however, is explicitly not being incorporated into the suggestions for the amendments of the Recommendations. HeidelbergCement proposes that besides the two rebuttable presumptions included in Article 131(c) Paragraph 2 for the existence of material mineral projects, also a rebuttable assumption for the non-existence of mineral material projects at companies with a business model described in paragraph 14 should be adopted. A wording proposal is submitted (see below under point 7. Annex).

3.7 The last sentence of Article 131(c) reads as follows:

“The materiality of mineral projects should be assessed having regard to all the company’s mineral projects relative to the issuer and its group taken as a whole.”

The decisive reference for the assessment of the Materiality of a mineral project is the issuer’s group (being the issuer and all of its subsidiaries) as a whole. Thus, the very same mineral project can be deemed *material* in case it belongs to a small-sized company, whereas in case it belongs to a large group, it may very well be deemed *non-material*. The application of such a reference is expressly supported by HeidelbergCement.

In the revised Recommendations, however, it is not sufficiently reflected that in case an issuer has material mineral projects, this does not mean on any account that the general information requested in Art. 132 and, if necessary, independent CPRs are only required for those mineral projects which, on applying this criteria, are deemed material (whereas for all non-material mineral projects neither the information pursuant to Art. 132 nor independent CPRs are necessary). Such ambiguities were already pointed out in the Position Paper of September 2011. During the hearing on 10 November 2011, it was assured by ESMA representatives that the Recommendations for mineral companies are by no means to be understood insofar as that for *all* mineral projects, *independent* of its materiality, the respective information and reports are requested in the prospectus. In order to prevent such difficulties in future while applying the Recommendations, appropriate wording proposals are submitted (see below under point 7. Annex).

4. Questions 3 and 4

Q3 Do you agree with the proposed approach to generally exempt non-equity securities from the requirement to produce a competent person’s report?

Q4 Do you agree with our proposed revision of the Article 133(ii) exemption regime?

4.1 The differentiated approach according to which non-equity securities require only general information pursuant to Article 132 in the prospectus, whereas equity securities also require a CPR, is, based on the varying objective of equity investors and non-equity investors, as described by ESMA, correct and appropriate. Therefore, the proposal in Q3 is expressly supported.

4.2 Furthermore, it is appreciated that a company that falls into the scope of Articles 131 to 133 only with the introduction of the materiality test by the March 2011 update of the Recommendations and that in the past had no reason to implement a Code conform reporting on raw materials or to prepare CPRs, henceforth receives the possibility to be exempted, under certain pre-requisites (= introduction of internal raw material reporting according to the Codes in Appendix I and regular publishing of these reporting results over a feasible period of at least three years) from the necessity of an independent, external CPR. The addressed proposals to Article 133(ii) in Q4 are therefore supported.

5. Questions 5, 6 and 7

Q5 Do you agree with the proposal to replace the term “equivalent overseas market” with the definition of “equivalent” third country market?

Q6 Do you agree with the proposal to apply the same equivalence assessment regime for third country markets as in Article 4.1 e) of the amended PD?

Q7 Do you agree with the proposal to replace the term “appropriate multi-lateral trading facility” with a definition based on the new Article 26a of the Prospectus Regulation?

5.1 The proposed amendments serve as a harmonization of the terminology, which is generally appreciated.

6. Questions 8 and 9

Q8 Do you agree with the proposed amendments to Article 133(i)(d) and Appendices II and III?

Q9 Do you agree with the proposed clarification for on-site inspections?

6.1 HeidelbergCement appreciates that ESMA intends to clarify that the possible contents of a CPR that are listed in Appendix II are merely to be understood as a non-binding recommendation but not as an obligation for a complete execution. In this respect, the proposed amendments to article 133(i)(d) and Appendix II – with one exception (see 6.3) – are supported.

6.2 HeidelbergCement, however, holds the opinion that there are still three points in Appendix II which should be clarified:

6.2.1 The wording in Article 133(i)(d) “*mineral projects segmented using a unit of account appropriate to the scale of its operations*” and the proposed clarification in Appendix II, that on-site inspections are not mandatory in each case, clearly shows that it is not necessary to have a complete stand-alone CPR for each mineral project prepared by an independent external Competent Person and that, in the view of a reasonable investor, it shall be sufficient to have an independent Competent Person, like a certified auditor, to review and audit the existing CPRs prepared by in-house competent persons.

6.2.2 In Appendix II it should also be clarified that the scope of the independent CPR should depend on an informed investor’s reasonable expectations of such a report.

6.2.3 The valuation of raw material reserves addressed in Appendix II Paragraph iv) entails substantial efforts and costs which go far beyond the evaluation of the quantities of raw material reserves and resources according to the respective Codes (e.g. PERC). Especially with mineral resources which compared to other minerals are low-cost and abundant and with which the value added is created by far predominantly in the subsequent industrial production processes (processing), there is usually in the

investor's point of view no necessity for a valuation of the mineral resources. In Appendix II it should therefore be clarified that in cases of such low-cost and abundant minerals an explicit valuation can be omitted on a regular basis.

- 6.2.4 To address the aforementioned clarifications and modifications suggested under 6.2.1 to 6.2.3 wording proposals will be submitted (see below under point 7. Annex).
- 6.3 Finally, ESMA suggests adding the wording "*segmented using a unit of account appropriate to the scale of operations of the issuer*" with regard to "*Historic Production/Expenditures*" in Appendix II Paragraph vi). This addition, however, could be misinterpreted in the sense that an aggregation of various material mineral projects would be acceptable only in this section of a CPR, however, not in the other sections pursuant to Appendix II Paragraphs i) to v) and vii) to ix). This, however, would contradict with Article 133(i)(d) which enables an aggregation of various material mineral projects in one entire CPR. Since the wording "*segmented using a unit of account appropriate to the scale of its operations*" used in Article 133(i)(d) refers to the entire Appendix II, the suggested addition of Appendix II Paragraph vi) is not necessary and thus might lead to the described misunderstandings. Therefore, this addition should be omitted (see below under point 7. Annex).

7. Annex

In the remarks of the aforementioned paragraphs 3 and 6 of this statement, several wording proposals were announced, which will be described hereafter. For ease of comparison with the suggested revised version of the Recommendations set out in the Consultation Paper under Annex III, the **changes proposed by HeidelbergCement** as compared to ESMA's now suggested text will be shown underlined (regarding new text passages) and shown in strike through (regarding to be deleted text passages).

1b MINERAL COMPANIES

131. Considering the specific features of minerals and Article 23 of the Regulation, ESMA proposes that mineral companies, when preparing a prospectus for a public offer or admission to trading of equity securities, debt securities with a denomination of less than EUR 100,000, depository receipts issued over shares with a denomination of less than EUR 100,000 or derivative securities with a denomination of less than EUR 100,000, should include the information set out in paragraphs 132-133.

For the purposes of these recommendations:

- a) 'mineral companies' means companies with material mineral projects.
- b) 'mineral projects' means exploration, development, planning or production activities (including royalty interests) in respect of minerals including: metallic ore including processed ores such as concentrates and tailings; industrial minerals (otherwise known as non-metallic minerals) including stone such as construction aggregates, fertilisers, abrasives, and insulants; gemstones; hydro-carbons including crude oil, natural gas (whether the hydrocarbon is extracted from conventional or unconventional reservoirs, the latter to include oil shales, oil sands, gas shales and coal bed methane), oil shales; and solid fuels including coal and peat.
- c) Materiality should be assessed from an investor point of view: such projects will be material where evaluation of the resources (and, where applicable, the reserves and/or exploration results) the projects seek to exploit is necessary to enable reasonable investors to make an informed assessment of prospects of the issuer.

Evaluation of mineral projects is presumed to be necessary for an informed assessment of the prospects of the issuer in a number of instances:

- where the projects seek to extract minerals for their re-sale value as commodities and there exists uncertainty (according to the traceable self-assessment of the issuer) as to either the existence of the resources in the quantities required or the technical feasibility of their recovery;
- where the minerals are extracted to supply (without re-sale to third parties) an input into ~~an~~ one or more industrial production processes (not necessarily up to the end-product) and there exists uncertainty (according to the traceable self-assessment of the issuer) as to either the existence of the resources in the quantities required or the technical feasibility of their recovery.

Evaluation of mineral projects is presumed to be not necessary for an informed assessment of the prospects of the issuer

- where the business model of the issuer is characterised by a broad variety of mineral projects related to construction materials such as limestone and aggregates.

The materiality of mineral projects should be assessed having regard to all the company's mineral projects relative to the issuer and its group taken as a whole.

d) 'appropriate multi-lateral trading facility' means a multi-lateral trading facility with rules as set out in Article 26a(2)(a)-(c) of Regulation (EC) No 809/2004 as amended by Art 1(13) of Regulation (EU) No 486/2012.

e) 'equivalent third country market' means a third country market which has been recognised by the Commission as equivalent in accordance with Article 4.1 e) of Directive 2003/71/EC as amended by Directive 2010/73/EC (Prospectus Directive).

132. All prospectuses within the scope set out in paragraph 131 by mineral companies should include the following up to date information about the respective material mineral projects segmented using a unit of account appropriate to the scale of its operations:

- a) details of mineral resources, and where applicable reserves (presented separately) and exploration results/prospects in accordance with one of the reporting standards that is acceptable under the codes and/or organisations set out in Appendix I;
- b) anticipated mine life and exploration potential or similar duration of commercial activity in extracting reserves;
- c) an indication of duration and main terms of any licenses or concessions and legal, economic and environmental conditions for exploring and developing those licenses or concessions;
- d) indications of the current and anticipated progress of mineral exploration and/or extraction and processing including a discussion of the accessibility of the deposit;
- e) an explanation of any exceptional factors that have influenced (a) to (d) above;

If the transaction the prospectus describes includes the acquisition of a mineral company or of reserves and/or resources and the acquisition (or acquisitions in aggregate) constitutes a significant gross change (as defined in the 9th Recital of Regulation EC 809/2004 and in item 6 of Article 4a of Regulation EC 211/2007) then the issuer should in addition include the information above on the assets being required. The new assets should be clearly segmented from the existing assets.

If information is included pursuant to this paragraph and it is inconsistent with corresponding information already put into the public domain by the issuer, the inconsistency should be explained in the prospectus.

133. i). In addition, all prospectuses for a public offer or admission to trading of equity securities, and depositary receipts issued over shares with a denomination per unit of less than EUR 100,000 by mineral companies within the scope set out in paragraph 131 should (except where the exemption in paragraph 133(ii) applies) contain a competent person's report about the respective material mineral projects which should:

a) be prepared by an individual who:

i) either:

(1) possesses the required competency requirements as prescribed by the relevant codes/organisation (listed in Appendix I); or

(2) if such requirements are not prescribed by the code/organisation, then:

(a) is professionally qualified and a member in good standing of an appropriate recognised professional association, institution or body relevant to the activity being undertaken, and who is subject to the enforceable rules of conduct;

(b) has at least five years' relevant professional experience in the estimation, assessment and evaluation of the type of mineral or fluid deposit being or to be exploited by the company and to the activity which that person is undertaking; and

ii) is independent of the company, its directors, senior management and its other advisers; has no economic or beneficial interest (present or contingent) in the company or in any of the mineral assets being evaluated and is not remunerated by way of a fee that is linked to the admission or value of the issuer;

- b) be dated not more than 6 months from the date of the prospectus provided the issuer affirms in the prospectus that no material changes have occurred since the date of the competent person's report the omission of which would make the competent person's report misleading;
- c) report mineral resources and where applicable reserves and exploration results/prospects in accordance with one or more of the reporting standards that is acceptable under the codes and/or organisations set out in Appendix I;
- d) contain as a minimum the following information on the company's material mineral projects segmented using a unit of account appropriate to the scale of its operations and prepared:
 - i) in the case of a company with mining projects – as set out in having regard to Appendix II;
 - ii) in the case of a company with oil and gas projects – as set out in having regard to Appendix III;

133.ii) An issuer is exempt from including the competent person's report required by paragraph 133(i) if the issuer can demonstrate that:

- a) its equity securities are already admitted to trading on either a regulated market, an equivalent third country market, or an appropriate multi-lateral trading facility; and
- b) it has reported and published annually details of its mineral resources and where applicable reserves (presented separately) and exploration results/prospects in accordance with one or more of the reporting standards set out in Appendix I for at least the last three years.

If an issuer has not reported on three financial years since its equity securities were admitted to trading and it is admitted to trading on a regulated market or an equivalent third country market then the condition in paragraph 133(ii)(b) will be deemed to be met if it has met the criteria in paragraph 133(ii)(b) for each annual reporting period since first admission of its equity securities.

If an issuer has not reported on three financial years since its equity securities were admitted to trading and it is admitted to trading on an appropriate multi-lateral trading facility, then the condition in paragraph 133(ii)(b) will be deemed to be met if:

- it published in connection with its admission a competent person's report by a suitably qualified and experienced independent expert which measured its mineral resources and, where applicable, reserves (presented separately) and exploration results/prospects; and
- it has reported and published annually details of its mineral resources and where applicable reserves (presented separately) and exploration results/prospects in accordance with one of the reporting standards set out in Appendix I for each annual reporting period since the first admission to trading.

If annual reporting of all classes of mineral resources and where applicable reserves and exploration results/prospects has not been possible because it has been prohibited by third country securities laws or regulations then the condition in paragraph 133(ii)(c) (b) can be deemed to be met by the annual reporting of those classes that can be reported.

133.iii). Information on mineral resources and where applicable reserves and exploration results/prospects as well as other information of a scientific or technical nature included in prospectuses outside of the competent person's report (if one is included) must not be inconsistent with the information contained in the competent person's report.

133.iv). Information required by any of these recommendations may be omitted if disclosure is prohibited by third country securities laws or regulations provided the issuer identifies the information omitted and laws/regulations that prohibit disclosure.

APPENDIX I

[...]

APPENDIX II - Mining Competent Person's Report – recommended content

~~CESR ESMA~~ recommends that competent persons should provide competent person's reports structured in accordance with either the model content recommended under the code, statute or regulation the company is reporting under (see Appendix I) or, where there no such model content is set out in the code, ~~CESR ESMA~~ recommends the competent person should address the information set out in this appendix. The independent competent person may also review and audit, like a certified auditor, (potentially supported by at-random checks of individual material mineral projects) internal reports of the issuer prepared by in-house competent persons. The competent person may, with the agreement of the relevant member state's competent authority, adapt these contents where appropriate for the circumstances of the issuer and where necessary to enable reasonable investors to make an informed assessment of prospects of the issuer.

i) Legal and Geological Overview – a description of:

- (1) the nature and extent of the company's rights of exploration and extraction and a description of the properties to which the rights attach, with details of the duration and other principal terms and conditions of these rights including environmental obligations, and any necessary licences and consents including planning permission;
- (2) any other material terms and conditions of exploration and extraction including host government rights and arrangements with partner companies;

ii) Geological Overview – a description of the geological characteristics of the properties, the type of deposit, its physical characteristics, style of mineralisation, including a discussion of any material geotechnical, hydro-geological/hydrological and geotechnical engineering issues;

iii) Resources and reserves

- (1) a table providing data on (to the extent applicable): exploration results inclusive of commentary on the quantity and quality of this, inferred, indicated/measured resources, and proved/probable reserves and a statement regarding the internationally recognised reporting standard used;
- (2) a description of the process followed by the competent person in arriving at the published statements and a statement indicating whether the competent person has audited and reproduced the statements, what additional modifications have been included, or whether the authors have reverted to a fundamental re-calculation;
- (3) a statement as to whether mineral resources are reported inclusive or exclusive of reserves;
- (4) supporting assumptions used in ensuring that mineral resource statements are deemed to be 'potentially economically mineable';
- (5) supporting assumptions including commodity prices, operating cost assumptions and other modifying factors used to derive reserve statements;
- (6) reconciliations between the proposed and last historic statement;
- (7) a statement of when and for how long a competent person last visited the properties (or a statement that no visit has been made if that is the case);
- (8) for proved and probable reserves (if any) a discussion of the assumed:
 - (a) mining method, metallurgical processes and production forecast;
 - (b) markets for the company's production and commodity price forecasts;
 - (c) mine life;
 - (d) capital and operating cost estimates;

iv) Valuation of reserves (or a statement that no valuation has to be made to enable reasonable investors to make an informed assessment of prospects of the issuer, e. g. because of the minerals being low-cost and abundant) – taking consideration of internationally recognised valuation codes as set out in Appendix I a valuation of reserves comprising:

- (1) an estimate of net present value (or a valuation arrived at on an alternative basis, with an explanation of the basis and of the reasons for adopting it) of reserves;
- (2) the principal assumptions on which the valuation of proved and probable reserves is based including those relating to discount factors, commodity prices, exchange rates, realised prices, local fiscal terms and other key economic parameters;
- (3) information to demonstrate the sensitivity to changes in the principal assumptions;

v) Environmental, Social and Facilities – an assessment of

- (1) environmental closure liabilities inclusive of biophysical and social aspects, including (if appropriate) specific assumptions regarding sale of equipment and/or recovery of commodities on closure, separately identified;
- (2) environmental permits and their status including where areas of material non-compliance occur;
- (3) commentary on facilities which are of material significance;

vi) Historic Production/Expenditures – an appropriate selection of historic production statistics and operating expenditures over a minimum of a three year period ~~segmented using a unit of account appropriate to the scale of operations of the issuer;~~

vii) Infrastructure – a discussion of location and accessibility of the properties, availability of power, water, tailings storage facilities, human resources, occupational health and safety;

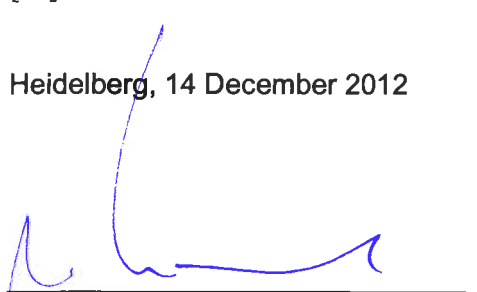
viii) Maps etc – maps, plans and diagrams showing material details featured in the text; and

ix) Special factors – if applicable a statement setting out any additional information required for a proper appraisal of any special factors affecting the exploration or extraction businesses of the company (for example in the polar regions where seasonality is a special factor).

APPENDIX III

[...]

Heidelberg, 14 December 2012



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Heiner Rohr
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