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COMMENTS CESR SECOND CONSULTATION
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We would like to thank CESR for the extensive explanations and opportunity to comment again on CESR proposed technical advice. Our comments are exclusively related to equity disclosure requirements. We note that CESR has taken quite a number of comments from different respondents on board. Notably, we are happy to see a clear statement as to the voluntary inclusion of profit forecasts. However, other important comments remain unsolved in our opinion.

Liability Regime

Although the CESR feedback paper of April (par. 27) states that the liability regime has been adapted to article 6 of the proposed Directive, we still believe that this is not completely accurate since the text of the Directive refers to natural or legal persons where CESR proposed text (e.g. Annex 4) refers to natural and legal persons.

Risk Factors

CESR feedback paper states that a large number of respondents agreed with the approach undertaken by CESR. We appreciate that the risk factors are much clearer in relation to the fact that the Registration Document should only refer to risks related to the industry and the issuer and the Securities Note risks related to the securities to be offered.

However, we wish to re-emphasize our previous comments in respect to the possibility of including risk factors in a Registration Document that may not be used for an offering. As underwriters, we are concerned about the obligation for issuers to provide a detailed disclosure of risk factors in a Registration Document that is just being filed with the competent authority and not subject to a due diligence process. If such document is subsequently used as an offering document, a due diligence process will be required, in particular in relation to the risk factors. This can entail a difficult situation for the issuer if the underwriters feel that the previous disclosure on risk factors is not appropriate for an offering. Furthermore, it can mislead investors that read an electronically filed Registration Document that is not regularly updated (only once a year).

Even if, as clarified during the second hearing, the securities note can update the risk factors, we wonder if the issuer may not be subject to liability from investors, if the securities note reveals a fundamental different approach to risk factors compared to those disclosed under a Registration Document.

We therefore would like to recommend again that CESR clarify that the disclosure of the risk factors in the Registration Document is limited to the cases where such document is published at the time and for the purpose of an offering.

Accounting Standards and Pro Forma Statements

We think it is essential that both CESR and the Commission further clarify the applicability of IAS and in general EU rules to non-EU issuers. It is our view that:

- According to the IAS Regulation (article 4) IAS only applies to companies resident in the EU and with securities traded in an EU regulated market. However, national EU countries may decide to require non-EU issuers to use IAS, although this is highly improbable at least before 2005.

- Non-EU issuers can choose to apply the full EU disclosure standards or use their local standards depending on an equivalence test as established in article 20 of the Prospectus Directive. This equivalence test also includes "information of a financial nature". As announced in the latest consultation paper CESR is expected to issue technical advice by December 2003 regarding the treatment of 3rd countries' issuers. We very much favour the use of comitology measures in this respect to allow for a uniform application of the Directive preventing therefore that national countries impose distinctive requirements to non-EU issuers.
- CESR consultation document explicitly states (see for example Annex 4) that the financial information can be prepared according to IAS Regulation or if not applicable to local GAAP. In our view, local GAAP can mean also for example US GAAP.
- Furthermore, CESR consultation document explicitly provides (item 20.4 in Annex 4) for a proviso for issuers not incorporated in an EU Member State in relation to "true and fair view" of the issuers' assets and liabilities.

Although we understand that it is not CESR's role to interpret current legislation, we would very much welcome some guidance in this respect.

Furthermore, in relation to pro forma statements we wonder whether it is the view of CESR that the historicals of the target company will need to be formally reconciled to the issuer's GAAP for purposes of the pro forma statements or whether restatement/reclassification to fit the issuers' financial presentation, including the necessary clarification footnotes would suffice.

We would also like to reiterate our comments during the first consultation in relation to the need to add to item 5 in Annex B the following sentence (extract of paragraph 59 of CESR first consultation document) "*when the previously published information is not directly applicable, pro forma financial information may be based on other than published information, in order to provide investors with the best understanding of the new company(ies*)".

Other detailed comments on Annex 4

- In relation to principal markets (**item 6.2**) we think it is necessary to add "if possible" (as for example in the case of item 17.1) since breakdown by activity and geographic market is not always possible depending on the issuer's financial reporting system.
- Under **item 11**, patents and licences not covered in the item but are mentioned in title, although they are covered in item 6.4.
- Under **item 22**, we think it will be clearer if the item (first paragraph) will read "to which the issuer or any member of the group has entered into in the two years immediately preceding publication of the prospectus.

Comments on Annex C

- **Item 4.11:** although we assume that this item only refers to "public offers" since otherwise there is no need to publish a prospectus, we would appreciate that the item reads "where the public offer is being made" and "taxes to be paid by the investors in connection with the public offer".
- **Item 5.1.3:** we seek clarification as to what is meant by "any possible amendments". We assume this is meant to inform the investor on amendments to the timetable.
- **Item 5.1.6:** we suggest to add "if any" since there may be situations where there is no limitation on the amount of the application.
- **Item 5.2.3 a) and b):** as already commented in our first submission, we believe that tranche sizes should be disclosed if they have been established but that there should not be an obligation to divide the offering in specific tranches. Thus, letter a) should in our opinion include "if any".
- **Item 5.3.1:** we seek clarification as what is meant by "formally responsible". In our view it will always be the issuer who bears ultimate responsibility for the issue price since the issuer is the owner of the data used for the valuation process. The current language suggests that there could be a person other than the issuer formally responsible for the determination of the offer price. Therefore, we suggest deleting "who has set the criteria or is formally responsible for its determination". This will be consistent, in our view, with CESR declared statements about the fact that the Prospectus Directive does not change national civil liability laws. In relation to the "indication of any expenses", as we have previously commented, it is not possible to provide such indication since each bank/broker will charge its own tariffs.

- **Item 5.4.1:** We believe that the term "placers" needs further clarification. Normally issuers will disclose the names of the various syndicate members. Adding selling group members is basically impossible since it may actually concern all brokers.
- **Item 6.3:** We assume that disclosure only needs to be made if the issue is an initiative of the issuer itself, otherwise this requirement is impossible to comply with.
- **Item 7.1:** We believe that the disclosure of addresses of selling shareholders who are natural persons may be in breach of privacy laws in certain countries and can actually endanger the personal security of private individuals. We believe that the name of those natural persons should suffice, as it is currently done.

Incorporation by reference

During the first public hearing we raised the point that we believed that the documents incorporated by reference could be previously or "simultaneously" published. An issuer could publish its prospectus and interim financial report on the same date and incorporate such interim report by reference into the prospectus (this was done for example in the December 2001 share issue of Royal KPN). This did not seem possible under the terms of the Directive (article 11.1) which requires that incorporation by reference could only be provided on previously published documents, which have been approved or filed. We were happy to hear that the CESR representative clarified that simultaneous publication was contemplated by CESR so long as the documents were filed with the competent authority and that that could happen at the same time. However, in the last consultation document, CESR seems to have deleted any reference to simultaneous publication that we regret.

In relation to paragraph 96 we think that it is necessary to change "not relevant' into "not relevant or covered elsewhere in the prospectus" in order to provide further clarity to the investor.

Availability of the prospectus

- **Paragraph 111:** we think that "ensuring" that documents in electronic format cannot be modified is materially impossible since even costly security measures (that will outweigh the benefits of electronic filing) will not be able to guarantee complete security. Instead, the requirement should be on a reasonable/best effort basis.
- **Paragraph 113:** in relation to the insertion of a disclaimer to ensure that ineligible investors do not subscribe, we believe that a disclaimer is not the means to achieve this. The disclaimer should make clear that the offer is only directed to certain investors in certain jurisdictions to the exclusions of others.
- **Paragraph 131:** directly linked to the issue of using disclaimers is of course the issue of selling restrictions. We believe that the mere posting of a prospectus documentation on the web site should not immediately be considered within the EU/EEA as an offer targeted to any investor in the EU. This will run against the benefits of allowing electronic filing. We would very much appreciate if CESR could propose specific guidance or a suggested standard warning statement within the EU so as the issuer can identify which EU/EEA territories it is targeting. Such guidance could provide issuers with the necessary legal certainty and will surely avoid the confusion that extensive disclaimers cause to investors.