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Stichting Autoriteit Financiële Markten
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Department
Legal & Compliance
Location
HD.02.02
Reference
0377hfBnm410

Subject
Consultation Paper June 2004

Date
18 October 2004

Dear Sirs, Madam,

As per the invitation of CESR delivered by the Autoriteit Financiële Markten, Amsterdam and following the meeting and open hearing in relation thereto, we are proud to present you with our reaction on the Consultation Paper dated June 2004.

Our consideration to the Consultation Paper are limited to the items referred to herein but may not be read as general qualification of the recommendations as a whole or to legitimacy of the recommendations as such. We believe that the recommendations could be helpful but lacking legal status, the use thereof should be done with care and due observance of the European level playing field.

We have understood that the conclusions of CESR on the consultation are not to be expected before the scheduled implementation of the directive in July 2005. This raises concern as because of the chosen timing the start of a new area will commence with at least one uncertainty. We therefore strongly advise to have the results public before July 2005

With reference to the Consultation Papers Index, this letter will report on chapter III, items 4,6 and 7, chapter IV, items 1a, 1c and 1e, item 2a, 2e and 2g. The numbering is according to the numbering in the Consultation Paper.

4. PROFIT FORECASTS OR ESTIMATES

50. Remarks:

- In paragraph 48 it is mentioned that the profit forecast is to be of profit before tax. The suggestion is to report on profit after tax or distributable profits, thereby requiring that issuers detail any non-recurring or extraordinary items.
- In paragraph 49 it is mentioned that there is a thin line between a profit forecast and trend information. Advice is to provide a clear distinction to provide both issuers and investors with clear guidance as to what to adhere to (issuer) and what to expect

(investor).

51. No examples required, as a clear description of what constitutes a profit forecast should be provided including a distinction versus trend information. For instance, providing a number of net profits, EBIT or EBITDA would constitute a profit forecast. Any disclosure of qualitative statement as 'higher' or 'lower' constitutes trend information.

6. PRO FORMA FINANCIAL INFORMATION

92. Any report on the pro forma financial information included in the prospectus should be provided by the independent auditor of the issuer. The independent auditor is best positioned to see whether the pro forma financial information is compiled on a basis consistent with accounting policies of the issuer and reporting guidelines. This also avoids potential surprises arising from the year-end audit.
98. Examples of indicators of size:
- Revenues
 - EBITDA
 - EBIT
 - EBT
 - Net profit
99. Should refer to IFRS figures, as this is relevant accounting standard going forward. Therefore, reconciliation of the indicators to IFRS from local GAAP can be necessary to establish whether 25% threshold was met with transaction. Furthermore, local GAAP could differ from target to bidder country, while IFRS will be uniform.

7. INTERIM FINANCIAL INFORMATION

112. Yes.

1a. PROPERTY COMPANIES

150. The usefulness of such report is limited, as such valuations are highly hypothetical. Furthermore, it should be considered who assumes legal responsibility for the correctness of these valuations. It is highly unlikely that the independent expert will assume this responsibility, while the company can't take responsibility, as it will no longer be independent.
151. It should be clear who assumes legal responsibility for the correctness of the information included in such report as this is very relevant for any investor.

Furthermore, the report should be drawn up according to general accepted valuation practices of the countries in which the real estate is based.

- 152. No opinion.
- 153. If one were to opt for inclusion of a valuation report, a condensed report is sufficient given the large number of properties usually held.
- 154. Yes. The requirement of 60 days makes such report an inhibiting factor in realising a capital raising. Therefore, older valuation reports, say up to 1 year, should be allowed. The real estate business is relatively stable and changes in valuation of individual properties will not prove to be material on the whole.
- 155. No. Such valuation report should not be included in the prospectus as responsibility for correctness will not be clear. Furthermore, valuations up to 1 year old should be allowed.

1c. INVESTMENT COMPANIES

- 171. No. 5% threshold too high considering the risk which can be run on small investments through derivative contracts. Therefore, a reporting should ideally be based on value at risk of 5% or all investment with 2.5% in value or higher. Furthermore, all details relating to remuneration of managers, boards, costs, etc should be disclosed in detail. Also, if an investment is made in another investment company, all fees and costs related to that entity should be disclosed. Finally, all rebate agreements should be disclosed.

1e. START-UP COMPANIES

- 187. We agree with the information as mentioned under 186. However, with respect to 185, the information disclosed should detail qualitative information on the business plan and business objectives as to the number of outlets, connection points, etc. Detailed financial forecasts for a period of 2 years can however not be demanded as these numbers will be highly misleading to investors. In a period of 2 years a company which exists for less than 3 years will in all likelihood be changed completely. That is why investors put their money into the company. It is impossible to forecast with any certainty such detailed financial information as revenues, EBITDA, EBIT, EBT and Net Profit. Therefore, this will in all instances be highly misleading. If an investor opts to invest in a start-up company without proven track record, he/she does this out of belief in the business case and hopes to achieve high return as the future is highly uncertain. This in itself provides the answer that such detailed financial information should not be given as the outcome is uncertain.

188. Yes.
189. (i) This is something not for an expert to assess but for the investor. Such certification can already be obtained with ISO or others. Therefore, if an investor wishes such certification, he can decide only to invest in companies having such certification. Furthermore, will any expert take responsibility for such statements of certification? Who will take legal responsibility if the service/product is not successful. It is the assessment of the investor whether or not he believes in the service/product of the company, that is why extraordinary returns are made by some and losses by others as they made a wrong assessment. Making outside experts liable for such matters will seriously harm the functioning of the investment industry.
- (ii) As per (i).
- (iii) As per (i).
- (iv) Yes.
190. If such report were to be included, which we strongly object to, CESR should lay down strong guidelines concerning the contents, as otherwise these would logically become very general in nature and therefore useless. The fact that legal liability on the report will have to be accepted by the expert, which he will not want to, makes that the contents will be meaningless.

2a. PRINCIPAL INVESTMENTS

219. No. It should be left to the discretion of management what it considers a principal investment. Defining the rules would make them too narrow and take away any responsibility from the issuer in determining its principal investments. Furthermore, this differs strongly per business and can therefore never be complete. One could ask companies to identify essential investments as principal, thereby running the risk that the land the factory is based on is not described as this is non essential as it is interchangeable for any other piece of land. Therefore, the issuer should decide in each instance what is relevant from a monetary and strategic point of view.
220. As per 219. Furthermore, the expected profitability is subjective and should therefore not be used.
221. No.

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

238, The appearance of certainty should be avoided. Notwithstanding that the disclosure of
239 (the contents) of agreement, voting rights and other forms of control might be necessary, the issuer might not be able to predict third parties intentions in the future. For example a governmental policies might change over the years and agreements can be breached. Investors should be made aware of the limits of the issuer vis-à-vis third parties.

2g. LEGAL AND ARBITRATION PROCEEDINGS

247, Some businesses or rather sectors tend to have more proceedings than others.
248 A distinction for example could be made between construction and service companies. It should be the issuers responsibility to avoid producing an endless list of proceedings, where only material proceedings are of the investors interest.

Yours Sincerely,
ING Bank N.V.

Harald Frank, Head of legal issuance Financial Markets and Investment Banking
Willem Jan Meijer, Vice President Equity Capital Markets