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NYSE Euronext response to ESMA's consultation paper regarding the technical advice on possible delegated acts concerning the Prospectus Directive (as amended)

Introduction

NYSE Euronext welcomes the opportunity offered by ESMA to respond to the consultation paper (the "Consultation Paper") regarding its technical advice on possible delegated acts concerning the Prospectus Directive (2003/71/EC) as amended by the Directive 2010/73/EU (the "Prospectus Directive").

As indicated in our response of 25 February 2011 following ESMA's call for evidence ("Call for Evidence") published on 26 January 2011 regarding the possible delegated acts concerning the Prospectus Directive, NYSE Euronext shares the goals of ESMA and the EU to increase the efficiency of the prospectus regime, reduce administrative burden for companies when listing and raising capital in the European securities markets and enhance investor protection.

The prospectus is one of the key aspects for the access of companies to financial markets. In fact, it is of crucial importance for issuers as well as for investors and intermediaries, as it gathers in just a few documents, amongst others, key information on the company and its past, current and forecast financial statements as well as its objectives, terms and conditions related to the issue of the financial instruments through the registration document and the securities notes. This information is presented at a time when the company most needs it, in order to inform and convince the potential investors when seeking access to financial markets.

A well presented prospectus is a key success factor for the attractiveness of a company for investors, irrespective of its size. It is particularly important in the case of small and medium sized enterprises as it increases the visibility of this particular market segment, provides information and protects investors.

The Consultation Paper addresses the following issues:

- the format of the final terms to the base prospectus (Article 5(5));
- the format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Article 5(5)); and
- the proportionate disclosure regime (Article 7).

NYSE Euronext supports most of the initial propositions set out in the Consultation Paper. NYSE Euronext has concentrated its responses mostly on Part 4 and Part 5 (5.I, 5.II and 5.III) of the Consultation Paper as these questions are the most relevant to its business and knowledge of the specific issues. These answers therefore concern more specifically the Proportionate disclosure regime as presented in Article 7 of the Prospectus Directive. Some answers are also provided to comment the changes proposed to Article 5(5) of the Prospectus Directive and referring to the Format of the summary of the prospectus and the content and specific form of the key information to be included in the summary. NYSE Euronext reiterates through these answers its aim at ensuring the efficiency of the markets while protecting investors.

Therefore, NYSE Euronext wishes to expose to ESMA the specific comments presented below.

Format of the final terms to the base prospectus (Part 3.V of the Consultation Paper)

Q6: Do you agree with the proposed mechanism of combining the summary with the final terms? If not, please provide your reasons and an alternative suggestion.

NYSE Euronext agrees with the proposed mechanism of combining the summary with the final terms. The summary gives investors easier access to the important terms of each individual issue. The additional work and associated costs for issuers should be limited given the fact that the summaries are based on the information included in the base prospectus. Furthermore, no separate approval from the competent authority will be required.

Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Part 4.II of the Consultation Paper)

Q8: Do you agree with our modular approach?

NYSE Euronext agrees with ESMA's modular approach based on which the annexes of the Prospectus Regulation (annexes I to XVII) as addressed in the main body of the prospectus. Such approach will ensure that key information is included in the summary in an easy-to-use approach and help investors to easily find additional information in the main body of the prospectus.

Q9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?

NYSE Euronext agrees with the ESMA's approach of identifying the mandatory key information in the five sections set out in the Mandate. It further enables investors to compare summaries. NYSE Euronext also agrees that the test for inclusion of "Points" in a summary should be *'that the content of a summary should convey the key information of the securities concerned in order to aid investors when considering whether to invest in such securities.'* The limitation of words (as expressed below) will jointly ensure that key information is easily identified by investors.

Q10: Do you agree that we have provided sufficient flexibility for issuers and their advisers in drafting summaries – whilst ensuring that summaries are brief and provide the reader with the necessary comparability between prospectuses?

Please refer to our response to question 9 and question 11c. NYSE Euronext agrees to prohibit the inclusion of a section or a "Point" for *"other information"*. This would decrease level of comparability. Although NYSE Euronext agrees comparability of summaries is important, the principal approach with respect to summaries should be that the summary gives the best synthesized view of the investment.

Q11c: Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?

As indicated in our response of 25 February 2011, NYSE Euronext is in favour of maintaining the limit on the number of words at 2500. This requires issuers to stick to essential information which facilitates the comparability of prospectuses by and selection work of investors.

Proportionate disclosure regime (Part 5 of the Consultation Paper)

Proportionate disclosure regime regarding rights issues (Parts 5.I and 5.II of the Consultation Paper)

Q17: Do you agree that there should be only one single proportionate regime and not two separate regimes, one for regulated markets and one for MTFs?

Yes. NYSE Euronext agrees that there should be one single proportionate regime and not two separate regimes, one for the regulated markets and one for MTFs. Not only is this easier to implement, it also ensures that investors and other participants in the financial markets are offered with one set of rules regarding the proportionate regime and not two resulting in quicker and broader acceptance of the new rules.

NYSE Euronext believes that it is essential that investors in a rights issue concerning an MTF listed company are provided with the same level of information (by issuing a prospectus) as a rights issue concerning a company listed on a regulated market.

For the need of clarity NYSE Euronext believes that financial instruments “admitted to trading”, but not “admitted to listing” on MTF, SIs or OTFs as developed in the current review of the MIFiD directive, should be subject to the same secondary market obligations as those instruments admitted to trading on regulated markets.

Regarding the SMEs market, we believe, as expressed in the MIFiD consultation, that it is acceptable for “admission to listing” rules to differ between regulated markets and MTFs. For example, NYSE Euronext facilitates the private placement procedure for SMEs on NYSE Alternext, an MTF specifically aimed at SMEs. However, NYSE Euronext does not support lighter rules concerning secondary markets for SMEs: investors should be able to benefit from all the transparency, reporting and organizational requirements pertaining to trading on a financial market.

Indeed, it is acknowledged that a company listed on a regulated market will incur more costs and regulatory obligations compared to a private company. The advantage, of course, is that the increased visibility and financial discipline resulting from publicly listed status will render the company more attractive to investors, enabling it to finance expansion. If a company remains private, investors will expect to be compensated for the additional perceived risks this implies and often in the form of a higher cost of capital.

However, the costs of becoming public can be too high for some SMEs, representing a real barrier to their access to public financial markets. This is the reason why it appears important to facilitate their access to capital markets by introducing proportionate listing and disclosure requirements for SMEs at EU level, as is already the case on national markets. As mentioned in the MIFiD consultation, we believe that such a regime could for instance consist in the adoption of lighter requirements regarding annual reporting for SMEs with a single audited annual report as it is the case on NYSE Alternext, as suggested by the commission. However, given the need to ensure the visibility and attractiveness of the SME segment to investors, maintaining frequent information to the market is crucial. Therefore, we believe that a lighter transparency regime for SMEs would encourage such companies to list on regulated markets and MTFs, as well as remain listed on such markets, thus raising capital to pursue new projects.

Q18: Do you agree with the proposal to consider that appropriate disclosures requirements for MTFs would include, as a minimum, obligations to publish:

- annual financial statements and audit reports within 6 months after the end of each financial year,
- half-yearly financial statements within a limited deadline after the end of the first six months of each financial year, and
- inside information?

Yes. NYSE Euronext agrees that for investor protection the appropriate disclosure requirements for MTFs should include annual financial statements and audit reports within six months after the end of each financial year, half-yearly financial statements within a limited deadline after the end of the first six months of each financial year and inside information.

Q22: Regarding the appropriate rules on market abuse, do you agree that there should be provisions in order to prevent insider trading and market manipulation? Do you consider it necessary to require that the rules of the MTFs fully comply with the provisions of the Market Abuse Directive?

Yes. The scope of the Market Abuse Directive should cover financial instruments admitted to trading on an MTF and insider dealing and market manipulation of such instruments should be prohibited. This will help to ensure a level playing field between the regulation of regulated markets and MTFs.

Furthermore, it is essential that investors on a MTF benefit from complete and consistent information on the potential investment and then consider SMEs listed and traded on MTFs with the same level of comfort in the documentation as for companies admitted to trading on a regulated market. NYSE Euronext fully confirms this analysis with regards to its past and present experience with NYSE Alternext, an MTF dedicated to SMEs operating in different European countries. Moreover, in the context of attracting investors and liquidity on the Small Cap segment where many of the resources devoted to these segments of the market prior to the financial crisis have either exited these market segments entirely or are present in much diminished size and resource, we recommend caution in developments having the unintended result of causing investors to perceive more limited information on SMEs listed on MTFs to make them relatively less attractive. We believe that in the interest of investor protection and SMEs attractiveness, the secondary market regulation of SMEs should be identical to that for blue chips.

Q24: As regards MTFs with appropriate disclosure requirements and market abuse rules, do you agree that in order to benefit from the proportionate prospectus, issuers should be required to make available their periodic and ongoing disclosures in a way that facilitates access to information by posting them on their websites?

Yes. NYSE Euronext believes that company websites are a good tool for making period and ongoing disclosures available to the public / investors.

Q27: Do you consider that the language regime could be a concern in terms of investor protection in case of passporting? Do you consider that the proportionate disclosure regime should be conditional upon compliance with the language requirements of Article 19 of the Prospectus Directive?

No. NYSE Euronext does not believe the language regime will be a concern in terms of investors' protection. NYSE Euronext agrees with the approach of ESMA that rights issues are primarily addressed to existing shareholders who have already invested in the issuer and are aware of the language regime applicable to the company in question.

Q29: Considering the objective to enhance investor protection, do you agree that information regarding the issuer's activities and markets and historical financial information cannot be omitted?

Yes. NYSE Euronext agrees that information regarding the issuer's activities and markets and historical financial is required to enhance investors' protection.

Q30: Do you consider that, in order to reduce administrative burden, incorporation by reference could be a solution? Do you have any suggestions to improve the incorporation mechanism?

Yes. NYSE Euronext believes that the incorporation by reference mechanism is a good tool to reduce administrative burden and reduce costs.

Q31: Do you agree with the proposals to require basic and updated information regarding the issuer's principal activities and markets?

Yes. NYSE Euronext agrees that basic and updated information regarding the issuer's principal activities and markets is required to enhance investors' protection.

Q32: Do you agree with the proposal to require only the issuer's historical financial information relating to the last financial year?

Yes. Given that the historical financial information for the previous years will already be made available to the public NYSE Euronext agrees with the proposal to require only the issuer's historical financial information relating to the last financial year.

Q34: Do you agree with the proposal to include a statement in the proportionate prospectus drawing attention to the specific regime and level of disclosure applicable to rights issues?

Yes. NYSE Euronext believes that it should be made clear to investors and other market participants that a specific regime is applicable.

Proportionate disclosure regime regarding SMEs and issuers with reduced market capitalisation (Part 5.III of the Consultation Paper)

Q37: Do you agree that a full prospectus should always be required for an IPO and for initial admission to a regulated market (as described in paragraph 141 above)?

Yes. NYSE Euronext recommends that a full prospectus should not only be required for an IPO on a regulated market but also in respect of an IPO on an MTF.

As indicated in our response to the Call for Evidence it is important to note that investors ultimately make the investment decisions and that, therefore, extreme care needs to be taken in relation to facilitate a lighter regime for smaller companies compared to larger companies in order not to tilt the balance so that investors prefer to invest in larger companies because these are more transparent and provide better quality and quantity of information. NYSE Euronext notes that currently EU public markets are not functioning as they should, especially for smaller companies.

Too few investors, brokers, research analysts and other participants are taking interest in smaller (listed) companies compared to larger capital companies. Many resources devoted to companies in the

small/medium segment of the market have either exited these market segments entirely or are present in much diminished size and resource as a result of the financial crisis.

NYSE Euronext believes that making the proportionate disclosure regime applicable to SMEs and issuers with reduced market capitalization will not encourage investors to invest capital in such SMEs or issuers and will even reinforce relative investor confidence in larger companies to the disadvantage of SMEs and issuers with reduced market capitalization. It is all the more important at the time of the IPO for the SMEs to share complete information as the IPO period is a strong confidence builder with potential investors and analysts.

NYSE Euronext therefore strongly recommends that a full prospectus should also be required for an IPO on an MTF to create confidence and attractiveness at the most sensitive period of time of the equity story and insure investor protection. Moreover, as also indicated in our response to question 17, alternative admission to listing procedures whereby no full approved prospectus is required can be facilitated by MTFs.

Q38: Do you agree with the proposal summarized in the table in paragraph 141?

No. Please see our response to question 37 above.

Q39: Do you agree that there should be only one schedule for a proportionate prospectus for both unlisted and listed SMEs and Small Caps or do you believe that further consideration should be given to having a separate regime for unlisted companies, dealt with under the proposed revision to MiFID?

No. Please see our response to question 37 above.

Q44: Taking into account the items which ESMA proposes to delete or redraft as per Annex 4, do you consider the proportionate disclosure regime for SMEs/Small Caps could strike the right balance between investor protection, the amount of information already disclosed to the markets and the size of the issuers?

NYSE Euronext believes that a lighter prospectus regime for SMEs will not encourage investors to bring capital to SMEs and increases the risk of reinforcing relative investor confidence in Large Caps to the disadvantage of SMEs seeking access to finance from public capital markets. A lighter prospectus regime for SMEs should avoid having the unintended result of causing investors to perceive SMEs being less attractive given the more limited information being made available.