

CESR CONSULTATION ON PROPOSALS FOR THE REVIEW PANEL WORK PLAN

Reply of NASDAQ OMX

NASDAQ OMX welcomes the opportunity to comment on the work plan of the Review Panel. The impact of the work undertaken by the Review Panel will increase with a better focus and with prioritising the areas of significant importance for the functioning of the financial markets. NASDAQ OMX therefore welcomes the initiative of CESR to gather views from market participants on the priorities of the Review Panel.

Before addressing the specific questions in the consultation, we wish to underline that the impact of the work undertaken by the Review Panel is of important value and should be developed with a better focus and, most importantly, should lead to better follow-up work. Any surveys, mappings or assessments undertaken by the Review Panel should result in follow-up work consisting of taking action to remedy the negative effects detected. Alternatively, deeper studies should be carried out by the Review Panel if needed. Whether or not it is within the mandate or powers of CESR to execute the regulatory or other changes needed, CESR should at least present the results of mapping exercises or of other activities undertaken, in conjunction also with proposals for remedies needed. Otherwise, the merits of the work done by the Review Panel and by CESR as a whole risk being lost. In our view the reasons stated under the column “Why” should be developed and should state that the reason is to detect divergences and to propose ways to achieve better convergence. This comment is valid for all possible work streams. National margins and options should be kept at a minimum and should require proper justification. It needs to be underlined that the work of the Review Panel clearly has the potential of supporting a more harmonised regulatory environment. It also seems efficient to as far as possible coordinate the priorities of the Review Panel with the Commission’s initiatives in response to the recommendations in the de Larosi re report, to identify and remove key differences in national legislation in order to achieve a core set of harmonised standards to be applied throughout EU.¹

Below, we comment on the proposed work streams and respond to the specific questions.

The proposed work streams

1. Contingency measures / emergency powers

One area which could be looked into within this work stream is suspension of trading. The Review Panel should evaluate the practical functioning of the Protocol on the operation of notifications of MiFID Article 41 suspensions and removals of financial instruments from trading (CESR/08-363). Also, it seems CESR members do not have the same powers when it comes to suspension of trading,

¹ Communication for the Spring European Council COM(2009/ 114, page 5, and Annex I, page 3.

and even if powers may be the same, the criteria for actually applying these powers seem to vary. Investors should be afforded with the same level of protection irrespective of where they trade.

2. Use of national options and discretions in relation to MiFID, Prospectus and UCITS Directives

CESR members did not apply the Prospectus Directive in a harmonised way is the third country regime. For instance, some CESR members took steps to recognise US prospectuses under certain conditions, while others did not. In December 2008 the CESR Prospectus Level 3 Group announced that further work is now being done at CESR level on recognition of third country prospectuses (CESR/08-972). This is a positive step and NASDAQ OMX looks forward to further announcements on the result of this work. Nevertheless, it could be relevant also for the Review Panel to look into CESR members' application of the equivalency rules in the Prospectus Directive, with the aim to propose possible measures for further harmonising the regulatory framework on prospectuses.

Another aspect that could be looked into is the actual thresholds in place in national legislation under Article 1(2)(h) in conjunction with Article 3(2)(e) of the Prospectus Directive. There is room for further harmonisation.

3. Divergences in prospectus regimes

NASDAQ OMX fully encourages this work stream but also, as already stated above, believes the reason for the review should be further developed. The Review Panel should come forward with proposals on what national options in the Prospectus Directive could be abolished and on what measures are needed in order to achieve a more harmonised application of the Prospectus Directive especially concerning exemptions to the obligations to draw up prospectuses and to approval of prospectuses.

4. Availability of prospectuses

One issue that could be looked into is how long prospectuses are actually kept publically available in accordance with article 14(2) and 14(4) of the Prospectus Directive. This especially includes reviewing the public availability of supplements, as supplements are subject to the same availability rules according to Article 16. CESR members' routines on supplements could be looked into in general.

5. Key investor information for securities

This is an important work stream. It seems structured products are being treated in differently by CESR members. The financial crisis has proven the importance of product transparency. Product transparency gives the investors an opportunity to make qualified investment decisions. Without doubt, information should be homogenous across products.

6. Differences in use of guidance

This is an important work stream. As markets are becoming more and more fragmented, an overall view from the regulators is more important than ever. Varying application of the Market Abuse Directive, of Regulations as well as of CESR Guidance puts confidence in financial markets at risk. Regulatory arbitrage is possibly more important in this field than in any other. The Review Panel has already conducted extensive reviews of the powers of CESR members in relation to the Market Abuse Directive and has detected great differences among Member States. A peer review on the 1st and 2nd set of CESR guidance relating to the Market Abuse Directive is likely to also show divergences. We repeat again that the reason for the review should not be to only map these divergences but also to propose measures needed in order to achieve greater harmonisation.

7. Actual use of sanctioning powers

See comments above under items 1 and 6.

8. Divergence in liability regimes

No comment.

9. Takeover bids regime

See below under questions 6-7.

10. CESR Recommendations on Article 51(3) Implementing MiFID

MiFID has in a revolutionary way changed the regulatory landscape in the securities markets. It is of utmost importance that MiFID is implemented and applied in a harmonised way, by firms as well as by regulators, in order to develop the pan-European level playing field among market participants. NASDAQ OMX believes the Review Panel could play an important role in achieving more harmonisation as regards MiFID and that reviews on the functioning of MiFID should be generally prioritised by CESR, including the Review Panel.

A key work stream should be to review how Member States have implemented the MiFID transparency regime and how it is applied by CESR members. This involves looking into how the definitions of MTFs and Systematic Internalisers, as well as the transparency waivers, are actually applied. Divergent applications mean that certain execution arrangements are not brought under the scope of MiFID provisions as intended, and thus execution is often done without transparency to the market. Also, it seems that various execution venues are under different requirements on quality standards and reporting mechanisms, which does not ensure the best quality and availability of data. This affects the level playing field as well as the availability of consolidated quality data to investors. It seems necessary to achieve harmonisation regarding data in order to truly deliver on MiFID best execution rules.

Specific questions 5.-7.

5. Cross-border issues related to the Transparency Directive

We believe the Review Panel should look into the rules in Articles 9(2) and 15 in the Transparency Directive, imposing obligations on shareholders on notification of ‘passive changes’, i.e. changes to holdings occurring as a result of actions taken by the issuer but without any activity at all from the shareholder. This rule is perceived as surprising and burdensome by many shareholders. The value of such ‘passive’ information to shareholders and potential investors may be contested. It could be argued that notifications on changes in holdings resulting from shareholders actually taking action, are essentially more important signals to investors. Consequently, it may be questioned whether the costs induced by this obligation on ‘passive changes’ is coupled with enough benefits. There may also be a risk that CESR members are not enforcing this rule in a harmonised way. We suggest the Review Panel conduct a selective review and, if divergences are detected, also come forward with proposals on remedies, which possibly in fact could be to simply delete the rule as it is not as beneficial as it is burdensome.

Generally, the Transparency Directive plays an important role for the regulatory environment for issuers as well as investors. To attract foreign issuers and investors to the European market, it is

welcome to further harmonise the information obligation regime. For this reason it is of general importance that the Review Panel looks into the Transparency Directive.

6.-7. Priority of takeover issues

The Takeover Directive plays an important role for the regulatory environment for issuers as well as investors. Being a minimum harmonisation directive with relatively large space for national options, it is not surprising that takeover regimes are still very divergent across Member States. To attract foreign investors to the European market, it is welcome to further harmonise the European takeover regime. For this reason it is of general importance that the Review Panel looks into takeover issues.
