

*15 July 2011*

## **ESMA Consultation Paper**

# **ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU**

### **Reply from NASDAQ OMX**

The NASDAQ OMX Group, Inc. delivers trading, exchange technology and public company services across six continents, with more than 3,600 listed companies. NASDAQ OMX offers multiple capital raising solutions to companies around the globe, including its U.S. listings market, NASDAQ OMX Nordic, NASDAQ OMX Baltic, NASDAQ OMX First North, and the U.S. 144A sector. The company offers trading across multiple asset classes including equities, derivatives, debt, commodities, structured products and exchange-traded funds. NASDAQ OMX technology supports the operations of over 70 exchanges, clearing organizations and central securities depositories in more than 50 countries. NASDAQ OMX Nordic and NASDAQ OMX Baltic are not legal entities but describe the common offering from NASDAQ OMX exchanges in Helsinki, Copenhagen, Stockholm, Iceland, Tallinn, Riga, and Vilnius.

NASDAQ OMX is pleased for the opportunity to respond to this consultation. We acknowledge that our response will be published.

As an introduction we would like to provide you with some general remarks in relation to the prospectus directive.

The current regulatory distinction between regulated markets and MTFs as regards requirements for issuers listed on these venues should be maintained, leaving it for the market operators and financial institutions to tailor the MTF markets according to the specific needs of the issuers and investors. In this respect we see an advantage with introducing a proportionate disclosure regime for issuers listed on MTFs, to increase the flexibility for companies wanting to list on a MTF.

In the group of companies classified as 'small', there are indeed companies of very different sizes, stages of growth, types of business and other characteristics. They are normally more rooted in the local business environment than larger companies that may have a more international business perspective. They are also normally more dependent on local investors. For these reasons, there are no benefits in developing an EU-wide rules for smaller listed companies. Their growth would be

better supported if they could adapt their application of corporate governance principles to their characteristics and the local environment.

Furthermore, introducing special rules for listed small and medium sized enterprises (SMEs), would create an additional regulatory layer, an 'SME layer', which we do not support. An SME layer would risk deteriorating the integrity and competitiveness of the listed market, creating an additional layer with questionable benefits. We lack analysis of the benefits of such an additional layer, especially from the investor perspective. Investors on the regulated markets demand high quality information. The confidence in the regulated markets must be maintained, not reduced. The comply or explain approach is appropriate and already provides for the best flexibility.

If such an SME layer was to be developed, we strongly believe the definition of an SME must be the same across Europe, it must be based on the same threshold. It has been proposed to introduce a definition that is based on the size of the national market. We strongly oppose this, as it would essentially result in same-size companies being captured by different rules depending on where the company is located. This does not support a level playing field, for instance as regards the various types of ownership. It would not provide small companies across Europe with equal opportunities for growth.

We believe the focus of future measures should be on the investor perspective. Investors see a need to improve liquidity, to have diversified MTF markets, to have analyst coverage. They need to be certain of their exit options.

Some suggestions for targeted policies that would attract a wider set of investors to MTF markets are:

- A common regime for a tailored type of 'UCITS fund' or other type of fund that allows for a larger portion of investments in shares of issuers listed on MTFs and the SMEs on the regulated market. This would increase the attractiveness of smaller markets by investors and result in generally improved visibility.
- A common language regime for companies on regulated markets that allow companies to disclose information in English only. Small companies from small countries go international early with their business and often use English as company language and should be able to do that in the marketplace as well. This is in particular a problem for companies from the Nordic countries. Currently, the MTFs can allow companies to use only English, but as soon as these companies are ready to switch to the regulated market, local language regimes (primarily derived from the Transparency Directive) often require the disclosure of information in a local language. This is a paradox that on the one hand allows issuers on the MTFs the choice to communicate with international investors in English, but when the issuers switch to the regulated market, this communication with investors comes at a cost for translation. This administrative cost is an obstacle for growth. A common language regime would reduce the costs for all issuers on regulated markets but it would have the greatest and most important effect for the smaller issuers. It would also put all issuers on all markets on a level playing field as regards access to capital cross-border.
- A long-term effort on investor education.

- Finding ways to enable exchanges and advisors to adopt innovative and flexible solutions to support smaller companies, such as the creation of indices, knowledge transfer and other tailored services.
- Looking at the appropriateness of increased visibility for a European corporate governance benchmark. This could potentially help issuers communicate to investors about their governance, which we sometimes see as a challenge.

Please find below our replies to specific questions in the consultation document where we have any input to provide:

**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?**

The current regulatory distinction between regulated markets and MTFs as regards requirements for issuers listed on these venues should be maintained, leaving it for the market operators and financial institutions to tailor the MTF markets according to the specific needs of the issuers and the investors. In this respect we see an advantage with introducing a separate proportionate disclosure regime for MTFs to increase the flexibility for companies wanting to list on a MTF.

**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?

NASDAQ OMX considers the current disclosure requirements for MTFs as adequate.

**Q20: For issuers listed on MTFs where there is no disclosure requirements on board practices and remuneration, do you agree that this information should be included in the prospectus?**

No. NASDAQ OMX does not deem that necessary.

**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?**

No. NASDAQ OMX considers the current provisions for MTFs as adequate.

**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. NASDAQ OMX proposes a common language regime for companies on regulated markets that allow companies to disclose information in English only. Small companies from small countries go international very early with their business and often use English as company language and should be able to do that in the marketplace as well. This is in particular a problem for companies from the Nordic countries. Currently, the MTFs can allow companies to use only English, but as soon as these companies are ready to switch to the regulated market, local language regimes (primarily derived from the Transparency Directive) often require the disclosure of information in a local language. This is a paradox that on the one hand allows issuers on the MTFs the choice to communicate with international investors in English, but when the issuers switch to the regulated market, this communication with investors comes at a cost for translation. This administrative cost is an obstacle for growth. A common language regime would reduce the costs for all issuers on regulated markets but it would have the greatest and most important effect for the smaller issuers. It would also put all issuers on all markets on a level playing field as regards access to capital cross-border.

**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.

**Q36: What are the costs for drawing up a full prospectus? What are the most burdensome disclosure requirements? Can you provide any data? Can you assess the costs that the proposed proportionate prospectus will allow issuers to save?**

In Finland the costs of drawing a prospectus have been considered high. For example a First North (MTF) recently estimated the cost of drawing up a prospectus was € 200-300 000 and they only raised €1.2 million in total.

**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.

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

Yes.

**Q40: Can you provide data on the average costs for SMEs and Small Caps to draw up a prospectus? What are the most burdensome parts of a prospectus to produce?**

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