

European Securities and Markets Authority  
11-13 avenue de Friedland  
75008 PARIS  
FRANCE

Submitted by e-mail

Subject: Eumedion's response to the consultation on ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU (ESMA/2011/141)

Ref: B2011.30

Amsterdam, 15 July 2011

Dear Sirs, dear Madams,

Eumedion welcomes the opportunity to submit comments on ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EC (Document Nr. ESMA/2011/141). By way of background, Eumedion is the Dutch based corporate governance forum for institutional investors. Our 68 Dutch and non-Dutch participants have together more than EUR 1 trillion assets under management. They invest for their clients and their beneficiaries and in listed companies worldwide.

Taking into consideration Eumedion's objective is to raise corporate governance standards of listed companies from an institutional investor's perspective and that pre-emptive rights are seen as one of the governance instruments for shareholders to control management boards, we confine our response to the questions raised in part 5 of the consultation paper ('Proportionate disclosure regime'). In answering the questions we try to achieve a proper balance between an adequate degree of investor protection and reducing the administrative or financial burden for listed companies.

*Q16. Do you agree with the proposal to consider that “near identical rights” should have the same characteristics than pre-emption rights? Do you agree with the definition given in paragraph 117? Are there any other characteristics which should be taken into account?*

We concur with ESMA that the scope of Article 7(2)(g) of the Prospectus Directive amended regarding rights issues should be clarified as the benefits for issuers by using the proportionate disclosure regime will not be reaped when the wording “provided that the issuer has not disapplied the statutory pre-emption rights” is interpreted in a strict manner. However, we only can support the proposed “broad” implementation of Article 7(2)(g) when the proposed wording of “near identical rights” has a precise definition and that the “near identical rights” have the same ‘substantial’ characteristics as pre-emption rights. We generally agree with the proposed characteristics mentioned in paragraph 117. Though it is not crystal-clear yet whether issuers are allowed to apply restrictions to a rights issue in certain jurisdictions (especially Australia, Canada, Japan and the United States) i.e. excluding certain shareholders from receiving, buying or selling any rights and from subscribing to the rights issue. We would like to suggest ESMA taking away any confusion regarding this issue by making clear that issuers are allowed to set the condition that the rights may only be exercised in so far as it does not lead to disproportionate setbacks caused by compliance with local securities laws (as already indicated in paragraph 115).

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

Yes. We are in strong favour of creating a level playing field as much as possible between regulated markets and MTFs as otherwise issuers would have another reason to move from a regulated market to an MTF. This will potentially endanger investor protection.

*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, these requirements are in our view minimum requirements to preserve a satisfactory level of protection of investors of companies listed on MTFs.

*Q19. What should be the maximum deadline for publishing half-yearly financial statements?*

We are in favour of a 2 months deadline, which already applies to issuers listed on a regulated market. A longer deadline would imply that investors have to base their investment decision making process of buying or selling (rights on) shares on rather old and probably not up-to-date financial information. This will probably lead to a higher risk premium on these shares.

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

Yes. Receiving adequate and up to date information on the corporate governance structure (board practices) is considered to be essential for analysing the issuer, especially its risk profile. The remuneration policy or remuneration structure is also important information for analysing the risk profile. However, there is less need of knowing the exact amount or value of each of the components of a board member's remuneration package. Such information would be too detailed and would not be appropriate for inclusion within investment decisions.

*Q21. Are there any other disclosure requirements not listed above which should be required for MTFs?*

No.

*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. While in the latest relevant EC regulatory initiatives MTFs and exchanges have rightly been recognised as exchangeable infrastructures, the Market Abuse Directive is still not tuned accordingly. The current scope of issuers with financial instruments admitted to trading on a regulated market should therefore be broadened to issuers with financial instruments admitted to trading on MTFs in order to create a level playing field between trustworthy markets.

*Q23. Are there any other EU Directive or Regulation not listed in paragraph which should be taken into account?*

Yes: the IAS Regulation (Regulation (EC) No. 1606/2002), although ESMA has taken this Regulation into account in drafting the concrete texts of the amendments to the annexes of Commission Regulation (EC) No. 809/2004.

*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, we agree. Investors investing in shares listed on an MTF should be protected by a high level of information of the company involved and have easy access to this information.

*Q25. Do you agree with the approach proposed in order to determine which items to delete from Annexes I and III of the Prospectus Regulation?*

Yes, we agree.



*Q26. Do you agree with the proposed items which could be deleted from Annex I (Minimum Disclosure Requirements for the Share Registration Document) and Annex III (Minimum Disclosure Requirements for the Share Securities Note) of the Prospectus Regulation?*

We partly agree. We are not in favour of the proposal to delete items 21.2 (Memorandum and Articles of Association) and 25 (Information on holdings). Sometimes listed companies state on their websites or in their annual reports that these documents (the Articles of Association and a list of subsidiaries and associated companies) have been filed with the local Trade Registry. These documents are very important for an investor's analysis of the corporate governance structure and the risk profile of the company. However, it is costly to travel to these Trade Registries and to inspect these documents on-site. We therefore agree that these items can be deleted under the condition that these documents are published on the website of the company.

*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?*

Yes. Although rights issues are in theory addressed to existing shareholders who have already invested in the issuer and are aware of the language regime applicable to the company (as stated in paragraph 126), the subscription rights can be sold to new investors, as recognised in paragraph 124. One of the conditions for a real Single European Market is avoiding practical barriers for cross-border investing. The language regime of the Home Member State regarding regulated information based on the Transparency Directive and the Market Abuse Directive could be one of the practical barriers. Therefore we are in favour of ESMA's suggestion that the proportionate disclosure regime should be conditional upon compliance with the language requirements of Article 19 of the Prospectus Directive.

*Q28. In case of issuers listed on regulated markets, do you consider that disclosures on remunerations required by item 15 of Annex I of the Prospectus Regulation are redundant with information already made available to shareholders and the public in general and could therefore be deleted from the proportionate prospectus for rights issues?*

Yes. The remuneration information mentioned is inserted in the annual report, remuneration report or notes to the annual accounts, dependent upon Member State legislation and corporate governance codes.

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

Yes, we concur with ESMA's line of reasoning in paragraphs 130 and 131.

*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. As more and more investors work in a 'paperless environment', it would be useful to have hyperlinks in the (proportionate) prospectus to the full and regulated information. In the Netherlands,

some listed companies already use these hyperlinks in their annual reports. This is appreciated by the investor community.

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

Yes.

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

Yes, under the condition that the financial statements related to the 3 years are still available on the issuer's website.

*Q33. Do you agree with the proposal to redraft certain items of Annexes I and III of the Prospectus Regulation as proposed in paragraphs 132 to 134? Are there any other items which should be redrafted?*

We concur with ESMA's proposals.

*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, although we would like to suggest inserting the word "primarily" between "is" and "addressed" in the first dent (related to ESMA's remarks in paragraph 124). Furthermore we would like to suggest inserting a third dent: "For further and more detailed information, please check the company's website".

*Q35. Do you agree with the schedule for rights issues presented in Annex 2 of this consultation paper?*

We generally agree, but we have some suggestions for additional information relevant for investors:

- item 6.1: we would like to suggest adding the words "preferably in a diagram or graph form" to this item (the group structure is in most cases better and easier to understand by investors if presented in a diagram or graph form).
- item 11.3: we would like to suggest adding the words "and any other committee" after "remuneration committee" as the composition and terms of reference of other committees are also important elements for the analysis of the investor.
- item 19: we would strongly suggest that the documents mentioned in this item should be published on the company's website as a minimum (see also our answer to Q26).

*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?*

We do not have such information. This information should be submitted by issuers and their advisors.



*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. As the liquidity of SME/small cap shares is generally low and as SMEs/small caps are in general controlled by a rather small number of shareholders (who are in many cases also the founders of the company or other insiders), the risk profile of SMEs/small caps is generally higher than that of large caps. Therefore, a proportionate level of public information (on the financial situation, etc.) and protection for potential investors is very important. We agree with ESMA that reducing the prospectus requirements for SMEs and small caps could be detrimental to these group of companies in the long run.

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

No. As already stated in our answer to Q17, we are in favour of creating a level playing field between regulated markets and MTFs as otherwise issuers would have another reason to move from a regulated market to (only) an MTF. This will endanger investor protection.

We concur with ESMA that a proportionate prospectus is satisfactory for the OTC markets, as – in general – only professional players are active in these markets. It is not necessary to protect these players by a full prospectus requirement.

*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. We refer to our answer to Q37.

*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?*

We do not have such information. This information should be submitted by issuers and their advisors.

*Q41. Do you consider that the three items identified in paragraph 147 could be omitted without lowering investor protection?*

Yes.

*Q42. Do you agree with the items ESMA proposes to delete and to redraft listed in Annex 4 and the proportionate schedule for the share registration document presented in Annex 5?*

Yes.

*Q43. Are there any other items which could be deleted or redrafted? Please justify any suggestions, including, if possible, the costs that would be saved and the impact on investor protection.*

No.

*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 issuers?*

Yes.

*Q45. Given the number and nature of the items ESMA proposes to delete and to redraft listed in Annex 4, do you consider the proposal would suppose a significant reduction of the costs to access financial markets for SMEs and Small Caps? Can you estimate the costs that the proposed proportionate prospectus will allow SMEs and Small Caps to save?*

We are not able to give a clear answer to this question.

*Q46. Do you agree with the proposal to require historical financial information covering only the last financial year for credit institutions issuing securities referred to in Article 1(2)(j) of the Prospectus Directive?*

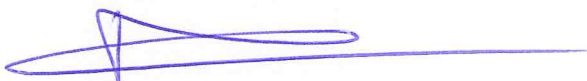
Yes.

*Q47. "In performing its work on the proportionate disclosure regime, ESMA has sought to identify all possible omissions with regards to content of prospectuses as part of this Consultation Paper, however do you believe that further omissions are possible particularly with respect to the areas indicated in the request for advice by the Commission?"*

Yes, we would like to suggest extending the proportionate disclosure to also investment companies with variable capital. As these kind of companies are exempted from the statutory obligation to offer newly issued shares on a pre-emptive basis to the existing shareholders in proportion to the capital represented by their shares (Article 1(2) of the 2<sup>nd</sup> Company Law Directive on capital protection), it would seem logical to also exempt these companies from the requirement to publish a full prospectus.

If you would like to discuss our views in further detail, please do not hesitate to contact us.

Yours sincerely,



---

Rients Abma  
Executive Director Eumedion