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NYSE Euronext Response to ESMA's Consultation Paper regarding 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 the administrative burden for companies when listing and raising capital in European securities markets, and enhance investor protection.

The prospectus is one of the key aspects for companies accessing financial markets. It is of crucial importance to issuers as well as to 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 potential investors when seeking funding on financial markets.

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

The first Consultation Paper in 2011 addressed the first part of the European Commission's Mandate to EMSA, including 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 responded to the ESMA consultation on the above-mentioned issues in July 2011.

The current request for comments on the Consultation Paper addresses the second part of the technical advice ESMA has been mandated for, including the following issues:

- the consent to use a prospectus in a retail cascade (Articles 3 and 7)
- review of the provisions of the Prospectus Regulation (Articles 5 and 7)

NYSE Euronext supports most of the initial propositions set out in the Consultation Paper. NYSE Euronext has concentrated its responses to the questions which are the most relevant to its business and knowledge of the specific issues. NYSE Euronext reiterates through these answers its primary objective of ensuring efficiency in financial markets while protecting investors. Therefore, NYSE Euronext wishes to share with ESMA the specific comments presented below.

3.5. The consent to use a prospectus in a retail cascade (Articles 3 and 7)

Concept of retail cascades under the Amended Directive

As a general note, NYSE Euronext agrees with ESMA that further regulation regarding the consent to use a prospectus in a retail cascade is needed. Having clear rules and guidelines will more readily be accepted by market participants and increase efficiency and security in the securities chain.

Q3:

Do you agree with ESMA's understanding of retail cascades and in particular that the terms and conditions of the offer by the intermediaries may not differ from the terms and conditions in the prospectus or final terms? If not, please specify which terms and conditions may differ from those stated in the prospectus or final terms and who would be responsible and liable for such information.

NYSE Euronext agrees with ESMA's understanding that the terms and conditions of the offer by the intermediaries may not differ from the terms and conditions in the prospectus or final terms; otherwise the issuer's consent might be difficult to obtain.

Q6:

Do you consider it necessary to clarify in the prospectus who is responsible for information that is provided by the intermediary to the investor?

NYSE Euronext considers it necessary to clarify in the prospectus who is responsible for information that is provided by the intermediary to the investor. For example, the issuer is ultimately responsible for ensuring the validity of the information. The intermediary remains responsible for additional information he may provide to investors. Vigilance should be exercised with respect to the imposition of liability obligations to a party using a prospectus with the consent of the issuer, who at the same time has little or no control over the completeness of a prospectus or its updating process.

Validity of a prospectus and responsibility of the issuer or the person responsible for the prospectus. Duration of consent

Q7:

Do you agree that the period for which consent to use a prospectus may be granted cannot extend beyond the validity of the prospectus and the period in which a supplement is possible according to Article 16 Prospectus Directive? If not, please specify how in particular a standalone prospectus can be kept valid once the period according to which a supplement is possible has lapsed.

NYSE Euronext agrees that the period for which consent to use a prospectus may be granted (by the issuer to a financial intermediary) cannot be extended beyond the validity of the prospectus and the period in which a supplement is possible. If not, there is no certainty that, in respect of retail cascades, disclosures made through the prospectus and supplements are complete and up to date.

However, the issuer cannot always control the occurrence of a material event or the timing of approval of a supplement. Even if it could control those types of events or their timing, some delay between the occurrence of the event and the publication of a supplement is very likely.

Q8:

In relation to a standalone prospectus, do you agree that once the offer which is the subject matter of the initial prospectus has been closed, financial intermediaries subsequently offering the securities in a retail cascade should prepare a new prospectus which could incorporate by reference the issuer's initial prospectus?

In cases where the issuer has not given its consent to an intermediary, NYSE Euronext agrees that a new prospectus with incorporation by reference should be prepared and made available by the intermediary. Given the fact that intermediaries can make use of the incorporation by reference feature, this should not lead to excessive additional administrative and/or financial burdens to ensure the efficiency of the market.

Principles regarding disclosure requirements in relation to retail cascades in a prospectus

Q11:

Given the fact that in a retail cascade the responsibility of the issuer for the content of the prospectus is subject to its consent to use the prospectus such consent is crucial for the whole prospectus responsibility regime. Therefore ESMA believes that the consent to use the prospectus needs to be public, and furthermore, that it should be stated in the prospectus as is also the case for the general responsibility statement. Do you agree with ESMA's approach to include such consent in the prospectus or base prospectus/final terms?

NYSE Euronext agrees with the position of ESMA that the written agreement itself does not need to be disclosed to the public, as it contains provisions which are relevant only to the parties involved in the agreement.

NYSE Euronext also considers it necessary that the consent to use the prospectus (which is part of the written agreement) needs to be published together with the identity of the financial intermediaries and any conditions attached to the consent (including its duration) that are relevant for the use of the prospectus.

NYSE Euronext also takes the view that the consent to use the prospectus should be included in the prospectus or the base prospectus/final terms, as the case may be.

Q13:

ESMA believes that the means of publication to be used in relation to the existence of a consent and any conditions attached to it should allow investors and competent authorities to clearly determine the responsibilities of the persons involved. Instead of including the above elements within the prospectus do you believe that there are any other methods of publication for this information that would also provide sufficient transparency and legal certainty? If yes, please specify.

NYSE Euronext believes that applying the same methods of publication as for 'price sensitive information' would provide sufficient transparency and legal certainty.

Principles regarding disclosure of information on retail cascades when unknown at the time of approval of the prospectus or filing of final terms

Q14:

Do you consider a supplement necessary in relation to information on retail cascades? Please explain and justify your position, also taking into account different typical situations of retail cascades and any effect such retail cascade related information may have on the assessment of the securities.

In general, NYSE Euronext deems it necessary to disclose to investors the consent, the identity of the intermediaries and any relevant conditions attached to such consent to investors, whether that is through a renewed filing of the final terms, a supplement, or in other ways, e.g. by requiring disclosure in the same way that 'price sensitive information' is disclosed. This information on retail cascades is material and should therefore be made available.

Q15:

In case of standalone-prospectuses:

Q15a)

If a supplement is not required, how should the consent to use the prospectus be published?

NYSE Euronext would propose to treat it the same as way price-sensitive information (i.e. regulated information), through a press-release and on the website of the issuer.

Q15b)

If a supplement is not required, how can it be safeguarded that the investor and the competent authority in the home member state but also the competent authorities in any host member states learn of the new information? Please explain and justify your position, also taking into account issues as e.g. language requirements, filing of such information with the relevant competent authorities and responsibility issues that may arise in respect of such disclosures outside of a prospectus.

NYSE Euronext proposes the same treatment as price-sensitive information together with an obligation to inform the competent authorities of any host member states, issuing a press-release and publication on the website of the issuer.

Q15c)

Without prejudice to the requirement of a supplement, when information on a retail cascade is not known at the time of approval of a prospectus, do you consider it necessary to indicate in a prospectus how such information on retail cascades will be published? Should there be any specific regulation or guidance detailing by what means such information should be published (e.g. requiring publication in accordance with Article 14.2. Prospectus Directive)?

NYSE Euronext does not deem it necessary to indicate in a prospectus how such information will be published, but recognises that it could be helpful. If there are clear guidelines on how such information can be made public, it is no longer necessary to require such information to be included in the prospectus. NYSE Euronext welcomes consistent and generally accepted market practices based on clear guidelines.

Section 4. Review of the provisions of the Prospectus Regulation (Articles 5 and 7)

Information on Taxes withheld at source

Q4: What information on withholding tax should be required by the Prospectus Regulation in order to ensure that the prospectus provides investors with sufficient information to know the "net" amount that they will receive in accordance with the terms of the securities?

NYSE Euronext is in favour of keeping the current requirement of the Prospectus Regulation on tax information, and a statement in the tax section of the prospectus inviting investors to seek appropriate advice on their specific situation.

Q5: In cases where tax treaties mitigate or prevent applicable double taxation, do you consider it useful for investors to be informed of this fact?

See answer to Q4.

Index Composed by the Issuer

Q7: Do you agree to keep the current requirement of the Prospectus Regulation to disclose the description of an index composed by the issuer in the prospectus? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

NYSE Euronext considers that the description of an index composed by the issuer should be disclosed in the prospectus. For broadly based, generally recognised and frequently published indices, NYSE Euronext takes the view that issuers are only required to indicate where information about the index can be found instead of having to provide a description of the composition of the index in the prospectus.

Profit Forecast and Estimate

Q9: Do you agree with ESMA's view to keep the current requirement of the Prospectus Regulation to produce a report for profit forecasts and profit estimates? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

NYSE Euronext agrees that the general requirement to obtain an accountant's report should be retained because it provides assurance to investors that the basis of accounting used for the forecasts and estimates is consistent with the accounting policies of the issuer and that the forecasts and estimates have been properly prepared on the basis of the underlying assumptions. In reality, few issuers give such figures and they prefer to have analysts produce notes. For smaller issuers which do not benefit from large analyst coverage, the existence of an audit report is a guarantee that the company has properly drawn up estimates.

As previously stated in our response to ESMA's consultation on the Prospectus Directive in July 2011, in this context, it may be helpful, both to SME's and investors, to encourage SME's to communicate their level of activity and trends and provide some guidelines as to the means of communication. This could encourage the provision of better information to investors without the costs associated with audited reports of projected information analysis.

Q10: Do you agree with ESMA's approach to exclude "preliminary statements" from the scope of Article 2.11. relating to "profit estimate" and to provide a definition of "preliminary statements" in the Prospectus Regulation? If not, please indicate your reasons.

NYSE Euronext believes the definition should extend to preliminary statements relating to interim periods and not only the annual past year in order to maintain consistency and encourage flexibility all year long and taking into account preliminary statements relating to interim periods.

Q11: Do you agree with the list of criteria that have been defined for "preliminary statements"? If not, please indicate your reasons.

NYSE Euronext believes that, in practice, it may be difficult to obtain any formal auditor signoff on year-end figures prior to substantial completion of related audit fieldwork. This may well limit issuers' ability to make use of the flexibility offered by the new definition.

Audited Historical Financial Information

Q12: Do you agree to keep the current requirement of the Prospectus Regulation to produce audited financial information covering the latest three financial years? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

NYSE Euronext agrees with ESMA that for Regulated Markets, financials for the latest three financial years should remain required (both for IPOs and follow-ons). Cost reductions will be limited/nil given that in general, issuers seeking a follow-on will have three years financials available which can be incorporated by reference.