RE: Ju2012/1709/LI

NASDAQ OMX Stockholm AB ("NASDAQ OMX ") has been asked to provide its opinion on the captioned matter regarding the overall discussion on the future of EU:s company law. Please acknowledge the fact that the wording set out below constitutes our preliminary view and we therefore kindly ask you for the possibility to revert with additional views hereof should we deem it appropriate.

Summary:

- There is room for more harmonization, especially for company groups
- Corporate governance is however best addressed in principles based codes in combination with the comply or explain approach, rather than in detailed Company law. Detailed legislation risks deteriorating the well functioning Nordic model, a model that for instance supports strong and active shareholders.
- The purpose of company law should be to improve the environment in which European companies operate, setting the right framework for regulatory competition allowing for a high level of flexibility and choice and ensure a strong role for shareholders.
- Issuers listed on exchanges are already appropriately regulated. More rules risk deteriorating the transparent listed markets.

NASDAQ OMX appreciates the opportunity to participate in the debate on European Company law and wishes to provide comments in relation to the parallel work streams on corporate governance. We also provide a few more comments in relation to the questions we have replied to in the questionnaire.

Exchanges' role in financing the economy
We reply to this consultation primarily in the role of a financial institution that provides a market place for companies to access finance. We offer listings on regulated markets as well as alternative venues in the form of MTFs, where companies of very different sizes can chose the listing option that suits them the best. We are dedicated to providing the listed companies on all our markets with the best environment to grow and prosper. A particular point to note is that even during the crisis we saw companies moving up from the alternative markets to the regulated market. This confirms that the role of exchanges in financing the economy and creating growth is sustainable and must be
recognised and defended. European company law must contribute to a supporting business environment.

**Corporate governance better addressed in codes than legislation**

Although there may be room for more harmonization in European Company law (see below under Q 6), we want to underline that for corporate governance, principles based corporate governance codes, in combination with a strong comply or explain approach, is often a better alternative than legislation in the fields of company law and non-financial disclosure. Corporate governance codes provide necessary room for each company to adapt the application of principles depending on what is suitable for each company at each specific point in time, the stage of maturity and growth of the company, type and diversity of business, etc. Company law, as well as corporate governance policy, should ensure sound growth for European companies. This requires leaving room for flexibility and adaptation to the specific circumstances for each company, thereby creating the best basis for innovation and growth.

Below we develop on the benefits of corporate governance codes over detailed legislation.

**The Nordic corporate governance model**

In the European jurisdictions where NASDAQ OMX and our listed companies have the largest part of the operations, the Nordic corporate governance model is the rule.

Besides company law, the Nordic model builds on corporate governance codes and the principle of comply or explain. The codes include overarching principles, which can be applied according to the size and other characteristics of each company. For listed companies, the framework also includes NASDAQ OMX’ listing rules.

In general, the Nordic codes are high quality and have been regularly updated following international and local developments. This model is recognized for high quality company law, the power of general clauses, the protection of minority shareholders and the strong and irrevocable powers of the general meeting of the shareholders. It also provides for transparency towards investors, which is fundamental to maintain confidence and well functioning capital markets. Furthermore, it in fact supports strong and active shareholders, for example by the system of nomination committees where shareholders take part and also by the mandatory powers of the general meeting to elect the board members. Many companies in the Nordics have controlling owners. The number of companies on the NASDAQ OMX Nordic market with a controlling owner is about 75%. The controlling owners are in general strong, in the sense that they take active part in the decision making of the company. The presence of controlling owners is another Nordic specificity.

An example of an area where further detailed European company law would be particularly inappropriate is division of functions and duties among board and management as well as the composition of the board. In the Nordic countries, the division of functions and duties of the chairperson of the board and the CEO is already provided for in the company law or in corporate governance codes. Deviation from the main principle should be allowed, for instance for smaller companies, and then be explained according to the comply or explain approach. In the Anglo-Saxon model, a rule on division of functions and duties could possibly be useful, while in the German model it would appear to have no effect. Further, NASDAQ OMX believes in board diversity, including that the board should be composed of representatives with the right combination of skills, knowledge and experience, as best appropriate for each company at each point in time. We also believe the composition of the board should be the responsibility of the owners, not legislation. Restrictions or detailed rules on board composition would limit to the free entrepreneurship and shareholder responsibility that is fundamental in a market economy and would even limit the basic right of

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1 A further description of the Nordic model may be found in a common publication by the Nordic corporate governance committees, Corporate Governance in the Nordic Countries: [http://www.corporategovernanceboard.se/media/28287/nordic%20cga%20booklet%20-%20final%20web%20version.pdf](http://www.corporategovernanceboard.se/media/28287/nordic%20cga%20booklet%20-%20final%20web%20version.pdf)
property. Rules on the composition of the board are best placed in the corporate governance codes based on sound principles.

While the Nordic codes display similarities, there are still differences and a common Nordic code has not been developed. This shows that even in highly integrated markets displaying many similar characteristics, room for local adaptation is needed. Full Nordic harmonization without negative consequences for the companies has not appeared as the best alternative, due to well-founded local market practices.

The Nordic model differs in some aspects from the Anglo-Saxon and European continental models. In other European regions, the corporate governance models are rather developed around a more dispersed ownership structure, where the executives instead have a stronger role vis-à-vis the owners. Company law and corporate governance systems must not destroy any of these structures, but should instead allow for overarching principles to be implemented in the most appropriate way depending on the local environment.

The World Economic Forum has concluded Sweden is the country with the best corporate governance in the world.\textsuperscript{2} Such a winning concept must not be destroyed, rather defended and continuously developed. The Nordic model should be one of the several models that should continue to exist. Other models have their benefits and are deeply rooted in their respective markets, due to particular local needs.

\textit{Improved implementation of the comply or explain approach}

We are convinced that signs of weak implementation of corporate governance codes cannot be remedied by even more rules, such as in detailed company law. On the contrary, focus should be on improving implementation. An open and clear justification for the deviation from the corporate governance code promotes confidence in the markets. There should be a trustworthy mechanism in place which controls the compliance and also deviations are disclosed and explained. It is a central feature of the principle based Nordic model that companies are required to explain deviations.

In the Nordics, the monitoring of the comply or explain approach follows similar systems: In Sweden, the Corporate Governance Board conducts a yearly assessment of the corporate governance reports of listed companies and publishes the result in its yearly report. Furthermore, NASDAQ OMX, as part of its surveillance function, monitors the listed companies and according to the listing rules an issuer that does not comply with good practice may be brought to the disciplinary committee. The Swedish Securities Council may issue consultative guidance on the application of the code.

There is a similar system in Finland. The Securities Markets Association may issue consultative guidance. Again, there is no one to state that a company has deviated from the code for the wrong reason. That is for investors to decide based on the explanations given in a transparent manner. NASDAQ OMX’s surveillance function checks that there are clear and rational explanations for deviations.

In Denmark, the Danish Securities Council enforces compliance of listed companies with the current accounting regulations in their annual and interim reports, and may order a company to prepare a report on corporate governance that is in compliance with the rules. The Danish FSA carries out the Council’s secretariat function regarding the listed financial companies, while the secretariat function for listed non-financial companies is carried out by the Danish Commerce and Companies Agency.

These local variations of the same system work well. The Nordic surveillance function of NASDAQ OMX continuously evaluates its monitoring of explanations of the corporate governance codes and aims at improving its work.

**Flexibility needed to support innovation, growth and job creation**
Principle based corporate governance codes offer the most appropriate flexibility, supporting innovation, growth and job creation. Not all companies can be governed exactly the same. Companies come in many different shapes and sizes, their business is of varying diversity and complexity, they mature and develop at different pace and they face different governance needs from one time to another. Forcing all companies into the same mould would hamper the innovative power, the growth potential and the competitiveness of European companies. This would not only be inappropriate but even destructive to the economy at a time when growth and job creation is crucial for the recovery of the European economy.

**Q 5. Objectives of European Company law**
The overarching objective should be to improve the environment in which European companies operate and their mobility in the EU as well as setting the right framework for regulatory competition allowing for a high level of flexibility and choice. Especially in this time of recovery of the European economy, there must be a focus on supporting the business environment for companies. As already stated above, we believe relevant flexibility is needed in the regulatory environment in order to provide the best support for the diverse community of companies.

Also, there is a need to protect shareholders’ rights by not replacing their decision-making power by detailed legislation. The dangerous tendency to regulate in detail the governance of a company should be countered. Shareholders must maintain the right to take decisions about the company. What is best for a company in terms of management, risk taking, investments, etc., varies over time, depending on each company’s development, stage of growth, type and diversity of business, etc. It is the shareholders’ investments that are at risk, so shareholders’ rights must be protected. In case the Commission believes that in some Member States there are deficiencies in the shareholders’ rights, activities or responsibilities regarding board composition issues, such deficiencies should be addressed in the specific context of shareholder activity, rather than by detailed rules on for instance board composition.

**Q 6. Further harmonization?**
The most important area for further harmonization is company law for company groups and also other parts of company law that specifically addresses cross-border operations. See below under Q 19. However, a few words of caution. As already mentioned above, corporate governance should be left outside legislation. Further, a factor that is often perceived as burdensome for companies is the mere changes of rules. Even if a regulatory change may be beneficial in the long term perspective, it may cause short term cost and stalling of innovation and growth. It is important to find the right balance between improving the regulatory framework – which is indeed both relevant and desirable – on the one hand, and providing a stable regulatory environment. A focus on ‘need to do’ rather than ‘nice to do’, and also a focus on implementing and improving the application of the already existing framework, is welcome.

**Q 7. Move from distinguishing public/private to listed/unlisted?**
There is no need to move from distinguishing between public and private companies, to instead distinguish between listed and unlisted companies. Listed companies are already subject to targeted legislation (such as Transparency Directive, Market Abuse Directive/Regulation, Takeover Directive, Prospectus Directive). In addition, all listing venues have specific rules books for its listed companies. Beyond these rules, listed companies face the same needs and challenges as other companies. Further, listed companies are also very diverse among themselves, they come in different sizes and shapes,
have very diverse type of businesses and organizations. Notably, it is often forgotten that many listed companies are in fact small or medium sized. There is no basis for moving to a distinction between listed/unlisted companies in EU company law.

Specifically, we wish to again underline that a more detailed framework for listed companies risks having a detrimental effect on the transparent markets. The listed markets need to be defended as a well functioning way to access capital for enterprises. Public listed markets performed well during the crisis. There was continuous liquidity, thus providing access to capital markets for issuers. In case inappropriate legislation is added for the listed companies, more companies may opt for being outside the listed markets. In other words, this would function as a disincentive for listing on the public transparent markets. Alternative ownership models, such as private equity and government ownership would then be favored. This would risk having the consequence of overall reduced transparency and thus a deterioration of key tasks for an exchange, such as capital distribution. This will have negative effects on growth and job creation.

**Q 13. Support for European SMEs engaged in cross-border activities?**
It is very relevant and urgent to develop measures to support European SMEs. There are many areas where progress in SME policies could be encouraged, such as tax incentives for financing SMEs. Facilitating the expanding of operations cross border is also a welcome step, which may contribute to further measures. It is also important to ensure that there is a smooth regime for moving out of such a regime for companies that grow and no longer meet the criteria for an SME.

**Q 19. EU intervention in the field of groups of companies**
The regulatory framework for company groups is one area where further harmonization should be explored. NASDAQ OMX is a company group operating businesses in multiple jurisdictions, within as well as outside Europe. This is something we share with many of our listed companies. We welcome a regulatory environment that facilitates the operations of business within multinational company groups. The areas indicated by the Commission, such as mergers, divisions and transfer of seat, are among the relevant areas.

Stockholm as above

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