EUMEDION
CORPORATE GOVERNANCE FORUM

European Securities and Markets Authority
103 Rue de Grenelle
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Submitted by e-mail

Subject: Eumedion's response to the consultation on ESMA's draft technical advice on possible Delegated Acts concerning the Regulation on short selling and certain aspects of credit default swaps (ESMA/2012/98)

Ref: B2012.027

Amsterdam, 9 March 2012

Dear Sirs,

Eumedion welcomes the opportunity to submit comments on ESMA's draft technical advice on possible Delegated Acts concerning the Regulation on short selling and certain aspects of credit default swaps (ESMA/2012/98). 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 in listed companies worldwide.

We support a consistent approach to short selling, both across the European Union and through the upcoming different pieces of legislation affecting it (e.g. Transparency Directive and Market Abuse Regulation). The current fragmented situation in the European Union of various national short selling regulation approaches is not effective and potentially burdensome, in particular for institutional investors with their internationally diversified portfolios. The harmonizing Delegated Acts to be adopted by the European Commission on ESMA's advice may help to address this issue. To this end the Delegated Acts should be practible, credible and not impose unnecessary additional costs on institutional investors and other market participants.

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The consultation paper and the accompanying draft advice for Delegated Acts provide essential clarification on some of the Regulation's requirements. To our serious concern, however, the consultation has a very limited (three weeks) response period and does not include a cost-benefit analysis. While acknowledging that this is due to a very tight deadline set by the European Commission, we would stress the importance of a more realistic consultation in a sense that market participants have sufficient time to assess properly the draft standards' impact.

Given the fact that our focus is on institutional *shareholders* of listed companies, we are not responding to the questions concerning issues in relation to short positions in sovereign debts instruments. This means that we mainly confine our response to questions raised in Section I and II of the consultation paper to the extent that they are in the interest of shareholders of listed companies.

Ownership

Q1: Do you agree with the proposal concerning Article 2(1)(r) of the Regulation?

Yes. As stated in Article 2 of the Regulation a short sale is any sale of share which the seller does not 'own' at the time of entering into the agreement, including a sale where the seller has borrowed or agreed to borrow the share at the time of entering into the agreement. Unfortunately, the approach to ownership of shares or other securities is not harmonised in the European Union. Hopefully, a uniform ownership concept will be adopted under the upcoming Securities Law Directive. For the meantime it seems sensible, as proposed in the consultation document, to define ownership in accordance with the respective national civil and securities law applicable for the sale. We recognise that in some jurisdictions the person who legally owns a share (intermediary) is not always the person who bears the economic risks attached to the share (i.e. beneficial owner). This means that it makes sense not only to include legal ownership but also economic ownership in the Delegated Acts at this point.

Q2: Are there other cases which need to be excluded from the definition of a short sale?

We concur with the proposed exclusions for (i) sales under securities lending or repo agreements and (ii) sales of financial instruments that were prior purchased but not delivered yet. Those exemptions are in line with Recital 17 of the Regulation. Market-making activities have already been excluded in Article 17 of the Regulation.

Q3: Are there other definitions in Article 2(1), which need further clarification? Please explain which one(s) and why further clarification is required.

At this stage we do not see there is a stressing need to futher clarify other definitions stated in Article 2 (1) of the Regulation.

Holding

Q4: Do you agree with the above proposal? If not, please give reasons.

No. Although we realise that the scope and purpose of the disclosure requirement under the Transparency Directive and the Short Selling Regulation are not completely identical, we believe it is of significant importance to use a single concept of 'holding' under both pieces of legislation. Two different concepts of the key element of 'holding' in the disclosure requirement frameworks applicable to the same group of market participants, i.e investors, will not only result in an extensive burden on these market participants, but also make the overall framework less practicable and unnecessary complicated.

Beyond this need for a uniform approach, we are not sure whether the draft advice is properly framed for the purpose of specifying article 3 (2) (a) of the Regulation. Article 3 (2) (a) refers to 'holding' a short position in *shares* or *sovereign debts instruments*. Specified provisions of this Regulation requirement, to be adopted in the Delegated Acts, should have the same scope and also be limited to these two type of instruments. However, this seems not to be the case, as the second part of the draft advice focuses on (claims on) other types and financial instruments and refers to Article 3 (2) (b). This is not only confusing but also raises the question whether it is legitimated in the context. Consequently, we would recommend to remove the second part of the draft advice.

Q5: Do you have any suggestions on possible further criteria to describe the holding of a share or sovereign debt?

As mentioned above, we would be in strong favour of consistency in defining 'holding' of a share in the Short Selling Regulation and in the already existing Transparency Directive.

Having a net short position and method of calculation

Q6: Do you agree with the above proposal? If not, please give reasons.

No. We believe that baskets, indices and reverse exchange traded funds (ETFs) should only be included in the calculation of a person's holding of a short position in a share of a listed company when the listed company's shares represent at least 20% of the components of the basket, the index or the reverse ETFs. This approach would be in line with existing Dutch and UK regulations for disclosure of interests in 'contracts for differences' and other cash settled equity instruments.

Q12: Do you think it is appropriate the "delta adjusted method" for the calculation of short position for shares?

Yes, in our view the 'delta adjust method' is generally more appropriate than the nominal method for the calculation of derivatives in relation to issued share capital. The advantage of a delta-adjusted disclosure obligation is that it more accurately affects the holder's real economic exposure to the

underlying shares. This method is already used for the disclosure of interests in 'contracts for differences' and other cash settled equity instruments in several Member States. We would recommend to allow calculation on either a nominal or a delta adjusted basis for a transitional period of at least 6 months from 1 November 2012 when the new framework enters into force. This would offer market participants sufficient time to get familiar with the calculation methods and to adjust their internal systems and procedures to comply with the new rules.

Q13: Is there any comment you would like to make in relation to the calculation of the position in shares set out in Box 4?

We understand that the calculation of shares needs to take into account changes in the issued share capital of the company (e.g. capital raising, bond conversion, capital amortisation) that can trigger or eliminate notification obligations. Though there are some serious compliance difficulties. We are very concerned that institutional investors will not be able to take notice of these issued share capital changes within a timely manner (1 trading day) as a consequence of insufficient disclosures on the side of issuers. Therefore, we would welcome a general obligation in the Delegated Acts for issuers and competent authorities to disclose changes in issuer share capital on a real time basis.

Netting and aggregation

Q17: Do you agree with the approaches described above to cater for specific situations when different entities in a group have long or short positions or for fund management activities related to separate funds? If not, can you state your reasons and provide alternative method(s) of calculation?

We partly agree. Although we support the objective that the short position transparency regime should provide complete and accurate information about a natural or legal person's position, we oppose the introduction of a 'decision maker' level for net short position notification. Introducing such an additional level is likely to place a significant burden on institutional investors while not adding much value in terms of market transparency. In this respect we note that the definitions of 'decision maker' and 'investment strategy' are rather vague. As a result we prefer a two level notification approach above a three level approach as proposed.

Regarding fund activities, we believe that an approach of (i) calculating both on individual fund level and (ii) on the level of separate funds under the same management responsibilities is more practicable and also sufficient in achieving the Regulation's objectives. When it comes to groups of different legal entities, the same two level approach should apply. This means calculating and netting on each individual legal entity level as well on the whole group level.

We concur with the proposal that where two or more portfolios are managed on a discretionary basis by the same external investment manager and follow the same investment strategy in relation to a issuer, the net positions of all managed portfolios should be aggregated. In that context the potential notification disclosure obligation applies both to the external managers and to his clients. Where a

notification by an investment manager is the same as that being for its clients, it should be allowed to make a single notification provided that it is made clear that the notification is on behalf of both parties.

Q18: Which do you consider the better definition of a group for the purpose of this Regulation?

For the purpose of a uniform and practical disclosure approach we would prefer using the definition of 'group' as stated in Article 2 of the Transparency Directive.

If you would like to discuss our views in further detail, please do not hesitate to contact us. Our contact person is Wouter Kuijpers (e-mail: wouter.kuijpers@eumedion.nl, tel. +31 20 70 85 882).

Yours sincerely,

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