

Directorate-General for Financial Stability,  
Financial Services and Capital Markets Union  
European Commission  
1049 BRUSSEL  
BELGIUM

The Hague, 7 March 2018

Ref: B18.08

**Subject: Eumedion's comments on ESMA's technical advice on the Short Selling Regulation**

Dear Sir/Madam,

Eumedion would like to make some comments on ESMA's technical advice on the Short Selling Regulation.<sup>1</sup> By way of background, and to put our comments in context, Eumedion is the Dutch based corporate governance and sustainability forum for institutional investors. Our 65 Dutch and non-Dutch participants have together more than € 5 trillion assets under management. Participants include a wide range of institutional investors; pension funds, mutual funds, asset managers and insurance companies. Some topics of ESMA's technical advice fall outside the scope of Eumedion. Therefore our comments are confined to the topics that are the most relevant for Eumedion and its participants; 1) short term restrictions on short selling in case of a significant decline in prices and 2) transparency of net short positions and reporting requirements.

Eumedion welcomes the efforts of ESMA to improve the relevance, effectiveness, coherence and efficiency of the Short Selling Regulation. Nevertheless, we have major concerns regarding a number of proposals of ESMA to amend the Short Selling Regulation, particularly the following: 1) the proposal to change the current short-term bans on short selling into bans on entering into or increasing net short positions.<sup>2</sup> As already mentioned in our response<sup>3</sup> to the consultation paper of ESMA<sup>4</sup>, we believe that it should be seriously considered to eliminate the power to adopt short-term

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<sup>1</sup> Final Report, Technical Advice on the evaluation of certain elements of the Short Selling Regulation (ESMA70-145-386).

<sup>2</sup> P. 47/48 of ESMA's technical advice.

<sup>3</sup> <https://www.eumedion.nl/en/public/knowledgenetwork/consultations/2017/2017-09-response-esma-consultation-paper-on-short-selling-regulation.pdf>.

<sup>4</sup> Consultation paper of ESMA on the evaluation of certain elements of the Short Selling Regulation (ESMA70/145/127).



bans on short selling.<sup>5</sup> Especially, since there is little if not any evidence of the effectiveness of those short-term bans while such bans can seriously harm investor's confidence in EU markets.<sup>6</sup> If the European Commission decides that the current regime of short-term bans needs to be preserved instead of eliminated, we advise not to follow ESMA's advice to change the scope into bans on entering into or increasing net short positions.<sup>7</sup> Since such a change would also include the use of derivatives, it would effectively and severely limit the ability of institutional investors to hedge their exposure.<sup>8</sup> Eumedion considers that this is undesirable. Hence we are of the opinion that the scope of the proposed new short-term bans should not include derivative short positions that merely serve the purpose of (partially) hedging long exposure. Therefore: **derivative short positions that merely serve the purpose of (partially) hedging long exposure should be excluded from the scope of short-term bans.**

2) the proposal to set up a fee for position holders to have access to and report through an EU-wide notification and publication system.<sup>9</sup> Although we support the introduction of an EU-wide notification and publication system, we are not in favour of ESMA's proposal to set up a fee for position holders to have access to and report through such a system. According to ESMA's technical advice (p. 57) the majority of respondents did not support the introduction of such a fee. An EU-wide notification and publication system will help to achieve the underlying objectives of the Short Selling Regulation; uniform disclosure of net short positions throughout the Union.<sup>10</sup> Currently, the process for registration and submitting notifications is not harmonised across the Union. ESMA's technical advice (p. 57) correctly states that an EU-wide notification and publication system would reduce the administrative burden and costs that position holders currently bear when submitting notifications to multiple reporting systems. In other words, such a system would promote supervisory convergence and would solve the existing cross-border problems mentioned above. Eumedion regards it as a task of the national competent authorities to facilitate an EU-wide notification and publication system while keeping the administrative burden for investors as low as possible. Therefore: **the proposal of ESMA to set up a fee for position holders to have access to and report through an EU-wide notification and publication system should not be followed.**

Finally, we would like to take the opportunity to make some suggestions in order to make the notification of significant net short positions in shares less burdensome for investors.

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<sup>5</sup> According to p. 43 and 46 of ESMA's technical advice the majority of the respondents to the consultation paper of ESMA suggested that the power of NCAs to adopt short-term bans should be altogether eliminated.

<sup>6</sup> See p. 41 and 43 of ESMA's technical advice and p. 30 of the consultation paper of ESMA on the evaluation of certain elements of the Short Selling Regulation (ESMA70/145/127).

<sup>7</sup> P. 48 of ESMA's technical advice states that the definition of net short positions is comprehensive, as it includes short positions entered into through short selling, derivatives, and OTC trading.

<sup>8</sup> For more details we refer to: <https://www.eumedion.nl/en/public/knowledgenetwork/consultations/2017/2017-09-response-esma-consultation-paper-on-short-selling-regulation.pdf>.

<sup>9</sup> P. 59 of ESMA's technical advice.

<sup>10</sup> Recital 3 of the Short Selling Regulation states "It is appropriate and necessary for those rules to take the legislative form of a regulation in order to ensure that provisions directly imposing obligations on private parties to notify and disclose net short positions relating to certain instruments and regarding uncovered short selling are applied in a uniform manner throughout the Union". For more details we refer to: <https://www.eumedion.nl/en/public/knowledgenetwork/consultations/2017/2017-09-response-esma-consultation-paper-on-short-selling-regulation.pdf>.

- ESMA is of the view that the current initial and incremental thresholds should be maintained.<sup>11</sup> We partly agree. Eumedion generally supports the current initial thresholds but doubts whether the requirement to report all changes (upwards and downwards) of net positions at incremental thresholds of 0,1% is appropriate and results in meaningful information for both market participants and regulators. Therefore: **the uneven incremental thresholds should be removed from the Short Selling Regulation.**<sup>12</sup>
- It follows from the technical advice (p. 58) that ESMA believes that the current rules on the look-through of indices are appropriate and need not to be changed. We disagree with that. Some of our participants consider it a very burdensome task to constantly monitor and calculate net positions regarding a share, where it is one of many in an index, basket or exchange traded fund (ETF). Therefore: **indices, baskets and ETFs should only be included in the calculation of net positions insofar as a set threshold is crossed.**<sup>13</sup>

We are available should you require further clarification regarding this letter.

Yours faithfully,



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<sup>11</sup> See p. 53 of ESMA's technical advice.

<sup>12</sup> For more details we refer to: [https://eumedion.nl/en/public/knowledgenetwork/consultations/2013-03\\_response\\_esma\\_call\\_for\\_evidence\\_short\\_selling\\_regulation.pdf](https://eumedion.nl/en/public/knowledgenetwork/consultations/2013-03_response_esma_call_for_evidence_short_selling_regulation.pdf).

<sup>13</sup> For more details we refer to: [https://eumedion.nl/en/public/knowledgenetwork/consultations/2013-03\\_response\\_esma\\_call\\_for\\_evidence\\_short\\_selling\\_regulation.pdf](https://eumedion.nl/en/public/knowledgenetwork/consultations/2013-03_response_esma_call_for_evidence_short_selling_regulation.pdf).