



European Securities and Markets Authority
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Submitted by e-mail

Subject: Eumedion's response to ESMA's consultation on draft Regulatory Technical Standards (RTS) under the revised Transparency Directive (ESMA/2014/300)
Ref: B14.21

The Hague, 19 May 2014

Dear Sirs, Madams,

Eumedion welcomes the opportunity to submit comments on ESMA's Draft Regulatory Technical Standards on major shareholdings and indicative list of financial instruments subject to notification requirements under the revised Transparency Directive (Document Nr. ESMA/2014/300). By way of background, Eumedion is the Dutch based corporate governance forum for institutional investors. Our 70 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.

Various cases in different Member States have shown that cash settled derivatives can also be used in order to acquire and/or exercise potential influence in a listed company without any disclosure. Due to a lack of transparency, market participants are unable to examine who has such a significant economic exposure to shares and (potentially) access to voting rights. Holders of significant economic long positions, on the contrary, have better information on the undisclosed economic interests and, as a result, the free float. This may create a situation of information inequality and inefficient pricing, which potentially diminishes market confidence. Therefore, we much welcome the revised Transparency Directive (hereafter TD) and the work ESMA is conducting on the Draft Regulatory Technical Standards (hereafter Draft RTS) under the revised TD.

In answering the questions and considering the technical nature of the draft RTS, we try to achieve a proper balance between an adequate degree of market transparency and limiting the compliance burden for financial institutions involved. Our response is confined to those questions which are most relevant for Eumedion and its participants.

Q1. Do you agree that the trading book and the market maker holdings should be subject to the same regulatory treatment regarding Article 9(6b) RTS?

We believe the principles should apply in the same manner to credit institutions and investment firms in respect to the trading book and market maker holdings.

Q3. Do you agree with the ESMA proposal of aggregating voting rights held directly or indirectly under Articles 9 and 10 with the number of voting rights relating to financial instruments held under Article 13 for the purposes of calculation of the threshold referred to in Article 9(5) and (6)? If not, please state your reasons.

Yes we agree. As the rule of aggregation of shares, voting rights and financial instruments referred to in articles 9 (1), 10 (1) and 13 (1) TD already applies to the calculation of holding thresholds subject to the notification, it should for reasons of consistency also apply to the related market maker and trading book exemptions.

Q5. Do you agree that, in the case of a group of companies, notification of market making and trading book holdings should be made at group level, with all holdings of that group being aggregated (Article 3(1))?

Yes we agree. TD's main principle of major shareholding disclosure is that the final beneficial owner, e.g. the parent undertaking, has to disclose any voting rights which are held, or may be exercised by an undertaking controlled by that person or entity (Article 10 (e) TD). We believe that the same principle should be applied to the market maker and trading book holding exemptions as referred to in Article 9 (5) and Article 9 (6) TD.

Q6. Do you agree that an exemption to notify at group level can apply if an entity meets the independence criteria set out under paragraph 72 (Option 2)?

In order to benefit from the existing market and trading book exemptions, voting rights connected to these positions are **not** to be exercised. This implies that the existing test of independence under Article 12(4) and (5) TD requiring that both the management company and the investment firm exercise voting rights independently from the parent undertaking, seems to be rather meaningless. In light of this, we welcome that ESMA has come up with independence criteria for the market maker and

trading book exemptions that refer to “other” holdings of the credit institution or investment firm which are unrelated to the trading book or market maker activity.

Q9. Do you agree with the proposal that financial instruments referenced to a basket or index will be subject to notification requirements laid down in Article 13(1a)(a) when the relevant securities represent 1 % or more of voting rights in the underlying issuer or 20 % or more of the value of the securities in the basket/index or both of the above?

Yes, we agree with ESMA’s proposal that financial instruments referenced to a basket or index should be disclosable if the related securities in the basket represent 1% or more of the voting shares of the underlying issuer, or 20% or more of the value of the securities in the basket/index, or both. These thresholds are already market practices in several member states, including the Netherlands and the UK.

If ESMA were to propose lower thresholds, the requirements could become quite costly and burdensome. A higher threshold, on the other hand, could compromise transparency too much.

Q10. Are there any other thresholds we should consider?

We do not propose any other thresholds, but what could be taken in consideration by ESMA are changes in the index or basket. In fact, it is not entirely clear to us how the transparency regime works out if a position held via a basket or index changes ‘passively’ (e.g. due to a change in the composition of an index/basket or a change in the value of the relevant securities). We would not expect a new disclosure if a disclosure threshold was reached or passed solely as a result of the change to the basket/index. The market could benefit from more guidance on this in ESMA’s final considerations regarding the RTS.

Q11. Please estimate the number of disclosures you would have to make per year should the above mentioned thresholds be adopted. Please also provide an estimate of the compliance costs associated with the disclosure (please distinguish between one-off and on-going costs).

A participant of Eumedion, an asset manager with approximately € 185 billion assets under management, estimates that it would have to make daily calculations for 25 different indices for potential disclosures in case the proposed thresholds are adopted. The list of 25 indices changes over time depending on buy/sell activity based on changes in the investment strategy.

The incremental compliance costs are difficult to estimate but presumably of high magnitude. They could include both one-off costs (e.g. costs for adapting IT systems and re-engineering the existing technical interfaces between the institution and the national reporting systems; new compliance costs for learning the notification processes of the various competent authorities across the EU as there would not be a harmonised EU reporting system in place) and on-going costs (including costs of buying data on indices’ composition from external providers in order to be able to calculate holding

positions when the respective financial instrument is included in those indices). In principle information on the compilation of indices should be publicly available. However, index providers are more and more switching off access to this information as they can earn money with providing it on a commercial basis.

The estimated cost components of data regarding indices are:

- 1) Composition and weight of each index and its constituents: up to € 250,000 a year (excluding VAT) for roughly 25 indices;
- 2) Data regarding constituents of the indices (issuer, nominal capital, issued shares, outstanding voting rights): up to € 300,000 a year. These data are only available via data vendors and not publicly available.

Q12. Do you agree that a financial instrument referenced to a series of baskets which are under the thresholds individually but would exceed the thresholds if added and totalled should not be disclosed on an aggregated basis?

Yes, we fully agree with ESMA's approach. It would not be realistic that market parties build a stake in a single issuer by obtaining small holdings in different diversified baskets just to avoid notification.

Q13. Do you agree that our proposal for the method of determining delta will prevent circumvention of notification rules and excessive disclosure of positions? If not, please explain.

Yes we agree with the practical and principle based approach of as proposed in draft Article 5. That said, we would like to make a minor remark regarding the wording of the proposed Article 5, paragraph 5. As IT systems should ensure adequate delta calculations and financial institutions are subsequently responsible to report on the outcomes, we would suggest replacing the word 'reporting' by 'calculations' in paragraph 5.

Q14. Do you agree with the proposed concept of "generally accepted standard pricing model"?

We concur with ESMA's preference for option 2. The method on the basis of the generally accepted industry standard pricing model is more appropriate than the rather prescriptive approach of option 1 in which several delta formulas are used, each of them specific for a certain type of instruments. The latter would be rather burdensome. The proposed elements of valuation, interests, dividend payments, time to maturity, volatility, and price of the underlying share are the key important parameters to use when determining delta.

Q15. Are these three types of client serving exemptions all appropriate in terms of avoiding excessive or meaningless disclosures to the market? Please provide quantitative evidence on the additional costs borne by financial intermediaries should any of these exemptions not be adopted.

We believe the three types of client serving exemptions are appropriate in terms of avoiding excessive or meaningless disclosures to the markets. Transactions undertaken within the three situations will by nature not serve the intermediary's own interest and will most probably not be used to exert influence on the issuer.

Q17. Do you agree with our analysis that applying the current exemptions can address certain notification requirements for cash-settled financial instruments introduced by Article 13(1)(b)?

Q18. In your opinion, is the application of current exemptions sufficient to achieve the aim of this provision (i.e. avoiding unmeaningful notifications to the market)?

We believe ESMA's considerations of interpreting the wording of the Article (4) mandate in a literal way makes clear that current exemptions do not sufficiently address client-serving transactions, as is the case for the Article 9(4) exemption for custodians and the Article 9(5) exemption for market makers. Due to that, the objective not to require low value disclosures from financial institutions holding positions purely to facilitate a client position, with no interest in the performance of underlying equity, would not be met.

Q19. Do you agree that the client-serving exemption should cover MiFID authorised entities as well as a natural or legal person who is not itself MIFID authorised but is in the same group as a MiFID authorised entity and is additionally authorised by its home non-EU state regulator to perform investment services related to client-serving transactions? Can you foresee any additional cost in case the exemption does not also cover non-EU entities within the group? If yes, please provide an estimate?

Q20. Do you think that the proposed methods of controlling client-serving activities are effective? Do you envisage other control mechanisms which could be appropriate for financial intermediaries who wish to make use of the exemption?

We agree with the teleological interpretation of Option 2 in that it adequately reflects that client-serving transactions are an independent subject from existing exemptions. Interpreting the ESMA mandate in this way would result in the client-serving exemption having an actual and practical impact. Obviously, an institution as a counterparty of a client in client-serving transactions which will use the exemption should have to be authorised to perform investment services under MiFID. In addition, it makes sense to require institutions to demonstrate to the competent authority that they have appropriate systems and controls in order to ensure that a clear line between client-serving transactions and transactions for other purposes in relation to the same issuer can be drawn. It should be crystal clear that an intermediary by no means uses its client position to exert influence on the issuer.

Q21. When does a financial instrument have an "economic effect similar" to that of shares or entitlements to acquire shares? Do you agree with ESMA's description of possible cases?

Basically, an instrument has as similar effect to that shares or entitlement to acquire shares when the holder of the financial instrument has in effect a long position on the economic performance of the

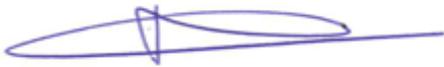
shares. This includes situations in which the holder benefits of an upward movement and/or the damages of a downward movement of the price of these shares. We largely agree with ESMA's clear description of possible cases. It may also be worth considering the long position definition under the EU Short Selling Regulation framework.

Q22. Do you think that any other financial instrument should be added to the list? Please provide the reasoning behind your position.

We do not believe there is a stressing need to enlarge the list. First of all, the proposed list is already rather comprehensive. Secondly, as the overall approach of Article 13 (1) TD is principle based, which focuses on the potential to have the same effect as qualifying instruments, we do not see much extra value to be gained from a list that captures all possible instruments that could meet the similar economic effect criterion. Thirdly, it does not make a huge difference whether or not an instrument is on the list. As ESMA rightly states, the list is indicative. That means that instruments on the list should not mechanically be disclosed and, at the same time, instruments which are excluded from the list could still be subject of disclosure and notification.

If you would like to discuss our views in further detail, please do not hesitate to contact us. Our contact person is Wouter Kuijpers (wouter.kuijpers@eumedion.nl, +31 70 2040 302).

Yours sincerely,



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