**FINAL**

EUROPEAN STRUCTURED INVESTMENT PRODUCTS ASSOCIATION

To

Mr. Jeroen Dijsselbloem
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The Netherlands

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*PER MAIL*

Ref.:

**Consultation on amending the *Royal Decree* implementing the Law on Supervision of Financial Undertakings ("Wet op het financieel toezicht") by way of introducing article 56a regarding the advertisements of certain Financial Products aimed on the consumers in the Netherlands**

Dear Sir,

Borne by a sense of urgency the European Structured Investment Products Association (EUSIPA), the umbrella association for issuers of structured products, seeks to address by way of this letter a specific regulatory issue within your scope of political and technical responsibility. (More details on EUSIPA you find at the back end of the document.)

We are highly concerned about the project of enlarging the product intervention powers of the Dutch securities markets regulator by way of inserting the proposed article 56a in above-mentioned implementing Royal Decree.

Independent of our discomfort with the unusually short response period of the consultation of about three weeks, we would like to kindly ask you to consider the below points and arguments when deciding on the next steps in this matter.

Overall and most importantly, EUSIPA and her members are convinced that the planned insertion of article 56a will not represent a contribution to the European and Dutch market place. On the contrary the administrative application of the powers conferred by article 56a to the relevant authorities might make the Dutch market fall out of the European level-playing field and transfer to foreign investors a notion of regulatory uncertainty which we think is not what you intended.

Our criticism relates in particular to the following impacts that the insertion of article 56a might have.

## 1. Creation of legal uncertainty

The powers conferred to the regulator upon an assumed fulfillment of the conditions set out in the new article 56a extend to all financial market segments on which products are traded with or sold to Dutch retail investors. The newly inserted article 56a requires the Dutch securities market regulator to interpret very broad legal terms such as "reasonable proportion" (of return compared to risk) or "so complex that" and others without having been provided with sufficient technical guidance for doing so.

We would wish to indicate our surprise that such ruleset is being considered in the Dutch legislative framework at all. In our eyes granting those wide unspecified scope for intervention to a regulatory authority would signify a fundamental change in Dutch regulatory policy. Up until now The Netherlands, in line with a few other countries, have been known within the European Union as market place following a sensible approach to financial sector regulation. In the area of derivatives and structured products regulation its focus seemed rather to be put on ensuring that issuers had the necessary internal governance provisions in place that ensured a financial product being sold to the customer it was meant for and wanted by.

EUSIPA is convinced that replacing above approach with massive large-scale intervention powers on the more granular level of product/asset classes, as is done with the insertion of article 56a, surely will create a huge legal uncertainty going forward, also judging from the experience we have with other markets in the EU. The uncertainty already stems from the situation that it is totally unclear to which extent these powers will be used. This argument wins even more traction given **that there is no reason why at this moment the retail market situation in the Netherlands would require such large-scale intervention powers being entrusted to the regulator.**

Whilst, as said, we would certainly regret such a fundamental change in the regulatory approach of your country with regard to retail markets we are also worried for other reasons.

## 2. Upcoming conflict with European Union rules

The delegation of substantial product intervention powers to the Dutch securities markets regulator by way of a national legal act in 2017 is from our point of view highly irritating with particular regard to the European Markets in Financial Infrastructure Regulation (MiFIR) which will come into force in January 2018. The provisions of this regulation set out in article 42 the intervention powers of national authorities. As your services are surely aware, **MiFIR will be directly applicable in each EU member state and render any opposing or contradicting national rule as of that day automatically null and void. We do not share in that context the view that the business practices sought to be banned by the application of the new article 56a ("reclame-uitingen"/advertising) are not covered**

**by MiFIR. Advertising is an essential business practice inherently linked to offering services on the market and hence covered by MiFIR.**

As said before, EUSIPA and our members are not aware, looking at the Dutch market situation, product landscape, investor behaviour or other, of any reason that could justify passing a legal act which, as article 56a, can be applied only for a few months before it is highly likely to be replaced by an overruling European legal act. Such fast-track legislation would only be justified if there were specific Dutch market issues that are to be addressed in the coming months and cannot wait for the European MiFIR rules coming into force. As stated before, such issues are not visible to us.

The fact that the legal situation, as would be established with the insertion of article 56a within 2017, will again be changed as of the enforcement of MiFIR thus sets another reason for legal uncertainty given that decisions taken in 2017 will have to be reviewed (on their legal validity under MiFIR) as of January 2018.

## 3. Wider distortion of the European level playing field through the administrative act related to the insertion of article 56a

The third main argument for opposing the insertion of article 56a is that it invites for unbalanced and hence wrong administrative decisions. This is illustrated by the fact that **its intended first application, in the format of the marketing ban planned by the AMF for several product types, is already misguided as the latter leads to a distortion of the European level playing field**.

Despite the general nature of article 56a which, as was said before, makes the intervention powers applicable to the entire spectrum of retail financial products, the fact that the insertion of article 56a is consulted upon at the same moment as a proposed new administrative act for which article 56a actually establishes the legal foundation (meaning the marketing ban for several products types by the AFM), suggests in our view that **article 56a has been drawn up in order to justify actually foremost that specific administrative act**.

EUSIPA considers this interconnection not only to be legally flawed but in its consequence also hugely detrimental to the Dutch marketplace from a European perspective.

With regard to the AFM measure we are opposed in particular **against any inclusion of certificates, warrants and turbos** in the range of products for which the marketing will be restricted. Whilst many European countries (France, Italy and others) have in the recent months and years restricted the marketing/sale of non-securities such as binary options, Contracts for Difference (CFDs) and certain FOREX and virtual currency products, or intend to do so (UK) they have not done so for listed securities, e.g. certificates, warrants and turbos. This actually ties in with our experience that related to certificates, warrants and turbos markets, there are neither concerns in terms of consumers complaints nor from an advertising practice point of view.

A reason for this may be that certificates, warrants and turbos are distinctly different from the aforementioned non-securities. Some items of relevance in this context are set out hereunder. (They will be outlined in more detail in our answer to the AFM consultation on the intended marketing ban.)

- The maximum loss an investor can incur with certificates, turbos and warrants is limited to the initial investment, which especially with turbo and warrants generally remains a relatively small amount;
- Most products are listed on the Euronext Exchange, a regulated market licensed by the Dutch Ministry of Finance ensuring the application of European and Dutch rules and their supervision, including negotiation and liquidity in the secondary market;
- Certificates, turbos and warrants sold to retail are publicly offered and hence strictly require prospectuses all of which are approved by regulatory authorities within The Netherlands or other EU countries. The distribution of these products is already today regulated by MiFID rules meant to ensure that the product is sold only to appropriate retail customers whose investment needs and strategy it needs to suit;
- The hedging of positions by the issuer does not conflict with the interests of the client. Contrary to common belief, the economic model of warrants, certificates and turbos is not based on a zero-sum game. The issuer of securities does not intend to benefit from customer anticipation errors. Its economic model relies, as the markets of professionals, on its ability to hedge the risk initiated by the position of the investor, benefiting from a size effect ("global hedging");
  This risk hedging policy is opposed to the practice of several players in the universe of CFDs and binary options. The latter have applied risky economic model, positioning themselves as direct counterparty to the client positions, without hedging.

**We intentionally mention above points within this consultation as they give evidence to our view that the planned new article 56a in in its broad and vague formulation actually invites for regulatory measures that are not proportionate and hence detrimental to the market place.**

Hoping that above three reasons sufficiently outline the background to our concerns and explain the reasons for this letter, we would like to encourage you to reconsider the enforcement of the planned insertion of article 56a into the *Royal Decree* in your further decision-making.

We explicitly thank you for this consideration in advance.

Sincerely,

**Heike Arbter**
*President,*
*EUSIPA*

**Thomas Wulf**
*Secretary General,*
*EUSIPA*

## Background on EUSIPA

EUSIPA, the European Structured Investment Products Association was set up in 2009 and is the European umbrella organisation for the issuers of structured products, which includes investment and leverage products alike. Currently, EUSIPA has nine member associations, which are the relevant national trade bodies from Austria (ZFA), Belgium (BELSIPA), France (AFPDB), Germany (DDV), Italy (ACEPI), Sweden (SETIPA), Switzerland (SVSP) The Netherlands (NEDSIPA) and the United Kingdom (UK SPA).

EUSIPA seeks to promote initiatives that enhance the proliferation of market standards and support the transparency of the structured products marketplace. A key tool offered and managed by EUSIPA in that context is the EUSIPA Derivative Map©, the world-wide only mapping of the most prevalent structured products types. It is aimed at professionals and widely used by issuers, distributors and many regulators. The current version can be found here:
http://www.eusipa.org/images/Presse/European_map_20160530_2016.pdf

The European retail markets in structured products are very diverse and differ in terms of listed/unlisted OTC and in terms of wrapper structures used (bonds, funds, insurance-linked products). For the retail markets in structured notes EUSIPA regularly publishes a market report whose latest version is available here:
http://www.eusipa.org/research-and-statistics/market-reports

The volume currently invested by retail clients in structured products within the EU-28 and Switzerland is estimated at Euro 450 billion.

Please also visit our website under www.eusipa.org for more information.