3-16-2020

ESMA Decision: Short Selling Transparency Obligations

European Securities and Markets Authority

European Securities and Markets Authority

16 March 2020
ESMA70-155-9546

ESMA DECISION

of 16 March 2020

to require natural or legal persons who have net short positions to temporarily lower the notification thresholds of net short positions in relation to the issued shares capital of companies whose shares are admitted to trading on a regulated market above a certain threshold to notify the competent authorties in accordance with point (a) of Article 28(1) of Regulation (EU) No 236/2012 of the European Parliament and of the Council

THE EUROPEAN SECURITIES AND MARKETS AUTHORITY BOARD OF SUPERVISORS,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area, in particular Annex IX thereof,

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC([1]), and in particular Article 9(5), 43(2) and 44(1) thereof,

Having regard to Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps([2]), and in particular Article 28 thereof,

Having regard to Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regards to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events([3]), and in particular Article 24 thereof,

Whereas:

1. Introduction

(1) This ESMA Decision requires natural or legal persons who have net short positions in relation to a share admitted to trading on a regulated market to notify to a competent authority details of any such position if the position reaches or exceeds 0.1% of the issued share capital.

(2) The measure imposed by the ESMA Decision addresses the necessity for national competent authorities and ESMA to be aware of the net short positions that market participants have entered into in relation to shares admitted to trading on a regulated market, given the recent exceptional developments in financial markets.

2. Ability of the measure to address relevant threats and cross-border implications (Article 28(2)(a) of Regulation (EU) No 236/2012)

a. Threat to the orderly functioning and integrity of the financial markets

[1] OJ L 331, 15.12.2010, p. 84.

[2] OJ L 86, 24.3.2012, p. 1.

[3] OJ L 274, 9.10.2012, p. 1.

(3) The outbreak of the COVID-19 pandemic is having serious adverse effects on the real economy and on EU financial markets. As regards the latter, since 20 February 2020 the stock markets in the EU lost 30% [Figure 1], and all sectors and types of issuers were affected by severe share price falls.

(4) ESMA considers that this adverse situation constitutes a serious threat to the orderly functioning and integrity of the financial markets. Namely, the price movements are linked to the spreading of the COVID-19 pandemic in the EU, which has greatly increased the sensitivity of EU financial markets. There is a clear risk that such downward trend will continue in the coming days and weeks. Such severe price falls undermine the price-formation mechanism, thereby threatening the integrity and orderly functioning of the markets.

(5) At the same time, the severe losses also have the effect of prejudicing market confidence. A decrease of the latter threatens the orderly functioning and integrity of the markets, as it may result in further volatility and downward price spirals.

(6) In this context, as further explained in Section 3 below, short sales can contribute to accelerate price volatility and to exacerbate market losses.

(7) Within the limit of ESMA's mandate, the proposed measure obliges natural or legal persons who have a net short position in shares admitted to trading on a regulated market to report to national competent authorities at a lower thresholds than the one established in Article 5 of Regulation (EU) 236/2012. This should improve the capacity of national competent authorities and ESMA to assess the situation adequately and react if the integrity, orderly functioning and stability of the markets require more stringent actions.

b. Threat to the stability of the whole or part of the financial system in the Union

(8) As explained by the ECB in its Financial Stability Review[4], financial stability is a condition in which the financial system – which comprises financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances. Substantial selling pressure and unusual volatility in the price of shares is already ongoing and could continue to occur. In such situation market participants may take new short positions in order to profit from further price falls, which may in turn exacerbate the falls experienced in the past weeks. ESMA considers that the current market circumstances are substantially threatening the financial stability in the Union.

(9) Those price declines have left the vast majority if not all shares admitted to trading on a regulated market in a situation of uncertainty in which further price declines not triggered by additional fundamental information could have highly detrimental consequences.

(10) It is at this stage of the developments, where there is an increasing amount of information flowing to the market in relation to Covid-19, that the measure may be most effective, as it will allow national competent authorities to better monitor the market trends and fine-tune further regulatory responses.

[4] https://www.ecb.europa.eu/pub/financial-stability/fsr/html/ecb.fsr201911~facad0251f.en.html.

(11) ESMA considers that lowering the reporting thresholds is a preliminary action that under these exceptional circumstances is essential to monitor developments in markets. This measure can be used to evaluate and potentially gradually implement further regulatory responses if those prove necessary.

c. Cross-border implications

(12) The threats to market integrity, orderly functioning and financial stability described above have a pan-EU character. Since 20 February 2020, the EUROSTOXX 50 INDEX, which covers 50 blue-chip issuers from 11[5] Eurozone countries, fell by approximately 30% [Figure 1Figure 1]. In addition, the effect of the unusual selling pressure was apparent in the main indices of EU markets [Figure 2].

(13) Given the fact that the financial markets of each EU Member State are affected by the threats, the cross border implications are particularly serious.

3. No competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that do not adequately address the threat (Article 28(2)(b) of Regulation (EU) No 236/2012)

(14) One of the conditions for ESMA to adopt the measure in this Decision is that a competent authority or competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address the threat.

(15) The market integrity, orderly functioning and financial stability concerns described in this Decision have led some national competent authorities to consult on or take national actions aimed at restricting the short selling of shares.

(16) In Spain, the Comisión Nacional del Mercado de Valores imposed a temporary ban on short sales concerning 69 shares[6] listed on several Spanish trading venues. The prohibition was adopted pursuant to Article 23 of Regulation (EU) No 236/2012, considering the price drop, higher than 10% and, for illiquid shares, higher than 20%, recorded by the relevant shares on 12th March 2020. The ban applied for the trading session of the 13th March 2020, and was not extended.

(17) In Italy the Commissione Nazionale per le Società e la Borsa imposed a temporary ban on short sales concerning 85 shares[7] listed on the MTA market of Borsa Italiana. The prohibition was adopted pursuant to Article 23 of Regulation (EU) n. 236/2012, considering the price drop, higher than 10%, recorded by the shares on 12th March 2020. The ban applied for the trading session of the 13th March 2020 and was not extended.

[5] Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain.

[6] https://www.cnmv.es/portal/verDoc.axd?t={2ac24be5-78d8-4360-8199-c181c951e1e9}.

[7] http://www.consob.it/web/consob-and-its-activities/news-in-detail/-/asset_publisher/kcxlUuOyjO9x/content/press-release-12-march-2020-short-selling-hp/718268.

(18) The two measures were followed on 13 March 2020 also in Germany, on the Tradegate Exchange, and in the United Kingdom of Great Britain and Northern Ireland[8], where the temporary ban concerned 154 instruments.

(19) Such temporary restrictions on short selling according to Article 23 of the Regulation (EU) No 236/2012 could not address the continuing threats as they are applicable for one trading day only.

(20) Following the expiration of the abovementioned temporary measures taken in Italy and Spain, no further measures based on Regulation (EU) 236/2012 have been taken in the EU, and as of the date of this Decision there are no such measures in force.

(21) At the time of adoption of this Decision, no competent authorities have adopted measures to increase their visibility of the evolution of net short positions activity through the establishment of lower reporting thresholds.

(22) In light of the abovementioned pan-EU threats, it has become evident that the information received by national competent authoritiesis is not sufficient under the current stressed market conditions. ESMA considers that lowering the reporting thresholds should ensure that all national competent authorities across the EU and ESMA have the best possible data set available to monitor the market trends and enable themselves and ESMA to take, if necessary, further measures.

(23) In taking this measure, ESMA has also considered that the new notification threshold shall become applicable immediately after its publication on the ESMA website, as foreseen in Article 28(9) of Regulation (EU) 236/2012.

4. Efficiency of the measure (Article 28(3)(a) of Regulation (EU) No 236/2012)

(24) ESMA also has to take into account to which extent the measure significantly addresses the threats identified.

(25) ESMA has analysed the circumstances in recent trading days on trading venues, in particular since 9 March 2020 [Figure 1], in how far they constitute threats to the integrity of markets and to financial stability in the Union and whether the ESMA measure is efficient in addressing such threats by taking a forward-looking approach.

a. The measure significantly addresses the threat to the orderly functioning and integrity of financial markets

(26) ESMA considers that despite the extraordinary losses that were incurred in the trading of shares on regulated markets since 20 February 2020 and particularly since 9 March 2020, markets have functioned orderly and that the integrity of markets has been largely preserved.

(27) On that basis and as of this date ESMA deems this Decision to be proportionate given current circumstances.

[8] https://www.fca.org.uk/news/news-stories/temporary-prohibition-short-selling.

(28) However, due to the consistent selling pressure caused by subsequent developments affecting an extremely large range of issuers from all kinds of sectors in all Member States, markets are nonetheless in a fragile state.

(29) At times of extreme selling pressure and market volatility engaging in short selling and the building up of short positions can amplify downward trends already present in financial markets. While short selling at other times may serve positive functions in terms of determining the correct valuation of issuers, in current market circumstances it poses an additional threat to the orderly functioning and integrity of markets.

(30) ESMA considers that, without such a measure being taken at this point in time, national competent authorities and ESMA would not have the capacity to monitor adequately the market in the current market environment, where the substantial selling pressure and unusual volatility [Figure 1] in the price of Union shares admitted to trading on a regulated market could further be amplified by the taking of short positions. In particular, given the horizontal impact of the current emergency situation that affects a broad set of shares across the Union, the fall in share prices may be due to additional selling pressure resulting from short selling activity and increased net short positions that, being below the current thresholds for notification to the national comptent authorities, are therefore undetected.

(31) Therefore, national competent authorities and ESMA need to be aware as soon as possible of market participants engaging in short sales and building up significant net short positions to prevent, if necessary, that those positions become signals leading to a cascade of selling orders causing a further significant fall in value. On the same grounds, ESMA considers adequate to maintain the publication threshold in Article 6 of Regulation (EU) No 236/2012, but is monitoring on an ongoing basis the market conditions and will take further measures if the market conditions make it necessary.

b. The measure significantly addresses the threat to the stability of the whole or part of the financial system in the Union

(32) As described above, trading in shares since 20 February 2020 and particularly since 9 March 2020 was characterised by substantial selling pressure and unusual volatility leading to significant downward spirals affecting issuers from all types of sectors.

(33) Unabated selling pressure on the shares of banks and other financial institutions as well as a wide range of issuers from all sectors can put the financial stability of one or several Member States and ultimately the financial system in the Union at risk.

(34) In addition, ESMA considers that the significant falls in value and extreme volatility particularly since 9 March 2020 can cause a lack of trust in the functioning of the financial system by market participants and the public at large.

(35) The existence of such risks is also evident by the multiple measures taken at Member State and Union level in the past few days to stabilise the financial system and the economy as a whole.

(36) As evidenced above, engaging in short selling and building up significant net short positions can amplify selling pressure and downward trends which at the present time poses a threat which can have highly detrimental effects on the financial stability of financial institutions and companies from other sectors. In that context, data limitations for national competent authorities and ESMA would restrict their capacity to address any potential

negative effects on the economy and ultimately the financial stability of the Union as a whole.

(37) ESMA's measure to temporarily lower the reporting thresholds of net short positions to national competent authorities addresses this threat posed to the stability of parts or ultimately the whole of the Union financial system.

c. Improvement of the ability of the competent authorities to monitor the threat

(38) In ordinary market conditions national competent authorities monitor any threat that may derive from short selling and the building up of net short positions with supervisory tools established in Union legislation, in particular the reporting obligations concerning net short positions established in Regulation (EU) No 236/2012[9].

(39) However, the existing market conditions render it necessary to intensify the monitoring activity of national competent authorities and ESMA of the aggregated net short positions in shares admitted to trading on regulated markets. To that end, it is essential not only to ensure that the national competent authorities are getting reports at an earlier stage of the build-up of a net short position and not at the current level of 0.2% but also that such revised reporting obligation enters into effect with immediate effect.

(40) Therefore, ESMA's measure improves the ability of national competent authorities to deal with the threats identified and to overall monitor and manage threats to the orderly functioning of markets and to financial stability at times of market stress.

5. The measures do not create a risk of regulatory arbitrage (Article 28(3)(b) of Regulation (EU) No 236/2012)

(41) In order to adopt a measure under Article 28 of Regulation (EU) No 236/2012 ESMA should take into account whether the measure creates a risk of regulatory arbitrage.

(42) Since ESMA's measure concerns the reporting obligations of market participants with respect to all shares admitted to trading on regulated markets, it will ensure a unique reporting threshold for all national competent authorities, ensuring a level-playing field among market participants from in- and outside of the Union in respect of trading of shares admitted to trading on a regulated market.

6. ESMA's measure does not have a detrimental effect on the efficiency of financial markets, including by reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to its benefits (Article 28(3)(c) of Regulation (EU) No 236/2012)

(43) ESMA has to assess whether the measure has detrimental effects which would be considered disproportionate compared to its benefits.

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[9] Cf. Article 5 of Regulation (EU) No 236/2012.

(44) ESMA considers it appropriate that national competent authorities closely monitor the evolution of the market and any evolution of net short positions before considering adopting any further measure. ESMA notes that the current reporting thresholds (0.2% of the issued share capital) may not be adequate in the current exceptional market conditions to timely identify trends.

(45) Although the enhanced reporting obligation laid down in this decision may add additional burden to reporting entities, it will not limit the capacity of market participants to enter into or increase their short positions in shares. As a result, the efficiency of the market will not be affected.

(46) The current measure should not affect the liquidity in the market as the increased reporting obligation for a limited set of market participants should not change their trading strategies and therefore, their participation in the market. Additionally, the exception foreseen for market making activities and stabilisation programs is meant not to increase the burden for entities that provide an important service in terms of providing liquidity and reducing volatility, particularly relevant in the current situation.

(47) ESMA believes that limiting the scope of its measure to one or several sectors or to a subset of issuers may not achieve the desirable outcome. The magnitude of the price declines, the wide range of shares (and sectors) affected and the degree of interconnection between the EU economies and trading venues, suggest that an EU-wide measure is likely to be more effective than sectorial national measures.

(48) In terms of creating market uncertainty, the measure does not introduce new regulatory obligations, as it only modifies the existing reporting obligation that has been in force since 2012, by lowering the threshold. It applies to all trading in shares admitted to trading on a regulated market and therefore does not create any uncertainty.

(49) ESMA also highlights that the measure is limited to the reporting of shares that are admitted to trading on a regulated market to capture those positions where additional reporting appears most relevant. The measure only applies if positions reach or exceed the 0.1% threshold after the entry into force.

(50) Therefore, ESMA does not consider that such enhanced transparency obligation can have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to its benefits.

(51) In terms of duration of the measure, ESMA considers that a duration of three months is justified considering the information available at the moment. ESMA is aware of the increasing administrative burden this decision implies for certain market participants and intends to revert to the regular reporting obligation as soon as the situation improves, but at the same time cannot discard the possibility of extending the measure where the situation should worsen.

7. Consultation and notice (Article 28(4) and (5) of Regulation (EU) No 236/2012)

(52) ESMA has consulted the ESRB. The ESRB has not raised any objections to the adoption of the proposed Decision.

(53) ESMA has notified national competent authorities of this proposed Decision.

(54) ESMA's measure will apply once this decision is published on the ESMA website.

HAS ADOPTED THIS DECISION

Article 1
Definition

For the purposes of this Decision, a 'regulated market' means a regulated market as referred to in Article 4(1)(21) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU([10]).

Article 2
Temporary additional transparency obligations

1. A natural or legal person who has a net short position in relation to the issued share capital of a company that has its shares admitted to trading on a regulated market shall notify the relevant competent authority, in accordance with Articles 5 and 9 of Regulation (EU) No 236/2012 of the European Parliament and of the Council where the position reaches or falls below a relevant notification threshold referred to in paragraph 2 of this Article.

2. A relevant notification threshold is a percentage that equals 0.1% of the issued share capital of the company concerned and each 0.1% above that threshold.

Article 3
Exemptions

1. In accordance with Article 16 of Regulation (EU) No 236/2012 of the European Parliament and of the Council, the temporary additional transparency obligations referred to in Article 2 shall not apply to shares admitted to trading on a regulated market where the principal venue for the trading of the shares is located in a third country.

2. The temporary additional transparency obligations referred to in Article 2 shall not apply to market making activities.

3. The temporary additional transparency obligations referred to in Article 2 shall not apply to a net short position in relation to the carrying out of a stabilisation under Article 5 of Regulation (EU) No 596/2014 of 16 April 2014 on market abuse ([11]).

[10] OJ L 173, 12.6.2014, p. 349.

[11] OJ L 173, 12.6.2014, p. 1.

Article 4
Entry into force and application

This Decision enters into force immediately upon its publication on ESMA's website. It shall apply from the date of its entry into force for a period of three months.

Done at Paris, 16 March 2020

[signed]

For the Board of Supervisors

Steven Maijoor

The Chair

ANNEX

Figure 1 – Economic indicators

	Changes since 1W	Changes since 20 Feb	Level
Equity market performance (in %)			
Eurostoxx 50	-17%	-29%	2,495
US S&P500	-9%	-20%	2,711
JP Nikkei	-16%	-26%	17,431
Global	-13%	-23%	179
European banks	-20%	-38%	93
IT financials	-21%	-40%	23
ES financials	-24%	-38%	62
DE financials	-22%	-34%	94
FR financials	-22%	-40%	108
Volatility (in bps, level in %)			
VSTOXX	31	60	74.3
VIX	16	42	57.8
Credit Default Swaps (in bps)			
Europe corporate	36	61	101
Europe high yield	123	303	501
Europe financials	40	87	131
Europe financials subordinate	52	142	240
10Y Government bonds (in bps, level in %)			
DE10Y	14	-14	-0.59
IT10Y	73	89	1.81
US10Y	25	-57	0.95
GB10Y	18	-17	0.41
JP10Y	14	4	0.00

Note: Data as of 15 Mar 20.
Sources: Refinitiv EIKON; ESMA.

FIGURE 2 – EUROPEAN STOCK INDICES PERFORMANCE

	Percentage change since 20 Feb 2020	1W percentage change
Eurostoxx50	-32.36%	-19.99%
AT	-36.96%	-23.50%
BE	-33.65%	-20.44%
BG	-18.26%	-15.47%
HR	-25.18%	-16.88%
CY	-22.47%	-15.33%
CZ	-24.79%	-14.30%
DK	-22.42%	-14.19%
EE	-20.92%	-14.25%
FR	-32.07%	-19.87%
DE	-32.44%	-20.02%
GR	-39.34%	-20.17%
HU	-25.34%	-16.99%
IE	-28.85%	-17.85%
IT	-36.39%	-23.30%
LV	-10.87%	-7.28%
LT	-16.65%	-9.98%
LU	-35.66%	-19.27%
MT	-9.05%	-7.55%
NL	-30.42%	-18.52%
NO	-29.25%	-17.39%
PL	-33.04%	-21.68%
PT	-29.08%	-17.85%
RO	-22.30%	-16.55%
SK	-5.69%	-5.02%
SI	-22.37%	-13.61%
ES	-33.24%	-20.84%
SE	-27.51%	-15.50%

Source: Refinitiv Datastream