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ESMA Opinion-On a Proposed Measure by Austria's FMA Under Section 1 of Chapter V of Regulation (EU) No 236/2012

European Securities and Markets Authority

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OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 23 March 2020

on a proposed emergency measure by the Austrian Finanzmarktaufsicht under Section 1 of Chapter V of Regulation (EU) No 236/2012

In accordance with Article 44(1) of Regulation (EU) No 1095/2010, the **Board of Supervisors** has adopted the following opinion:

I. Legal basis

1. In accordance with Article 27(2) of 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 swaps¹ (the Regulation), the European Securities and Markets Authority (ESMA) shall, within 24 hours of the notification made by a competent authority under Article 26 of that Regulation, issue an opinion on whether it considers the measure or proposed measure necessary to address the exceptional circumstances as further specified in Article 24 of Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012.

II. Background

2. On 18 March 2020, pursuant to Article 26 of Regulation (EU) No 236/2012, the Austrian Finanzmarktaufsicht (FMA) notified ESMA of its intention to make use of its powers of intervention in exceptional circumstances and to introduce an emergency measure under Article 20(2)(a) and (b) of that Regulation.
3. In particular, FMA notifies that the concerned measure bans any legal or natural person from entering into or increasing a short sale or a transaction other than a short sale which creates, or relates to a financial instrument and the effect or one of the effects of that transaction is to confer a financial advantage on a natural or legal person in the event of a decrease in the price or value of shares admitted to trading on the Regulated Market of the Vienna Stock Exchange (Amtlicher Handel; WBAH) and for which the FMA is the

¹ OJ L 86, 24.3.2012, p. 1–24.

Relevant Competent Authority under Article 2(1)(j) of Regulation (EU) No 236/2012. The ban applies to transactions executed both on a trading venue or over the counter.

4. The measure applies to any natural or legal person domiciled or established within the Union or in a third country.
5. The measure does not apply to the following:
 - a. Activities: market making activities, as defined in Article 2(1)(k) of Regulation (EU) No 236/2012 and pursuant to Article 17 of Regulation (EU) No 236/2012; and
 - b. Transactions: transactions that only lead to an indirect short position pursuant to Article 3(1)(b) of Regulation (EU) No. 236/2012, that is assessed as being immaterial. These short position shall be assessed as being immaterial, where they satisfy the following conditions:
 - i. They are held via the composition of an index or a basket of securities or an exchange traded fund pursuant to Article 3(3) of Regulation (EU) No 236/2012; and
 - ii. This composition is such that the total value of financial instruments concerned by this measure in this index, basket or ETF is at all times less than 50 percent.
6. The proposed measure entered into force on 18 March 2020 at 20:00 after publication of the relevant Resolution and will expire on 18 April 2020 at 23:59. The proposed measure may also be lifted before the deadline or extended , taking into account the development of the financial market situation. Pursuant to Article 26(3) of Regulation (EU) No 236/2012, the FMA notified ESMA less than 24 hours before the measure was intended to take effect.
7. The FMA considers that the measure is justified, in the first instance, by the existence of specific adverse circumstances that constitute a serious threat to market confidence in Austria and notes the existence of potential risks to financial stability in case the current market dynamics continue.
8. The FMA notes that, following the outbreak of the COVID-19 pandemic, there is a threat linked to the unforeseeable impact of the COVID-19 pandemic on the economy of the EU, including Austria, and the context in which stocks admitted to trading on Austrian trading venues will be traded in the coming weeks, as the pandemic spreads across an increasing number of countries. The World Health Organisation pointed out that the contagion should reach its peak in the following weeks. However, Austria has registered during the last days a rapid increase of the number of both infected people and people in need of continuous medical treatment in intensive care units.

9. In such situation, the FMA identifies three threats to market confidence:
 - a. First, the FMA notes that as opposed to a deterioration affecting just one issuer, based on fundamental economic factors, investors do not have accurate and public information on the impact of the public health crisis on each listed company, since events develop quickly and restrictions adopted by the Austrian Government might come with little or no advance notice. Hence, price formation may take place in an environment of partial information.
 - b. Second, the FMA reports to have observed examples of disinformation, rumours and false news in media and social networks regarding activities that could be affected by decisions of the Austrian Government or by the evolution of the crisis. According to the FMA, those rumours may affect listed companies and may damage the confidence of investors in an efficient market, one where prices are formed with public, reliable information.
 - c. Third, the FMA considers that, although Regulation (EU) No 236/2012 and Article 24 of Commission Delegated Regulation (EU) No 918/2012 do not specifically address a pandemic, when identifying the situations that could be considered a threat to market confidence, there is reference to “natural disasters” that may damage financial institutions, market infrastructures, clearing and settlement systems and supervisors. In the FMA’s view, the effect of the restrictions to the movement of workers and the fact that key personnel of infrastructures and supervisors may be affected and unable to continue working due to the state of emergency could be similar to some natural disasters, constraining infrastructures to manage markets.
10. In this context, the FMA considers that the growth of short positions betting on negative news (be they real or ill-based) affecting companies admitted to trading on Austrian trading venues could adversely affect market confidence and increase systemic risk through downward price spirals of the type we have observed since the outbreak.
11. The FMA also refers to a potential impact on financial stability. In the FMA’s view, in a context where the price of financial instruments and assets in general is rapidly deteriorating, the risk of weaker confidence of the public in financial stability based on false rumours cannot be discarded. Although the FMA declares not to have observed signs of these effects on financial stability at this stage, it also considers that these scenarios could develop quickly if selling panic as in the week from the 9 to 13 March 2020 happens again.

III. Opinion

12. ESMA considered the information provided by the FMA and is adopting the following opinion on the notified measure, on the basis of Article 27(2) of Regulation (EU) No 236/2012:

On the adverse events or developments

13. As indicated in ESMA Decision ESMA70-155-9546 and in the ESMA Opinions ESMA70-155-9556, ESMA70-155-9565, ESMA70-155-9851, ESMA70-155-9587 and ESMA 70-155-9590 respectively on emergency measures by the Comisión Nacional del Mercado de Valores (CNMV), the Commissione Nazionale per le Società e la Borsa (CONSOB), the Autorité des marchés financiers (AMF), the Hellenic Capital Markets Commission (HCMC) and the Financial Securities and Markets Authority (FSMA) under Section 1 of Chapter V of Regulation (EU) No 236/2012, ESMA agrees that the outbreak of the COVID-19 pandemic is having serious adverse effects on the real economy and on the financial markets of the Union. As regards the latter, since 20 February 2020 the stock markets in the Union lost up to or more than 30% in value, and all sectors and types of issuers were affected by severe share price falls (details in the Annex).
14. ESMA considers that the adverse situation linked to the COVID-19 with the consequent adoption by EU Member States of restrictive measures which impact all economic sectors has greatly increased the vulnerability of EU financial markets. There is a risk that the observed downward trend will continue in the coming days and weeks.
15. Pursuant to Article 20(1)(a), the measure under Article 20(2) of Regulation (EU) No 236/2012 requires the presence of adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned.
16. The FMA considers in its notification that the measure is justified by the adverse circumstances which constitute serious threats to market confidence, and potentially to the financial stability, in Austria. Namely, the FMA considers that the current context is not compatible with the availability of accurate information, with the consequence that price formation may take place in an environment of partial information. Rumours of false news linked to the pandemic may have the effect of impacting listed companies and damage the confidence of investors in the markets. A third source of threat to market confidence is that the COVID-19 pandemic is at the origin of restrictions on the availability of human resources at issuers and financial market participants.
17. ESMA notes that, following the outbreak of the COVID-19 pandemic, Austrian stocks were subject to severe downward price movements and high price volatility, and the Austrian main index (the ATX) decreased by approximately 41% between 2 and 18 March 2020 and a decrease of 18.49% occurred between 13 and 18 March 2020 (see the Annex).

18. As previously stated with respect to CNMV's, CONSOB's, AMF's, HCMC's and FSMA's short selling bans, ESMA agrees with the FMA that the severe losses observed, the uncertainty as regards the spreading of the COVID-19 contagion and the possible consequent further volatility and downward price spirals risk the loss of market confidence. ESMA also considers that the observed increase in net short positions in the last days may further exacerbate the downward price spirals, thereby further weakening market confidence in Austria. ESMA therefore agrees that the threats to market confidence on the Austrian market amount to serious threats. It should be noted that the ATX index includes relevant Austrian financial issuers (as Erste Bank, Raffeisen International, BAWAG, Vienna Insurance Group, Uniqa Insurance Group) and in that sense the circumstances described in Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 are met.
19. Furthermore, taking also into account that the losses observed in the main Austrian indices and the increase of net short positions, ESMA agrees that such circumstances impact market confidence in general, with consequences for all listed issuers.
20. ESMA agrees with the FMA's assessment that the impact of COVID-19 and the extraordinary market conditions caused by it qualify as "adverse events or developments" under Article 24(1) of Commission Delegated Regulation (EU) No 918/2012 and agrees that there are serious threats to market confidence.
21. With reference to the broader EU-markets scenario, ESMA has assessed that there are existing threats to market integrity, orderly functioning of markets and to financial stability. On that basis, on 16 March 2020 ESMA has adopted a decision to temporarily lower the notification thresholds of net short positions to national competent authorities in accordance with point (a) of Article 28(1) of Regulation (EU) No 236/2012 (ESMA70-155-9546). ESMA considers that its decision will enable national competent authorities to better monitor the existing threats.
22. At the same time, ESMA considers that the circumstances described above are adverse events or developments which constitute a serious threat to market confidence in Austria and under Article 20(1) of Regulation (EU) No 236/2012.

On the appropriateness and proportionality of the measure

23. In order to assess whether the measure would be appropriate and proportionate in relation to the threat, ESMA has analysed how and the degree to which sharp price declines pose a risk to the orderly functioning, integrity and stability of the Austrian market as a whole, looking not only at the range of shares affected by the latest market developments but also at the build-up of net short positions on shares in the scope of the measure.
24. From the analysis of the shares impacted by these sharp price declines, it becomes evident that the downward spiral spreads across the Austrian markets and across

different sectors, including systemically important institutions. Such widespread impact is consistent with the global nature of the outbreak of a global pandemic (COVID-19), as announced by the World Health Organisation², that has proven to be serious in Austria.

25. From that perspective, ESMA understands that limiting the scope of this measure to one or several sectors or to a subset of the issuers may not achieve the desired outcome. Without the broad scope applied by this measure, the FMA may have to adopt additional restrictive measures in the near future at a time when their effectiveness may be limited.
26. The above-mentioned data on the ATX index demonstrates that the latest developments in relation to COVID-19 have put an extremely wide range of Austrian shares in a situation of vulnerability. In case short-selling strategies start targeting those shares, the prices may drop further potentially triggering downward spirals and further 'runs' on the market.
27. ESMA considers that suspending the capacity of market participants in the Austrian market to enter into short sales or into transactions other than a short sale that would confer a financial advantage on a natural or legal person in the event of a decrease in the price or value of shares admitted to trading on the Regulated Market of the Vienna Stock Exchange would not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to its benefits. ESMA rather deems this measure appropriate to provide a uniform level of protection to all Austrian issuers and investors and the wider Austrian market as a whole.
28. ESMA considers that less stringent measures could not adequately address the threat to confidence in the Austrian market. A temporary restriction on short selling according to Article 23 of the Regulation (EU) No 236/2012 would not address the threat to market confidence as it would remain applicable for a few days only and would be limited to short selling without covering any opening or increasing of net short positions.
29. Additionally, ESMA notes that the proposed measure considers as immaterial and does not extend the prohibition to net short positions reached through trading in index-related instruments, baskets of financial instruments or exchange-traded instruments where their composition is such that the total value of financial instruments concerned by this measure in those indices, baskets or exchanged-traded instruments is at all times less than 50 per cent and to market making activity. This is with a view to limit the measure to the strictly necessary scope and not to be overly restrictive regarding trading strategies of market participants, with particular reference to those ones that provide an important service in terms of increasing liquidity and reducing volatility, which is particularly relevant in the current situation.

² https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200310-sitrep-50-covid-19.pdf?sfvrsn=55e904fb_2

30. For the above reasons, ESMA considers that the emergency measure adopted by the FMA under Article 20(2)(a) and (b) of Regulation (EU) No 236/2012 as further specified by Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 in relation to the shares in scope of the measure is appropriate and proportionate to address the existing threat to market confidence in the Austrian market.

On the duration of the measure

31. In terms of duration of the measure, ESMA considers that maintaining the prohibition for one month is justified considering the information publicly available at the moment. While the FMA expressed its intention to lift the ban as soon as the evolution of the situation allows, it does not discard the possibility of extending the measure if the situation so requires.

Conclusion: on the necessity of the measure

32. Having considered the adverse situation linked to the COVID-19, the appropriateness, proportionality and justified duration, ESMA considers the emergency measure adopted by the FMA as necessary under Article 20(2)(a) and (b) of Regulation (EU) No 236/2012 as further specified in Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 in relation to Austrian shares.

This opinion will be published on ESMA's website.

Done at Paris, 23 March 2020

A handwritten signature in blue ink, appearing to be 'S/M', is written on the page.

For the Board of Supervisors

Steven Maijor

Chair

ANNEX

FIGURE 1 – MAIN AUSTRIAN INDICES

Index	% variation between 3 February and 18 March 2020	% variation between 9 and 13 March 2020	% variation between 2 and 18 March 2020	% variation between 13 and 18 March 2020
WB ATX	-46.65%	-15.93%	-41.31%	-18.49%
WB ATX Prime	-45.57%	-15.53%	-40.00%	-17.79%
WB ATX Five	-48.23%	-14.26%	-42.40%	-18.65%
WB Wiener Boerse Index	-42.35%	-14.47%	-36.67%	-16.04%
WB Immobilien ATX	-45.74%	-21.50%	-44.31%	-24.01%
ATX Basic Industries	-45.66%	-25.71%	-38.48%	1.64%
ATX Consumer Prod. & Services	-45.82%	-25.77%	-38.74%	-0.02%
ATX Financials	-43.77%	-25.32%	-40.96%	-7.65%
ATX Industrial Goods & Services	-30.64%	-14.15%	-21.95%	-0.16%