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3-18-2020

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

European Securities and Markets Authority

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Recommended Citation

European Securities and Markets Authority, "ESMA Opinion-On a Proposed Measure by France's AMF Under Section 1 of Chapter V of Regulation (EU) No 236/2012" (2020). *YPFS Documents (Series 1)*. 8640. <https://elischolar.library.yale.edu/ypfs-documents/8640>

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OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 18 March 2020

on a proposed emergency measure by the Autorité des marchés financiers 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 is 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 17 March 2020, pursuant to Article 26 of Regulation (EU) No 236/2012, the French Autorité des marchés financiers (AMF) 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, the concerned measure bans any legal or natural person from entering into transactions which might constitute or increase a net short position on shares admitted on trading to French trading venues (Euronext Paris, Euronext Growth Paris, Euronext Access Paris), for which AMF is the relevant competent authority under Directive (EU) No 2014/65 and Regulation (EU) No 236/2012 as well as to all related instruments relevant for the calculation of the net short position as determined in Annex I, part 1,

¹ OJ L 86, 24.3.2012, p. 1–24.

Articles 5 and 6 of Commission Delegated Regulation (EU) No 918/2012. 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. Instruments: index-related instruments on indices not composed mainly by shares affected by the prohibition;
 - b. Activities: market making activities, as defined in Articles 2(1)(k) and 17 of Regulation (EU) No 236/2012;and
 - c. Transactions:
 - i. the creation of, or increase in, net short positions when the investor who acquires a convertible bond has a delta-neutral position between the equity component of the convertible bond and the short position taken to cover that component;
 - ii. the creation of, or increase in, net short positions through index-related instruments or baskets of financial instruments, not composed by a majority of shares included in the ban;
 - iii. the creation of, or increase in, net short positions where the creation of, or increase in, the short position in shares is hedged by a purchase that is equivalent in terms of proportion on subscription rights.

The AMF will re-evaluate these exemptions depending on market circumstances and could amend the decision accordingly if the need arises.

6. The proposed measure is expected to enter into force on 18 March 2020 at 00:00 and to expire after the close of the trading session on 16 April 2020. The proposed measure may also be lifted before the deadline if the risks of a loss of market confidence is reduced or extended at the expiry, taking into account market conditions. Pursuant to Article 26(3) of Regulation (EU) No 236/2012, the AMF notified ESMA less than 24 hours before the measure is intended to take effect.
7. The AMF considers that the measure is justified by, in the first instance, the existence of specific adverse circumstances that constitute a serious threat to market confidence in France. The AMF also notes the existence of potential risks to financial stability in case the current market dynamics continue.

8. The AMF notes that, following the outbreak of the COVID-19 pandemic, there is a threat linked to the unforeseeable impact of COVID-19 pandemic on the economy of the EU, including France, and the context in which stocks admitted to trading on French trading venues will be traded in the coming weeks, as the pandemic spreads across an increasing number of countries.
9. The AMF identified three threats to market confidence:
 - a. First, the AMF 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 French Government might come with little or no advance notice. Hence, price formation may take place in an environment of partial information.
 - b. Second, the AMF 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 French Government or by the evolution of the crisis. According to the AMF, those rumours may affect listed companies and may damage the confidence of investors on an efficient market, one where prices are formed with public, reliable information.
 - c. Third, the AMF 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 AMF’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, putting both infrastructures and the supervisor at enormous strain to monitor, supervise and manage markets.
10. In this context, the AMF considers that the growth of short positions betting on negative news (be they real or ill-based) affecting companies admitted to trading on French trading venues could destabilize markets in a way that could be self-reinforcing, with downward price spirals of the type already seen in the session of 12 March 2020.
11. The AMF also refers to a potential impact on financial stability. In the AMF’s view, in a context where the price of credit institutions’ stocks is rapidly deteriorating, the risk of weaker confidence of the public in financial stability based on false rumours cannot be

discarded. However, AMF also declares not to have observed signs of these effects on financial stability at this stage.

III. Opinion

12. ESMA considered the information provided by the AMF 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 and ESMA70-155-9565, respectively on proposed emergency measures by the Comisión Nacional del Mercado de Valores (CNMV) and the Commissione Nazionale per le Società e la Borsa (CONSOB) 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 has greatly increased the vulnerability of EU financial markets, and there is a concrete risk that the observed downward trend will continue in the coming days and weeks, with the consequent adoption by EU Member States of restrictive measures which impact all economic sectors.
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 AMF 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 France. Namely, the AMF 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.
17. ESMA notes that, following the outbreak of the COVID-19 pandemic, French stocks were subject to severe downward price movements and high price volatility, and the French main index (the CAC 40) decreased by 27.2% between 2 and 16 March 2020 (a decrease

of 5.8% occurred between 13 and 16 March 2020). Similar or greater decreases can be observed in other main French indices (see the Annex), amounting in one case to a drop of 38.6%.

18. As previously with respect to CNMV's and CONSOB's proposed short selling bans, ESMA agrees with the AMF that the severe losses observed, the incertitude 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 France. ESMA therefore agrees that the threats to market confidence on the French market amount to serious threats. It should be noted that the CAC 40 index includes relevant French financial issuers (as BNP Paribas, Société Générale, AXA, Crédit Agricole) 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 French 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 AMF'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 France and are consistent with the adoption of the measure of Article 20(1)(a) 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 French 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 French 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 very serious in France.
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 AMF may have to adopt additional restrictive measures in the near future at a time when their effectiveness may be limited.
26. As also indicated by the data submitted to ESMA by the AMF, the latest developments in relation to COVID-19, have put an extremely wide range of French 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 French market to enter into short sales or into transactions with equivalent effect in relation to shares admitted to trading on trading venues 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 suitable and adequate to provide an appropriate and uniform level of protection to all French issuers and investors and the wider French market as a whole.
28. ESMA considers that the measure is less stringent than other more intrusive measures that could adequately address the threat to confidence in the French market. A further 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 does not extend the prohibition to index-related instruments or baskets of financial instruments that are not composed by a majority of shares included in the ban 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 to trading strategies of market participants, with particular reference to those ones that provide an important service in terms of increasing liquidity and reducing volatility, 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 proposed by the AMF 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 French 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 AMF 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 proposed by the AMF 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 French shares.

This opinion will be published on ESMA's website.

Done at Paris, 18 March 2020

For the Board of Supervisors

Steven Maijoor

Chair

ANNEX

FIGURE 1 – MAIN FRENCH INDICES

Index	% variation between 2 and 16 March 2020	% daily variation between 13 and 16 March 2020
Euronext CAC ALL-SHARE INDEX	-27.1%	-6.5%
Euronext CAC MID 60	-29.5%	-8.4%
Euronext CAC NEXT 20	-32.9%	-8.9%
Euronext CAC SMALL	-28.8%	-9.7%
Euronext CAC BASIC MATER	-26.1%	-6.6%
Euronext CAC CONSUMER GOODS	-20.0%	-4.4%
Euronext CAC CONSUMER SERV	-26.8%	-6.8%
Euronext CAC FINANCIALS	-36.0%	-11.9%
Euronext CAC HEALTH CARE	-15.3%	-0.1%
Euronext CAC INDUSTRIALS	-32.4%	-8.9%
Euronext CAC OIL & GAS	-38.6%	-6.4%
Euronext CAC TELECOM	-22.9%	-3.1%
Euronext CAC TECHNOLOGY	-27.8%	-9.5%
Euronext CAC UTILITIES	-33.8%	-7.0%
Euronext CAC 40	-27.2%	-5.8%