



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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from: Presidency  
to: Delegations

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Subject: Proposal for a Regulation of the European Parliament and of the Council on  
Short Selling and certain aspects of Credit Default Swaps  
*- Revised Presidency compromise*

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Delegations will find attached a revised Presidency compromise on the above proposal.

Changes to the previous compromise, as set out in doc. 6823/1/11 REV 1, are highlighted in bold and underlined. Deletions, which are not substituted with new text, are marked with (...).

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
on Short Selling and certain aspects of Credit Default Swaps  
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Having regard to the opinion of the European Central Bank,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) At the height of the financial crisis in September 2008, competent authorities in several Member States and other countries such as the United States of America or Japan adopted emergency measures to restrict or ban short selling in some or all securities. They acted due to concerns that at a time of considerable financial instability, short selling could aggravate the downward spiral in the prices of shares, notably in financial institutions, in a way which could ultimately threaten their viability and create systemic risks. The measures adopted by Member States were divergent as the Union lacks a specific common regulatory framework for dealing with short selling issues.

- (2) To ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regard to the financial markets, and to ensure a high level of consumer and investor protection, it is therefore appropriate to lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional situations. It is necessary to harmonise the rules for short selling and certain aspects of credit default swaps, to prevent the creation of obstacles to the correct functioning of the internal market, as otherwise it is likely that Member States continue taking divergent measures.
- (3) It is appropriate and necessary for the provisions to take the legislative form of a Regulation in order to ensure that provisions directly imposing obligations on private parties to notify and disclose net short positions relating to certain instruments and regarding uncovered short selling are applied in a uniform manner throughout the Union. A regulation is also necessary to confer powers on the European Securities and Markets Authority (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council<sup>(...)</sup> to coordinate measures taken by competent authorities or to take measures itself.
- (4) Under normal market conditions short selling plays an important role in ensuring the proper functioning of financial markets, in particular in the context of market liquidity and efficient price formation. However in certain situations short selling may have adverse effects. To set an end to the current fragmented situation in which some Member States have taken divergent measures and to restrict the possibility of divergent measures being taken by competent authorities it is important to address the potential risks arising from short selling and credit default swaps in a harmonised manner. The requirements to be imposed should address the identified risks without unduly detracting from the benefits that short selling provides to the quality and efficiency of markets.

- (5) The scope of this Regulation should be as broad as possible to provide for a preventive regulatory framework to be used in exceptional circumstances. This framework should cover all financial instruments but provide for a proportionate response to the risks that short selling of different instruments may represent. Therefore, it is only in the case of exceptional situations that competent authorities of Member States and ESMA should be entitled to take measures concerning all types of financial instruments, going beyond the permanent measures that only apply to particular types of instruments where there are clearly identified risks that need to be addressed.
- (5a) References in this Regulation to natural and legal persons should be understood as covering all natural persons and legal entities including registered business associations without legal personality.
- (6) Enhanced transparency relating to significant net short positions in specific financial instruments is likely to be of benefit to both the regulator and to market participants. For shares admitted to trading on a trading venue in the Union, a two-tier model should be introduced that provides for greater transparency of significant net short positions in shares at the appropriate level. At the lower threshold notification of a position should be made privately to the regulators concerned to enable them to monitor and, where necessary, investigate short selling that may create systemic risks, be abusive or create disorderly markets; at the higher threshold, positions should be publicly disclosed to the market in order to provide useful information to other market participants about significant individual short selling positions in shares.

- (7) Notification to regulators of significant net short positions relating to sovereign debt in the Union should be provided for as it would provide important information to assist regulators in monitoring whether such positions are in fact creating systemic risks or being used for abusive purposes. Such a requirement should only include private disclosure to regulators as publication of information to the market for such instruments could have a detrimental effect on sovereign debt markets where liquidity is already impaired. Any requirement should include notification of significant exposures to sovereign issuers obtained by using credit default swaps.
- (8) The notification requirements related to sovereign debt should apply to the debt instruments issued by the Union and Member States, including European Investment Bank, any ministry, agency or special purpose vehicle that issues debt on behalf of a Member State or on behalf of several Member States, such as the European Financial Stability Facility. It should also apply in the case of a Member State that is a federal state, to debt instruments issued by one of the members making up the federation, but excluding any other regional or local bodies or quasi public bodies in a Member State that issue debt instrument. Debt instruments issued by the Union are notably in order to provide Member States with balance of payments or financial stability support, or to provide macro financial assistance to third countries.
- (9) In order to ensure a comprehensive and effective transparency requirement, it is important to include not only short positions created by trading shares or sovereign debt on trading venues but also short positions created by trading outside trading venues and economic net short positions created by the use of derivatives.

- (10) To be useful to regulators and markets, any transparency regime should provide complete and accurate information about a natural or legal person's positions. In particular, information provided to the regulator or the market should take into account both short and long positions so as to provide valuable information about the natural or legal person's net short position in shares, sovereign debt and credit default swaps.
- (11) The calculation of short positions or long positions should take into account any form of economic interest which a natural or legal person has in relation to the issued share capital of a company or to issued sovereign debt of a Member State or of the Union. In particular, it should take into account such an interest obtained directly or indirectly through the use of derivatives such as options, futures, contracts for differences and spread bets relating to shares or sovereign debt. In the case of positions relating to sovereign debt it should also take into account credit default swaps relating to sovereign debt issuers.
- (12) (...)
- (13) Buying credit default swaps without having a long position in underlying sovereign debt can be, economically speaking, equivalent to taking a short position on the underlying debt instrument. The calculation of a net short position in relation to sovereign debt should therefore include credit default swaps relating to an obligation of a sovereign debt issuer. The credit default swap position should be taken into account both for the purpose of determining whether a natural or legal person has a significant net short position relating to sovereign debt that needs to be notified to a competent authority and for the purpose of determining the significant uncovered position in a credit default swap relating to an issuer of sovereign debt that needs to be notified to the authority.
- (14) To enable ongoing monitoring of positions, the transparency requirements should also include notification or disclosure where a change in a net short position results in an increase or decrease above or below certain thresholds.

- (15) In order to be effective, it is important that the transparency requirements apply regardless of where the natural or legal person is located, including where the natural or legal person is located outside the Union, but has a significant net short position in a company that has shares admitted to trading on a trading venue in the Union or a net short position in sovereign debt issued by a Member State or the Union.
- (15a) The definition of a short sale is not intended to include a repurchase agreement (or repo) between two parties where one party sells the other a security at a specified price with a commitment to buy the security back at a later date at another specified price or to include a derivative contract where it is agreed to sell securities at a specified price at a future date. **The definition is also not intended to include a transfer of securities under securities lending agreement.**
- (16) Uncovered short selling of shares and sovereign debt is sometimes viewed as increasing the potential risk of settlement failure and volatility. To reduce such risks it is appropriate to place proportionate restrictions on uncovered short selling of such instruments. The detailed restrictions should take into account the different arrangements currently used for covered short selling. These include for instance a separate repurchase agreement on the basis of which the person short selling a security buys back an equivalent security in due time to allow settlement of the short sale transaction and includes collateral arrangements if the collateral taker can use the security for settling the short sale transaction. Further examples include: rights issues (offerings) of companies to existing shareholders, lending pools and repo facilities provided, for instance, by trading venues, clearing systems or central banks. The liquidity and ease of availability of a security should be taken into account when deciding if it can be reasonably expected that settlement can be effected when due. **The fact that a short sale will be covered by a purchase of the instrument during the same day can be considered as an example of offering a reasonable expectation that settlement can be effected when due.**

- (16a) It is also appropriate to include requirements relating to buy-in procedures and fines for failed settlement of transactions in shares. The buy-in procedures and late settlement requirements should set basic standards relating to settlement discipline. The buy-in and fining requirements should be sufficiently flexible to permit the central counterparty which is responsible for ensuring such procedures are in place to be able to rely on another market participant to operationally perform the buy in or impose the fine. However, for the proper functioning of financial markets it is essential to address wider aspects of settlement discipline in a horizontal legislative proposal.
- (17) Measures relating to sovereign debt and sovereign credit default swaps, including increased transparency and restrictions on uncovered short selling, should impose requirements which are proportionate and at the same time avoid an adverse impact on the liquidity of sovereign bond markets and sovereign bond repurchase (repo) markets.
- (18) Shares are increasingly admitted to trading on different trading venues both within the Union and outside the Union. Many large companies based outside the Union also have shares admitted to trading on a trading venue within the Union. For reasons of efficiency, it is appropriate to exempt securities from certain notification and disclosure requirements, where the principal venue for trading of that instrument is outside the Union.

- (19) Market making activities play a crucial role in providing liquidity to markets within the Union and market makers need to take short positions to perform that role. Imposing requirements on such activities could severely inhibit their ability to provide liquidity and have a significant adverse impact on the efficiency of the Union markets. Furthermore market makers would not be expected to take significant short positions except for very brief periods. It is therefore appropriate to exempt natural or legal persons involved in such activities from requirements which may impair their ability to perform such a function and therefore adversely affect the Union markets. In order for such requirements to capture equivalent third country entities, a procedure is necessary to assess the equivalence of third country markets. The exemption should apply to the different types of market making activity but not to proprietary trading. It is also appropriate to exempt certain primary market operations such as those relating to sovereign debt and stabilisation schemes as they are important activities that assist the efficient functioning of markets. Competent authorities should be notified of the use of exemptions and should have the power to prohibit a natural or legal person from using an exemption if they do not fulfil the relevant criteria in the exemption. Competent authorities should also be able to request information from the natural or legal person to monitor their use of the exemption.
- (20) In the case of adverse developments which constitute a serious threat to financial stability or to market confidence in a Member State or the Union, competent authorities should have powers of intervention to require further transparency or to impose temporary restrictions on short selling, credit default swap transactions or other transactions in order to prevent a disorderly decline in the price of a financial instrument. Such measures could be necessary due to a variety of adverse events or developments including not just financial or economic events but also for example natural disasters or terrorist acts. Furthermore, some adverse events or developments requiring measures could simply arise in one Member State only and not have any cross-border implications. Such powers need to be flexible enough to enable competent authorities to deal with a range of different exceptional situations. In taking such measures, the competent authorities must pay due regard to the principle of proportionality.

- (21) While competent authorities will usually be best placed to monitor market conditions and to initially react to an adverse event or development by deciding if a serious threat to financial stability or to market confidence has arisen and whether it is necessary to take measures to address such a situation, powers in this regard and the conditions and procedures for their use should be harmonised as far as possible.
- (22) In the case of a significant fall in the price of a financial instrument on a trading venue a competent authority should also have the power to temporarily restrict short selling of the financial instrument on that venue in order to be able to intervene rapidly where appropriate and for a 24 hour period in order to prevent a disorderly fall in the price of the instrument concerned.
- (23) Where an adverse event or development extends beyond one Member State or has other cross-border implications, for example if a financial instrument is admitted to trading on different trading venues in a number of different Member States, close consultation and co-operation between competent authorities is essential. ESMA should perform a key co-ordination role in such a situation and try to ensure consistency between competent authorities. The composition of ESMA, which includes representatives of competent authorities of the Member States, will assist it in the performance of such a role. In addition, competent authorities should have powers to take measures when they have an interest to intervene.
- (24) In addition to co-ordinating measures by competent authorities, ESMA should ensure that measures are only taken by competent authorities where it is necessary and proportionate. ESMA should be able to give opinions to competent authorities on the use of powers of intervention.

- (25) While competent authorities will often be best placed to monitor and to react quickly to an adverse event or development, ESMA itself should also have the power to take measures where short selling and other related activities threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, where there are cross-border implications and sufficient measures have not been taken by competent authorities to address the threat. ESMA should consult the European Systemic Risk Board whenever possible, and other relevant authorities when such a measure could have effects beyond the financial markets, as could be the case for commodity derivatives which are used to hedge physical positions.
- (26) The powers of ESMA under this Regulation in exceptional situations to restrict short selling and other related activities are conceived in accordance with the powers contained in Article 9 (5) of Regulation 1095/2010. The powers conferred on ESMA in exceptional situations should be without prejudice to the powers of ESMA in an emergency situation under Article 18 of that Regulation. In particular, ESMA should be able to adopt individual decisions requiring competent authorities to take measures or individual decisions addressed to financial market participants under Article 18 of that Regulation.
- (27) Powers of intervention of competent authorities and ESMA to restrict short selling, credit default swaps and other transactions should be only of a temporary nature and should only be exercised for such a period and to the extent necessary to deal with the specific threat.
- (28) Because of the specific risks which can arise from the use of credit default swaps, such transactions require close monitoring by competent authorities. In particular, competent authorities should have the power in exceptional cases to require information from natural or legal persons entering into such transactions about the purpose for which the transaction is entered into.

- (29) ESMA should be given a general power to conduct an inquiry into an issue or practice relating to short selling or the use of credit default swaps to assess whether that issue or practice poses any potential threat to financial stability or to market confidence. ESMA should publish a report setting out its findings when it conducts such an inquiry.
- (30) As some measures may apply to natural or legal persons and actions outside the Union, it is necessary in certain situations that competent authorities of Member States and authorities in third countries cooperate. Competent authorities of Member States should therefore enter into arrangements with authorities in third countries. ESMA should co-ordinate the development of such cooperation arrangements and the exchange between competent authorities of information received from third countries.

- (31) This Regulation respects the fundamental rights and observes the principles recognized in particular in the Treaty on the Functioning of the European Union and in the Charter of Fundamental Rights of the European Union, notably the right to the protection of personal data recognized in Article 16 of the Treaty and in Article 8 of the Charter. In particular, transparency regarding significant net short positions, including public disclosure where provided for under this Regulation, is necessary for reasons of financial market stability and investor protection. Such transparency will enable regulators to monitor the use of short selling in connection with abusive strategies and the implications on the orderly functioning of the markets. In addition, such transparency may help to avoid information asymmetries, ensuring that all market participants are adequately informed about the extent to which short selling is affecting prices. Any exchange or transmission of information by competent authorities should be in accordance with the rules on the transfer of personal data laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Any exchange or transmission of information by ESMA should be in accordance with the rules on the transfer of personal data laid down in Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, which should be fully applicable to the processing of personal data for the purposes of this Regulation.
- (32) Member States should lay down rules on sanctions applicable to infringements of this Regulation and ensure that they are implemented. The sanctions should be effective, proportionate and dissuasive.
- (33) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

(34) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty. In particular, delegated acts should be adopted in respect of details concerning the calculation of short positions, when a natural or legal person has an uncovered position in a credit default swap, notification or disclosure thresholds and further specification of criteria and factors for determining when an adverse event or development creates a serious threat to financial stability or to market confidence in a Member State or in the Union.

(34a) In the Declaration (No 39) on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the Conference took note of the Commission's intention to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice.

(35) The Commission should submit a report to the European Parliament and the Council assessing the appropriateness of the reporting and public disclosure thresholds provided for, the operation of the restrictions and requirements related to the transparency of net short positions and whether any other restrictions or conditions on short selling or credit default swaps are appropriate.

(36) Though national competent authorities are better placed to monitor and have better knowledge of market developments, the overall impact of the problems related to short selling and credit default swaps can only be fully perceived in a Union context. For this reason, the objectives of this Regulation can be better achieved at the Union level; the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(37) Since some Member States have already put in place restrictions on short selling and since delegated acts and binding technical standards are provided for which should be adopted before the framework to be introduced can be usefully applied, it is necessary to provide for a sufficient period of time for transitional purposes.

*HAVE ADOPTED THIS REGULATION:*

## CHAPTER I

### GENERAL PROVISIONS

#### Article 1

##### Scope

1. This Regulation shall apply to the following financial instruments:
  - (a) financial instruments that are admitted to trading on a trading venue in the Union, including such instruments when traded outside a trading venue;
  - (b) derivatives set out in Annex I Section C points (4) to (10) of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments that relate to a financial instrument referred to in point (a) or to an issuer of a financial instrument referred to in point (a), including such derivatives when traded outside a trading venue;
  - (c) debt instruments issued by a Member State or the Union and derivatives set out in Annex I Section C points (4) to (10) of Directive 2004/39/EC that relate or are referenced to such debt instruments issued by a Member State or the Union.
2. Articles 16, 17 and 19-25 shall apply to financial instruments in accordance with Article 2(1)(d).

## *Article 2*

### *Definitions*

1. For the purpose of this Regulation, the following definitions shall apply:
  - (a) "authorised primary dealer" means a natural or legal person who has signed an agreement with a sovereign issuer or has an equivalent formal recognition from or on behalf of a sovereign issuer under which that natural or legal person commits to deal as principal in connection with primary and secondary market operations relating to debt issued by that issuer;
  - (b) "central counterparty" means a legal entity that interposes itself between the counterparties to the contracts traded within one or more financial markets, becoming the buyer to every seller and the seller to every buyer and which is responsible for the operation of a clearing system;
  - (c) "credit default swap" means a derivative contract in which one party pays a fee to another party in return for a payment or other benefit in the case of a credit event relating to that reference entity, and of any other default, related to that derivative contract that has a similar economic effect;
  - (d) "financial instrument" means any of the instruments listed in Section C of Annex I of Directive 2004/39/EC;
  - (e) "home Member State" means:
    - (i) in relation to a regulated market and an investment firm the home Member State within the meaning of Article 4(1)(20) of Directive 2004/39/EC;
    - (ii) in relation to a credit institution the home Member State within the meaning of Article 4(7) of Directive 2006/48/EC;

- (iii) in relation to any other legal person the Member State in which its registered office is situated or if it has no registered office the Member State in which its head office is situated;
  - (iv) in relation to a natural person the Member State in which his or her head office is situated or if he or she has no head office the Member State in which his or her permanent residence is situated;
- (f) "investment firm" means an investment firm within the meaning of Article 4(1)(1) of Directive 2004/39/EC;
- (g) "sovereign debt" means a debt instrument issued by a sovereign issuer ;
- (ga) "sovereign credit default swap" means a credit default swap where a payment or other benefit will be paid in the case of a credit event or default relating to a sovereign issuer;
- (gb) "sovereign issuer" means any of the following that issues debt instruments:
  - (i) the Union;
  - (ii) a Member State including any ministry, agency or special purpose vehicle of the Member State;
  - (iii) in the case of a Member State that is a federal state, one of the members making up the federation;
  - (iv) a special purpose vehicle for several Member States; or
  - (v) the European Investment Bank;
- (h) "issued share capital" in relation to a company, means the total of ordinary and any preference shares issued by the company but does not include convertible debt securities;
- (i) "issued sovereign debt" means the total of sovereign debt issued by a sovereign issuer that has not been redeemed;

- (j) "local firm" means a firm referred to in Article 2(1)(l) of Directive 2004/39/EC;
- (k) "market making activities" mean the activities of an investment firm or a credit institution or a third country entity or a local firm that is a member of a trading venue or of a market in a third country whose legal and supervisory framework has been declared equivalent by the Commission pursuant to Article 15(2) when it deals as principal in a financial instrument, whether traded on or outside a trading venue, in any of the following capacities:
  - (i) by posting firm, simultaneous two way quotes of comparable size and at competitive prices, with the result of providing liquidity on a regular and ongoing basis to the market;
  - (ii) as part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade;
  - (iii) by hedging positions arising from the fulfilment of tasks under points (i) and (ii);
- (l) "multilateral trading facility" means a multilateral system within the meaning of Article 4(1)(15) of Directive 2004/39/EC;
- (m) "principal venue" in relation to a share means the venue for the trading of that share with the highest turnover;
- (n) "regulated market" means a multilateral system within the meaning of Article 4(1)(14) of Directive 2004/39/EC;
- (o) "relevant competent authority" means:
  - (i) in relation to sovereign debt of a Member State or in the case of a Member State that is a federal state, to sovereign debt of a member making up the federation or a credit default swap relating to a Member State or a federal state, the competent authority of that Member State;

- (ii) in relation to sovereign debt of the Union or a credit default swap relating to the Union, the competent authority of the jurisdiction in which the department issuing the debt is situated;
  - (iii) in relation to sovereign debt of several Member States acting through a special purpose vehicle or a credit default swap relating to such a special purpose vehicle, the competent authority of the jurisdiction in which the special purpose vehicle is established;
  - (iv) in relation to a financial instrument other than an instrument referred to in point (i) to (iii), the competent authority for that financial instrument as defined in Article 2(7) of Regulation (EC) No 1287/2006 and determined in accordance with Chapter III of that Regulation;
  - (v) in relation to a financial instrument that is not covered under point (i) to (iv), the competent authority of the Member State in which the financial instrument was first admitted to trading on a trading venue;
  - (vi) in relation to a debt instrument issued by the European Investment Bank the competent authority of the Member State in which the European Investment Bank is located.
- (p) "short sale" in relation to a share or debt instrument means any sale of the share or debt instrument which the seller does not own at the time of entering into the agreement to sell including such a sale where at the time of entering into the agreement to sell the seller has borrowed or agreed to borrow the share or debt instrument for delivery at settlement. This definition does not include:
- (i) a sale by either party under a repurchase agreement where one party has agreed to sell the other a security at a specified price with a commitment from the other party to sell the security back at a later date at another specified price; ~~or~~

**(ii) a transfer of securities under a securities lending agreement; or**

- ~~(ii)~~ (iii) entering into a futures contract or other derivative contract where it is agreed to sell securities at a specified price at a future date;
- (q) "trading day" means a trading day within the meaning of Article 4 of Regulation (EC) No 1287/2006;
- (r) "trading venue" means a regulated market or a multilateral trading facility in the Union;
- (s) "turnover" of a share, means turnover as defined in Article 2(9) of Regulation (EC) No 1287/2006;
2. The Commission may adopt, by means of delegated acts in accordance with Article 36 and subject to the conditions laid down in Articles 37 and 38, measures specifying the definitions laid down in paragraph 1, in particular specifying when a natural or legal person is considered to own a financial instrument for the purposes of the definition of short sale in point (p) of paragraph 1.

*Article 3*

*Short and long positions*

1. For the purposes of this Regulation, a position resulting from either of the following shall be considered a short position relating to the issued share capital of a company or issued sovereign debt of a sovereign issuer:
- (a) a short sale of a share issued by the company or a debt instrument issued by the Member State or Union;

- (b) a natural or legal person entering into a transaction which creates or relates to a financial instrument other than the instruments referred to in point (a) and the effect or one of the effects of the transaction is to confer a financial advantage on the natural or legal person in the event of a decrease in the price or value of the share or debt instrument.
- 2. For the purposes of this Regulation, a position resulting from either of the following shall be considered a long position relating to the issued share capital of a company or issued sovereign debt of a sovereign issuer:
  - (a) holding a share issued by the company or a debt instrument issued by the sovereign issuer;
  - (b) a natural or legal person entering into a transaction which creates or relates to a financial instrument other than the instruments referred to in point (a) and the effect or one of the effects of the transaction is to confer a financial advantage on the natural or legal person in the event of an increase in the price or value of the share or debt instrument.
- 3. For the purposes of paragraphs 1 and 2, the calculation of a short position and a long position relating to sovereign debt shall include any sovereign credit default swap that relates to the sovereign issuer.

The calculation of a short position and a long position relating to the issued share capital of a company or to the issued sovereign debt of a sovereign issuer shall include any instrument giving rise to an exposure, whether direct or indirect, to the issued share capital of a company or the sovereign debt of a sovereign issuer. Any economic interest held as part of a basket, index or exchange traded fund shall be included when calculating such positions.

- 4. For the purposes of this Regulation, the position remaining after deducting any long position that a natural or legal person holds in relation to the issued share capital of a company from any short position that that natural or legal person holds in relation to that capital shall be considered a net short position in relation to the issued share capital of that company.

5. For the purposes of this Regulation, the position remaining after deducting any long position that a natural or legal person holds in relation to the issued sovereign debt of a sovereign issuer and any long position in debt instruments of an issuer, the pricing of which has a high correlation with the pricing of the given sovereign debt from any short position that that natural or legal person holds in relation to the same sovereign debt shall be considered a net short position in relation to the issued sovereign debt of that sovereign issuer.
6. The calculation under paragraphs 1 to 5 for sovereign debt shall be for each single sovereign issuer even if separate entities issue sovereign debt on behalf of the sovereign issuer.
7. The Commission shall adopt, by means of delegated acts in accordance with Article 36 and subject to the conditions laid down in Articles 37 and 38, measures specifying:
  - (a) where a natural or legal person is considered to hold a share or debt instrument for the purposes of paragraph 2;
  - (b) cases in which a natural or legal person has a net short position for the purposes of paragraphs 4 and 5 and the method of calculation of the position;
  - (c) the method of calculating positions for the purposes of paragraphs 3, 4 and 5 when different entities in a group have long or short positions or for fund management activities related to separate funds.

## *Article 4*

### *Uncovered position in a credit default swap*

1. For the purposes of this Regulation, a natural or legal person shall be considered to have an uncovered position in a sovereign credit default swap to the extent that the credit default swap is not serving
  - (a) to hedge against the risk of default where the natural or legal person has a long position in the sovereign debt of the issuer to which the sovereign credit default swap relates, or
  - (b) to hedge any long position in debt instruments of an issuer the pricing of which has a high correlation with the pricing of the debt instruments of the sovereign issuer to which the sovereign credit default swap relates.
  
2. The Commission shall adopt, by means of delegated acts in accordance with Article 36 and subject to the conditions laid down in Articles 37 and 38, measures specifying:
  - (a) cases in which a credit default swap transaction is considered to be hedging against a default risk, for the purposes of paragraph 1, and the method of calculation of an uncovered position in a credit default swap for the purposes of that paragraph;
  - (b) the method of calculating positions for the purposes of paragraph 1 when different entities in a group have long or short positions or for fund management activities related to separate funds.

## CHAPTER II

### TRANSPARENCY OF NET SHORT POSITIONS

#### *Article 5*

##### *Notification to competent authorities of significant net short positions in shares*

1. A natural or legal person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue shall notify the relevant competent authority whenever the position reaches or falls below a relevant notification threshold referred to in paragraph 2.
2. A relevant notification threshold is a percentage that equals 0.2% of the issued share capital of the company concerned and each 0.1% above that.
3. The Commission may, by means of delegated acts in accordance with Article 36 and subject to the conditions laid down in Articles 37 and 38, modify the thresholds mentioned in paragraph 2, taking into account the developments in financial markets.

## *Article 7*

### *Public disclosure of significant net short positions in shares*

1. A natural or legal person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue shall disclose details of that position to the public whenever the position reaches or falls below a relevant publication threshold referred to in paragraph 2, in accordance with Article 9.
2. A relevant publication threshold is a percentage that equals 0.5% of the issued share capital of the company concerned and each 0.1% above that.
3. The Commission may, by means of delegated acts in accordance with Article 36 and subject to the conditions laid down in Articles 37 and 38, modify the thresholds mentioned in paragraph 2, taking into account the developments in financial markets.
4. This Article is without prejudice to laws, regulations and administrative provisions adopted pursuant to Directive 2004/25/EC\* of the European Parliament and of the Council of 21 April 2004 on takeover bids that require disclosure of short positions beyond the requirements of this Article.

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\* OJ L 142, 30.4.2004, p. 12"

*Article 8*

*Notification to competent authorities of significant net short positions in sovereign debt and credit default swaps*

1. A natural or legal person who has any of the following positions shall notify the relevant competent authority whenever any such position reaches or falls below the relevant notification thresholds for the Member State concerned or the Union:
  - (a) a net short position relating to the issued sovereign debt of a sovereign issuer;
  - (b) an uncovered position in a sovereign credit default swap.
2. The relevant notification thresholds shall consist of an initial amount and then additional incremental levels in relation to each Member State and the Union, as specified in the measures taken by the Commission in accordance with paragraph 3.
3. The Commission shall, by means of delegated acts in accordance with Article 36 and subject to the conditions laid down in Articles 37 and 38, specify the amounts and incremental levels referred to in paragraph 2. The Commission shall:
  - (a) ensure that the thresholds are not set at such a level as to require notification of positions which are of minimal value;
  - (b) take into account the total amount of outstanding issued sovereign debt for each sovereign issuer and the average size of positions held by market participants relating to the sovereign debt of that sovereign issuer, and
  - (c) take into account the liquidity of each sovereign bond market.

(...)

## *Article 9*

### *Method of notification and disclosure*

1. Any notification or disclosure under Articles 5, 7 or 8 shall set out details of the identity of the natural or legal person who has the relevant position, the size of the relevant position, the issuer in relation to which the relevant position is held and the date on which the relevant position was created, changed or ceased to be held.
2. The relevant time for calculation of a net short position shall be at midnight at the end of the trading day on which the natural or legal person has the relevant position. The notification or disclosure shall be made not later than at 15:30 on the next trading day. The times specified in this paragraph shall be calculated according to the time in the Member State of the relevant competent authority to whom the relevant position must be notified.
3. The notification of information to a relevant competent authority shall ensure the confidentiality of the information and incorporate mechanisms for authenticating the source of the notification.
4. The public disclosure of information set out in Article 7 shall be made in a manner ensuring fast access to information on a non-discriminatory basis. This information shall be posted on a central website operated or supervised by the relevant competent authority. The competent authorities shall communicate the address of this website to ESMA, which, in turn, shall put a link to all such central websites on its own website.

5. In order to ensure consistent harmonisation of paragraph 1, ESMA shall develop draft regulatory technical standards to specify the details of the information to be provided for the purposes of paragraph 1.

Powers are delegated to the Commission to adopt the regulatory standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

ESMA shall submit those draft regulatory technical standards to the Commission by [ 31 December 2011] at the latest.

6. In order to ensure uniform conditions of application of paragraph 4, ESMA may develop draft implementing technical standards to determine the means by which information may be disclosed to the public.

Power is conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2011] at the latest.

#### *Article 10*

#### *Application outside the Union*

The notification and disclosure requirements under Articles 5, 7 and 8 apply to natural or legal persons whether residing or established within or outside the Union.

## *Article 11*

### *Information to be provided to ESMA*

1. Competent authorities shall provide information in summary form to ESMA on a quarterly basis on net short positions relating to the issued share capital of companies and to the issued sovereign debt of Member States and of the Union, and uncovered positions relating to credit default swaps, for which it is the relevant competent authority and receives notifications under Articles 5 to 8.
  
2. ESMA may request at any time, in order to carry out its duties under this Regulation, additional information from a relevant competent authority of a Member State about net short positions relating to the issued share capital of companies and to the issued sovereign debt of Member States and of the Union, or uncovered positions relating to credit default swaps.

The competent authority shall provide the requested information to ESMA at the latest within seven calendar days.

## CHAPTER III

### UNCOVERED SHORT SALES

#### *Article 12*

##### *Restrictions on uncovered short sales*

1. A natural or legal person may only enter into a short sale of a share admitted to trading on a trading venue or a short sale of sovereign debt where one of the following conditions is fulfilled:
  - (a) the natural or legal person has borrowed the share or sovereign debt; or has made alternative provisions resulting in a similar legal effect;
  - (b) the natural or legal person has entered into an agreement to borrow the share or sovereign debt or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;
  - (c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share or sovereign debt has been located or has otherwise reasonable expectation that settlement can be effected when it is due.
- 1a. The restrictions in paragraph 1 do not apply to a short sale of sovereign debt if the transaction serves to hedge a long position in debt instruments of an issuer, the pricing of which has a high correlation with the pricing of the given sovereign debt.

2. In order to ensure uniform conditions of application of paragraph 1, ESMA may develop draft implementing technical standards to determine the types of agreements or arrangements that adequately ensure that the share or sovereign debt will be available for settlement.

ESMA shall, in particular, take into account the need to preserve liquidity of markets, especially sovereign bond market and sovereign bond repurchase markets (repo markets).

Powers are conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

ESMA shall submit those draft implementing technical standards to the Commission by [31 December 2011] at the latest.

### *Article 13*

#### *Buy-in procedures (...)*

1. A central counterparty in a Member State that provides clearing services for shares shall ensure that procedures are in place which comply with all of the following requirements:
  - (a) where a natural or legal person who sells shares is not able to deliver the shares for settlement within four business days after the day on which settlement is due, then procedures are automatically triggered for the buy-in of the shares to ensure delivery for settlement;
  - (b) where the buy-in of the shares for delivery is not possible then an amount is paid to the buyer based on the value of the shares to be delivered at the delivery date plus an amount for losses incurred by the buyer as a result of the settlement failure;

- (c) the natural or legal person who fails to settle reimburses all amounts paid pursuant to points (a) and (b).
- 2. A central counterparty in a Member State that provides clearing services for shares shall ensure that procedures are in place which ensure that where a natural or legal person who sells shares fails to deliver the shares for settlement by the date on which settlement is due, then such natural or legal person is subject to the obligation to make daily payments for each day that the failure continues.

The daily payments shall be sufficiently high to act as a deterrent to natural or legal persons failing to settle.

## CHAPTER IV

### EXEMPTIONS

#### *Article 14*

##### *Exemption where the principal trading venue is outside the Union*

1. Articles 5, 7, 12 and 13 shall not apply to shares of a company admitted to trading on a trading venue in the Union where the principal venue for the trading of the shares is located in a country outside the Union.
2. The relevant competent authority for shares of a company that are traded on a trading venue in the Union and a venue located outside the Union shall determine, at least every two years, whether the principal venue for the trading of those shares is located outside the Union.

The relevant competent authority shall notify ESMA of any such shares identified as having their principal venue located outside the Union.

Every two years ESMA shall publish the list of shares for which the principal venue is located outside the Union. The list shall be effective for a two year period.

3. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to specify the method to determine the principal venue for the trading of a share.

Powers are delegated to the Commission to adopt the regulatory standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

ESMA shall submit those drafts regulatory technical standards to the Commission by [31 December 2011] at the latest.

4. in order to ensure uniform conditions of application of paragraphs 1 and 2, ESMA may develop draft implementing technical standards to determine:
  - (a) the date on which, and the period in respect of which, any calculation determining the principal venue for a share shall be made;
  - (b) the date by which the relevant competent authority shall notify ESMA of those shares for which the principal venue is outside the Union;
  - (c) the date from which the list shall be effective following publication by ESMA .

Powers are conferred to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

ESMA shall submit those drafts implementing technical standards to the Commission by [31 December 2011] at the latest.

#### *Article 15*

##### *Exemption for market making and primary market operations*

1. Articles 5, 7, 8 and 12 shall not apply to transactions performed due to market making activities.

2. The Commission may, in accordance with the procedure referred to in Article 39(2), adopt decisions determining that the legal and supervisory framework of a third country ensures that a market authorised in that third country complies with legally binding requirements which are, for the purpose of the application of the exemption set out in paragraph 1, equivalent to the requirements under Title III of Directive 2004/39/EC, from Directive 2003/6/EC of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) and Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, and which are subject to effective supervision and enforcement in that third country.

The legal and supervisory framework of a third country may be considered equivalent where that framework fulfils all the following conditions:

- (a) markets in that third country are subject to authorization and to effective supervision and enforcement on an ongoing basis;
  - (b) markets have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;
  - (c) security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection;
  - (d) market transparency and integrity are ensured by preventing market abuse in the form of insider dealing and market manipulation.
3. Articles 8 and 12 shall not apply to the activities of a natural or legal person when, acting as an authorised primary dealer pursuant to an agreement with an issuer of sovereign debt, it is dealing as principal in a financial instrument in relation to primary or secondary market operations relating to the sovereign debt.

4. Articles 5, 7 and 12 shall not apply to a natural or legal person when it enters into a short sale of a security or has a net short position in relation to the carrying out of a stabilisation under Chapter III of Commission Regulation (EC) No 2273/2003 implementing Directive 2003/6/EC as regards exemptions for buy-back programmes and stabilisation of financial instruments.
5. The exemption referred to in paragraph 1 shall only apply where the natural or legal person concerned has first notified the competent authority of its home Member State, in writing, that they intend to make use of the exemption. The notification shall be made not less than thirty calendar days before the natural or legal person first intends to use the exemption.
- 5a. The exemption referred to in paragraph 3 shall only apply where the authorised primary dealer has first notified the relevant competent authority in relation to sovereign debt concerned, in writing that they intend to make use of the exemption. The notification shall be made not less than thirty calendar days before the natural or legal person first intends to use the exemption.
6. The competent authority referred to in paragraphs 5 and 5a may prohibit the use of the exemption if it considers that the natural or legal person does not satisfy the conditions of the exemption.

Any prohibition shall be imposed within the thirty calendar day period referred to in the first subparagraph or subsequently if the competent authority becomes aware that there have been any changes in the circumstances of the natural or legal person so that they no longer satisfy the conditions.

7. A third country entity that is not authorised in the Union shall send the notification referred to in paragraphs 5 and 5a to the competent authority of the main trading venue in the Union in which it trades.

8. A natural or legal person which has given a notification under paragraph 5 shall as soon as possible notify the competent authority of its home Member State in writing where there are any changes affecting that person's eligibility to use the exemption, or if it no longer wishes to use the exemption.
- 8a. A natural or legal person which has given a notification under paragraph 5a shall as soon as possible notify the relevant competent authority in relation to sovereign debt concerned in writing where there are any changes affecting that person's eligibility to use the exemption, or if it no longer wishes to use the exemption.
9. The competent authority of the home Member State may request information, in writing, from a natural or legal person operating under the exemptions set out in paragraph 1, 3 or 4 about short positions held or activities conducted under the exemption. The natural or legal person shall provide the information not later than four calendar days after the request is made at the latest.
10. A competent authority shall notify ESMA within two weeks of notification in accordance with paragraph 5 or 8 of any market makers and authorised primary dealers who are making use of the exemption and of any market makers and authorised primary dealers who are no longer making use of the exemption.
11. ESMA shall publish on its website a list of market makers and authorised primary dealers who are using the exemption and shall keep said website up to date.
- 11a. A notification for the purposes of this Article may be made by a person to a competent authority and by a competent authority to ESMA at any time within sixty calendar days before the date of application of this Regulation.

## CHAPTER V

### POWERS OF INTERVENTION OF COMPETENT AUTHORITIES AND OF ESMA

#### Section 1

##### *Powers of competent authorities*

#### Article 16

##### *Notification and disclosure in exceptional situations*

1. Subject to Article 18a, the competent authority of a Member State may require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify it or to disclose to the public details of the position whenever the position reaches or falls below a notification threshold fixed by the competent authority, where all the following conditions are fulfilled:
  - (a) there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State or in one or more other Member States;
  - (b) the measure is necessary to address the threat.

2. Paragraph 1 shall not apply to financial instruments in respect of which transparency is already required under Articles 5 to 8 of Chapter II. A measure under paragraph 1 may apply in circumstances or be subject to exceptions specified by the competent authority. Exceptions may in particular be specified to apply to market making activities and primary market activities.

### *Article 17*

#### *Restrictions on short selling and similar transactions in exceptional situations*

1. Subject to Article 18a, the competent authority of a Member State may take the measure referred to in paragraphs 2 or 3, where all of the following conditions are fulfilled:
  - (a) there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State or in one or more other Member States;
  - (b) the measure is necessary to address the threat.
2. The competent authority of the Member State may prohibit or impose conditions relating to natural or legal persons entering into:
  - (a) a short sale;
  - (b) 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 the natural or legal person in the event of a decrease in the price or value of another financial instrument.

(...)

4. A measure taken under paragraph 2 (...) may apply to transactions concerning all financial instruments, financial instruments of a specific class or a specific financial instrument. The measure may apply in circumstances, or be subject to exceptions, specified by the competent authority. Exceptions may in particular be specified to apply to market making activities and primary market activities.

### *Article 18*

#### *Restrictions on credit default swap transactions in exceptional situations*

1. Subject to Article 18a, the competent authority of a Member State may limit natural or legal persons from entering into sovereign credit default swap transactions or limit the value of uncovered sovereign credit default swap positions that may be entered into by natural or legal persons, where both the following conditions are fulfilled:
  - (a) there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State or in one or more other Member States;
  - (b) the measure is necessary to address the threat.

2. A measure under paragraph 1 may apply to credit default swap transactions of a specific class or to specific credit default swap transactions. The measure may apply in circumstances, or be subject to exceptions, specified by the competent authority. Exceptions may in particular be specified to apply to market making activities and primary market activities.

#### *Article 18a*

Without prejudice to Article 22, a competent authority of a Member State in relation to financial instrument for which it is not the relevant competent authority may impose or renew a measure(...) under Articles 16, 17 or 18 only with the consent of the relevant competent authority.

#### *Article 19*

##### *Power to temporarily restrict short selling of financial instruments in case of a significant fall in price*

1. Where the price of a financial instrument on a trading venue has significantly fallen during a single trading day in relation to the closing price on that venue on the previous trading day, the competent authority of the home Member State for that venue shall consider whether it is appropriate to prohibit or restrict natural or legal persons from engaging in short selling of the financial instrument on the trading venue or otherwise limit transactions in that financial instrument on that trading venue in order to prevent a disorderly decline in the price of the financial instrument.

Where the competent authority is satisfied under the first subparagraph that it is appropriate to do so, it shall, in the case of a share or a debt instrument, prohibit or restrict natural and legal persons from entering into a short sale on the trading venue or, in the case of another type of financial instrument, limit transactions in that financial instrument on that trading venue in order to prevent a disorderly decline in the price of the financial instruments.

2. The measure shall apply for a period not exceeding the end of the trading day following the trading day on which the fall in price occurs.
3. The measure shall apply in circumstances, or be subject to exceptions, specified by the competent authority. Exceptions may in particular be specified to apply to market making activities and primary market activities.
4. The Commission shall, by means of delegated acts in accordance with Article 36 and subject to the conditions laid down in Articles 37 and 38, specify what constitutes a significant fall in value for financial instruments, taking into account the specificities of each class of financial instrument.
5. In order to ensure consistent harmonisation of paragraph 4, ESMA shall develop draft regulatory technical standards to establish the method of calculation of the fall in value specified by the Commission as referred to in paragraph 4.

Powers are delegated to the Commission to adopt the regulatory standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 2011] at the latest.

*Article 20*

*Period of restrictions*

Any measure imposed under Articles 16 to 18 shall be valid for an initial period not exceeding three months from the date of publication of the notice referred to in Article 21.

Any such measure may be renewed for further periods not exceeding three months at a time if the grounds for taking the measure continue to be applicable. If the measure is not renewed after that three-month period, it shall automatically expire.

*Article 21*

*Notice of restrictions*

1. A competent authority shall publish on its website notice of any decision to impose or renew any measure referred to in Articles 16 to 19.
2. The notice shall specify at least details of:
  - (a) the measures imposed including the instruments and class of transactions to which they apply and the duration of the measures;
  - (b) the reasons why the competent authority believes it is necessary to impose the measures including the evidence supporting the reasons.
3. A measure taken under Articles 16 to 19 shall take effect when the notice is published or at a time specified in the notice that is after its publication and shall only apply in relation to a transaction entered into after the measure takes effect.

## *Article 22*

### *Notification to ESMA and other competent authorities*

1. Before imposing or renewing any measure under Article 16, 17 or 18 and before imposing any restriction under Article 19, a competent authority shall notify ESMA and other competent authorities of the measure it proposes.
2. The notification shall include details of the proposed measures, the class of financial instruments and transactions to which they will apply, the evidence supporting the reasons for those measures and when the measures are intended to take effect.
3. Notification of a proposal to impose or renew a measure under Article 16, 17 or 18 shall be made not less than 24 hours before the measure is intended to take effect or to be renewed. In exceptional circumstances, a competent authority may make the notification less than 24 hours before the measure is intended to take effect where it is not possible to give 24 hours notice. A notification of a restriction under Article 19 shall be made before the measure is intended to take effect.
4. A competent authority of a Member State that receives notification under this Article may take measures in accordance with Articles 16 to 19 in that Member State when it is satisfied that the measure is necessary to assist the competent authority making the notification. The competent authority that receives notification shall also give notice in accordance with paragraphs 1 to 3 where it proposes to take measures.

## *Section 2*

### *Powers of ESMA*

## *Article 23*

### *Coordination by ESMA*

1. ESMA shall perform a facilitation and coordination role in relation to measures taken by competent authorities under Section 1. In particular, ESMA shall ensure that a consistent approach is taken by competent authorities regarding measures taken under Section 1, especially regarding when it is necessary to use powers of intervention under Section 1, the nature of measures imposed and the commencement and duration of any measures.
2. After receiving notification under Article 22 of any measure that is to be imposed or renewed under Article 16, 17 or 18, ESMA shall within 24 hours issue an opinion on whether it considers the measure or proposed measure is necessary to address the exceptional situation. The opinion shall state whether ESMA considers that adverse events have occurred, or developments have arisen, which constitute a serious threat to financial stability or to market confidence in one or more Member States, whether the measure or proposed measure is appropriate and proportionate to address the threat and whether the proposed duration of any such measure is justified. If ESMA considers that the taking of any measure by other competent authorities is necessary to address the threat, it shall also state this in the opinion. The opinion shall be published on ESMA's website.
3. Where a competent authority proposes to take, or takes, measures contrary to an ESMA opinion under paragraph 2 or declines to take measures contrary to an ESMA opinion under that paragraph, it shall immediately publish on its website a notice fully explaining its reasons for doing so.

*Article 24*

*ESMA intervention powers in exceptional situations*

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA shall, where all conditions in paragraph 2 are satisfied, take one or more of the following measures:
  - (a) require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify a competent authority or to disclose to the public details of any such position;
  - (b) prohibit natural or legal persons from entering, or impose conditions relating to natural or legal persons entering, into a short sale or a transaction which creates, or relates to, a financial instrument and the effect or one of the effects of the transaction is to confer a financial advantage on the natural or legal person in the event of a decrease in the price or value of another financial instrument;
  - (c) limit natural or legal persons from entering into sovereign credit default swap transactions or limit the value of uncovered sovereign credit default swap positions that a natural or legal person may enter into;
- (...)

With respect to the financial instruments referred to in Article 1(1)(c), imposing or renewing of such measures by ESMA requires consent of the relevant competent authority. ESMA shall ask for the consent of the relevant competent authority as early as possible.

A measure may apply in circumstances, or be subject to exceptions, specified by ESMA. Exceptions may in particular be specified to apply to market making activities and primary market activities.

2. ESMA shall only take a decision under paragraph 1 if all of the following conditions are fulfilled:
  - (a) the measures listed in points (a) to (...) **(c)** of paragraph 1 address a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and there are cross-border implications;
  - (b) a competent authority or competent authorities have not taken measures to address the threat or measures that have been taken do not adequately address the threat.
3. When taking measures referred to in paragraph 1, ESMA shall take into account the extent to which the measure:
  - (a) will significantly address the threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union or will significantly improve the ability of competent authorities to monitor the threat;
  - (b) will not create a risk of regulatory arbitrage;
  - (c) will not have a detrimental effect on the efficiency of financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure.

Where a competent authority or competent authorities have taken a measure under Article 16, 17 or 18, ESMA may take any of the measures referred to in paragraph 1 without issuing the opinion provided for in Article 23.

4. Before deciding to impose or renew any measure referred to in paragraph 1, ESMA shall consult the European Systemic Risk Board and, where appropriate, other relevant authorities.

5. Before deciding to impose or renew any measure referred to in paragraph 1, ESMA shall notify competent authorities of the measure it proposes. The notification shall include details of the proposed measures, the class of financial instruments and transactions to which they will apply, the evidence supporting the reasons for those measures and when the measures are intended to take effect.
6. the notification shall be made not less than 24 hours before a measure is intended to take effect or to be renewed. In exceptional circumstances, ESMA may make the notification less than 24 hours before the measure is intended to take effect where it is not possible to give 24 hours notice.
7. ESMA shall publish on its website notice of any decision to impose or renew any measure referred to in paragraph 1. The notice shall at least specify the following details:
  - (a) the measures imposed, including the instruments and class of transactions to which they apply and the duration of the measures;
  - (b) the reasons why ESMA is of the opinion that it is necessary to impose the measures, including the evidence supporting the reasons.
- 7a. After deciding to impose or renew any measure referred to in paragraph 1, ESMA shall immediately notify competent authorities of the measures taken.
8. A measure shall take effect when the notice is published on the ESMA website or at a time specified in the notice that is after its publication and shall only apply in relation to a transaction entered into after the measure takes effect.
9. ESMA shall review its measures referred to in paragraph (1) at appropriate intervals and at least every three months. If a measure is not renewed after that three month period, it shall automatically expire. Paragraphs 2 to 8 shall apply to a renewal of measures.
10. A measure adopted by ESMA under this Article shall prevail over any previous measure taken by a competent authority under Section 1.

## *Article 25*

### *Further specification of adverse events or developments*

The Commission shall adopt by means of delegated acts in accordance with Article 36 and subject to the conditions laid down in Articles 37 and 38, measures specifying criteria and factors to be taken into account by competent authorities and ESMA in determining when the adverse events or developments referred to in Articles 16, 17, 18 and 23 occur and when the threats referred to in Article 24(2)(a) arise.

## *Article 25a*

### *Inquiries by ESMA*

ESMA may, on the request of one or more competent authorities or on its own initiative, conduct an inquiry into a particular issue or practice relating to short selling or relating to the use of credit default swaps to assess whether the issue or practice poses any potential threat to financial stability or market confidence in the Union.

ESMA shall publish a report setting out its findings and any recommendations relating to the issue or practice.

## CHAPTER VI

### ROLE OF COMPETENT AUTHORITIES

#### *Article 26*

##### *Competent authorities*

Each Member State shall designate one or more competent authorities for the purpose of this Regulation.

Where a Member State designates more than one competent authority, it shall clearly determine their respective roles and it shall designate the authority to be responsible for coordinating the cooperation and the exchange of information with the Commission, ESMA and other Member States' competent authorities.

Member States shall inform the Commission, ESMA and the competent authorities of other Member States of those designations.

#### *Article 27*

##### *Powers of competent authorities*

1. In order to fulfil their duties under this Regulation, competent authorities shall have all the supervisory and investigatory powers that are necessary for the exercise of their functions. They shall exercise their powers in any of the following ways:

- (a) directly;

- (b) in collaboration with other authorities;
  - (c) by application to the competent judicial authorities.
2. In order to fulfil their duties under this Regulation, competent authorities of Member States shall have, in conformity with national law, the following powers:
- (a) of access to any document in any form and to receive or take a copy thereof;
  - (b) to demand information from any natural or legal person and if necessary to summon and question a natural or legal person with a view to obtaining information;
  - (c) to carry out on-site inspections with or without announcement;
  - (d) to require existing telephone and existing data traffic records;
  - (e) to require the cessation of any practice that is contrary to this Regulation;
  - (f) to request the freezing and/or the sequestration of assets.
3. The competent authorities of Member States shall, without prejudice to points (a) and (b) of paragraph 2, have the power in individual cases to require a natural or legal person entering into a credit default swap transaction to provide all the following elements:
- (a) an explanation of the purpose of the transaction and whether it is for the purposes of hedging against a risk or otherwise;
  - (b) information verifying the underlying risk where the transaction is for hedging purposes.

## *Article 29*

### *Professional secrecy*

1. The obligation of professional secrecy shall apply to all natural or legal persons who work or who have worked for the competent authority or for any authority or natural or legal person to whom the competent authority has delegated tasks, including auditors and experts contracted by the competent authority. Information covered by professional secrecy may not be disclosed to any other natural or legal person or authority except when such disclosure is necessary for legal proceedings.
2. All the information exchanged between competent authorities under this Regulation shall be considered confidential, except when the competent authority states at the time of communication that such information may be disclosed or when such disclosure is necessary for legal proceedings.

## *Article 30*

### *Obligation to co-operate*

Competent authorities of Member States shall cooperate where it is necessary or expedient for the purposes of this Regulation. In particular, competent authorities shall, without undue delay, supply each other with information which is relevant for the purposes of carrying out their duties under this Regulation.

## *Article 31*

### *Cooperation in case of request for on-site inspections or investigations*

1. The competent authority of one Member State may request assistance of the competent authority of another Member State with regard to on-site inspections or investigations.

The competent authority shall inform ESMA of any request referred to in the first subparagraph. In case of an investigation or an inspection with cross-border effect, ESMA may and if requested shall coordinate the investigation or inspection.

2. Where a competent authority receives a request from a competent authority of another Member State to carry out an on-site inspection or an investigation, it may do any of the following:
  - (a) carry out the on-site inspection or investigation itself;
  - (b) allow the competent authority which submitted the request to participate in an on-site inspection or investigation;
  - (c) allow the competent authority which submitted the request to carry out the on-site inspection or investigation itself;
  - (d) appoint auditors or experts to carry out the on-site inspection or investigation;
  - (e) share specific tasks related to supervisory activities with other competent authorities.

## Article 32

### *Cooperation with third countries*

1. The competent authorities of Member States shall wherever possible conclude cooperation arrangements with competent authorities of third countries concerning the exchange of information with competent authorities in third countries, the enforcement of obligations arising under this Regulation in third countries and the taking of similar measures in third countries by their competent authorities to complement measures taken under Chapter V.

A competent authority of Member States shall inform ESMA and other competent authorities of Member States where it proposes to enter into such an agreement.

- 1a. The cooperation arrangement shall contain provisions on the exchange of data and information necessary for the relevant competent authority to comply with the obligation set out in Article 14(2)
- 2 ESMA shall coordinate the development of cooperation arrangements between the competent authorities of Member States and the relevant competent authorities of third countries. For that purpose, ESMA shall prepare a template documents for cooperation arrangements that may be used by competent authorities of Member States.

ESMA shall also coordinate the exchange between competent authorities of Member States of information obtained from competent authorities of third countries that may be relevant to the taking of measures under Chapter V.

3. Competent authorities of Member States shall conclude cooperation arrangements on exchange of information with the competent authorities of third countries only where the information disclosed is subject to guarantees of professional secrecy which are at least equivalent to those set out in Article 29. Such exchange of information shall be intended only for the performance of the tasks of those competent authorities.

### *Article 33*

#### *Transfer and retention of personal data*

With regard to transfer of personal data between Member States or between Member States and a third country, Member States shall apply Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. With regard to transfer of personal data by ESMA to Member States or to a third country, ESMA shall comply with Regulation (EC) No 45/2001.

Data shall be retained for a maximum period of 5 years.

### *Article 34*

#### *Disclosure of information to third countries*

The competent authority of a Member State may transfer to a third country data and the analysis of data when the conditions laid down in Article 25 or 26 of Directive 95/46/EC are fulfilled but such transfer shall be made only on a case-by-case basis. The competent authority of the Member State shall be satisfied that the transfer is necessary for the purposes of this Regulation. Any such transfer shall be made under agreement that the third country shall not transfer the data to another third country without the express written authorization of competent authority of the Member State.

The competent authority of a Member State shall only disclose information received from a competent authority of another Member State to a competent authority of a third country where the competent authority of the Member State concerned has obtained the express agreement of the competent authority which transmitted the information and, where applicable, the information is disclosed solely for the purposes for which that competent authority gave its agreement.

### *Article 35*

#### *Penalties*

Member States shall establish rules on administrative measures, sanctions and pecuniary penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The measures, sanctions and penalties provided for shall be effective, proportionate and dissuasive.

Member States shall notify those rules to the Commission by [1 July 2012] at the latest and shall notify it without delay of any subsequent amendment affecting them.

## CHAPTER VII

### DELEGATED ACTS

#### *Article 36*

##### *Exercise of the delegation*

1. The power to adopt delegated acts referred to in Articles 2(2), 3(7), 4(2), 5(3), 7(3), 8(3), 9(5), 14(3), 19(4), 19(5) and 25 shall be conferred on the Commission for an indeterminate period of time.
2. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
3. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in Articles 37 and 38.

#### *Article 37*

##### *Revocation of the delegation*

1. The delegation of powers referred to in Articles 2(2), 3(7), 4(2), 5(3), 7(3), 8(3), 9(5), 14(3), 19(4), 19(5) and 25 may be revoked at any time by the European Parliament or by the Council.
2. The institution which has commenced an internal procedure for deciding whether to revoke the delegation of powers shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated powers which could be subject to revocation and possible reasons for a revocation.

3. The decision of revocation shall put an end to the delegation of the powers specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the delegated acts already in force. It shall be published in the Official Journal of the European Union.

### *Article 38*

#### *Objections to delegated acts*

1. The European Parliament and the Council may object to a delegated act within a period of two months from the date of notification.

At the initiative of the European Parliament or the Council this period shall be extended by one month.

2. If, on expiry of the period referred to in paragraph 1, neither the European Parliament nor the Council has objected to the delegated act it shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

The delegated act may be published in the Official Journal of the European Union and enter into force before the expiry of that period where the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If either the European Parliament or the Council objects to a delegated act, within the period referred to in paragraph 1 it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.

## CHAPTER VIIa

### IMPLEMENTING ACTS

#### *Article 39*

##### *Committee procedure*

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC23.
2. Where reference is made to this paragraph, Article 5 and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.
3. The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

## CHAPTER VIII

### TRANSITIONAL AND FINAL PROVISIONS

#### *Article 40*

##### *Review and report*

By 30 June 2014, the Commission shall, in light of discussions with the competent authorities and ESMA, report to the Council and the European Parliament on:

- (a) the appropriateness of the reporting and public disclosure thresholds under Articles 5, 7 and 8;
- (b) the operation of the restrictions and requirements provided for in Chapter II; and
- (c) whether any other restrictions or conditions on short selling or credit default swaps are appropriate.

#### *Article 41*

##### *Transitional provision*

Existing measures falling within the scope of this Regulation, in force before [15 September 2010], may remain applicable until [1 July 2013] provided that they are notified to the Commission.

#### *Article 42*

##### *Entry into force*

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

It shall apply from [1 July 2012].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*

*The President*

*For the Council*

*The President*

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