EUROPEAN COMMISSION

Brussels, 15.9.2010
COM(2010) 482 final

2010/0251 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on Short Selling and certain aspects of Credit Default Swaps

{SEC(2010) 1055}
{SEC(2010) 1056}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Short selling of securities is a practice where a natural or legal person sells a security he does not own with the intention of buying back an identical security at a later point in time. It is an established and common practice in most financial markets. Typically short selling relates to shares although it can also occur in relation to other types of financial instruments.

Short selling can be divided into two types: covered short selling where the seller has borrowed the security, or made arrangements to ensure they can be borrowed before the short sale and uncovered or naked short selling where at the time of the short sale the seller has not borrowed the securities or ensured they can be borrowed.

Short selling is undertaken by a range of market participants and is used for different purposes such as hedging, speculation, arbitrage and market making.

At the height of the financial crisis in September 2008, competent authorities in several EU Member States and the USA 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 may 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 European Union lacks a specific legislative framework for dealing with short selling issues.

Earlier this year concerns were expressed by some Member States about the possible role played by derivative transactions, notably credit default swaps, in relation to the prices for Greek sovereign bonds. A number of Member States (notably Germany and Greece) have recently adopted temporary or permanent restrictions at national level relating to short selling of shares and/or credit default swaps.

The European Parliament has also been considering short selling issues in the context of consideration of the proposed Directive on alternative investment fund (including hedge funds) managers.

The current fragmented approach to short selling and credit default swaps limits the effectiveness of supervision and the measures imposed and results in regulatory arbitrage. It may also create confusion in markets and costs and difficulties for market participants.

Most studies conclude that short selling contributes to the efficiency of markets. It increases market liquidity (as the short seller sells securities and then later purchases the identical securities to cover the short sale). Also, by allowing investors to act when they believe a security is overvalued it leads to more efficient pricing of securities, helps to mitigate price bubbles and can act as an early indicator of underlying problems relating to an issuer. It is also an important tool that is used for hedging and other risk management activities and market making.

But short selling can in some situations be viewed as giving rise to a number of potential risks. For example in extreme market conditions there is a risk that short selling can lead to an excessive downward spiral in prices leading to a disorderly market and possible systemic risks. Moreover, if there is insufficient transparency about short positions it can lead to regulators not being able to monitor the implications upon market orderliness or monitor the use in connection with abusive strategies. In addition, lack of transparency may lead to information asymmetries if other market participants are not adequately informed about the extent to which short selling is affecting prices. For uncovered short sales there may also be increased risk of settlement failures and volatility.

Short selling of financial instruments being used as part of an abusive strategy, for example the use of short sales in connection with the spreading of false rumours to drive down the price of a security, is already prohibited under the Market Abuse Directive 2003/6/EC[1]. However, short selling is often not abusive and there is currently no European legislation dealing with other potential risks that might arise from short selling.

A credit default swap is a derivative which provides a form of insurance against the risk of credit default of a corporate or government bond. In return for an annual premium, the buyer of the credit default swap is protected against the risk of default of the reference entity (stated in the contract) by the seller. If the reference entity defaults, the protection seller compensates the buyer for the cost of the default.

In the Commission's communication of 2 June 2010 on Regulating Financial Services for Sustainable Growth, the Commission stated that it will propose appropriate measures on short selling and credit default swaps[2]. This would be based on the findings of an ongoing investigation into the functioning of financial markets and in particular sovereign debt markets.

A number of jurisdictions (such as the USA) have recently updated their rules applying to short selling of shares conducted on trading venues. The Commission considers it is desirable to have a regulation addressing the potential risks arising from short selling. The intention is to harmonise requirements relating to short selling across the European Union, harmonise the powers that regulators may use in exceptional situations where there is a serious threat to financial stability or market confidence and ensure greater co-ordination and consistency between Member States in such situations.

The regulation should apply to all natural or legal persons who engage in short selling, across all market sectors, and whether regulated by other pieces of financial services regulation (e.g. banks, investment firms, hedge funds etc) or unregulated. As far as possible, the requirements should apply to the natural or legal persons entering into short sales rather than to other market participants such as intermediaries who execute a transaction for a client. The regulation aims at addressing the identified

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1 Directive 2003/6/EC of the European parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (OJ L 96, 12.4.2003, p. 16).

2 Communication of 2 June 2010 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the European Central Bank - COM(2010) 301, p. 7.

risks without unduly detracting from the benefits that short selling provides to the quality and efficiency of markets.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

The initiative is the result of an extensive dialogue and consultation with all major stakeholders, including securities regulators and market participants.

The Commission asked the European Securities Markets Expert Group (ESME), an independent advisory group to the Commission composed of market participants, to prepare a report on short selling. The report contains a series of recommendations and was adopted by ESME on 19 March 2009[3].

In April 2009, the European Commission asked some general questions about a possible regulatory regime for short selling in the context of a call for evidence on the review of the Market Abuse Directive launched on 20 April 2009[4]. There was some support for such a regime although most contributors considered that the Market Abuse Directive was not the appropriate instrument for addressing short selling, as most short selling does not involve market abuse[5].

The Committee of European Securities Regulators (CESR) consulted in the second half of 2009 on a possible pan-European model for the reporting and disclosure of net short positions in EU shares. On 2 March 2010 CESR published its final report recommending a model for a pan-European short selling disclosure regime for shares[6]. It recommended that the Commission introduce such a regime as soon as possible. On 26 May 2010 CESR published a further report setting out further technical details about how the model should operate[7].

The Commission had a number of discussions and consultations with various stakeholders including regulators[8].

From 14 June to 10 July 2010, the Commission launched a public consultation on policy options for a possible legislative initiative on short selling and credit default swaps. The Commission received around 120 contributions which have been published on the Commission's website[9].

The proposals take into account the work of ESME and CESR and responses to questionnaires sent to market participants and regulators and responses to the relevant public consultations.

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3 http://ec.europa.eu/internal_market/securities/docs/esme/report_20090319_en.pdf

4 Call for evidence, Review of Directive 2003/6/EC on insider dealing and market manipulation (Market Abuse Directive). For the text of the call for evidence, see: http://ec.europa.eu/internal_market/consultations/docs/2009/market_abuse/call_for_evidence.pdf

5 Directive 2003/6/EC defines in its article 1 inside information and market manipulation, which together constitute market abuse.

6 CESR/10-088 , "Model for a Pan-European Short Selling Disclosure Regime".

7 CESR/10-453, "Technical details of the pan-European short selling disclosure regime".

8 A list of formal and informal consultations is included in the Impact Assessment accompanying this proposal.

9 http://ec.europa.eu/internal_market/securities/short_selling_en.htm

In line with its "Better Regulation" policy, the Commission conducted an impact assessment of policy alternatives. Policy options related to the scope of the proposals, the proposed transparency regimes, requirements relating to uncovered short selling, exemptions and exceptional powers to restrict short selling.

Each policy option was assessed against the following criteria: impact on stakeholders, effectiveness and efficiency.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Legal basis

The proposal is based on Article 114 of the TFEU.

3.2. Subsidiarity and proportionality

The objectives of the proposal cannot be sufficiently fulfilled by the Member States.

According to the principle of subsidiarity (Article 5.3 of the TFEU), action on EU level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the EU. The preceding analysis has shown that although all the problems outlined above have important implications for each individual Member State, their overall impact can only be fully perceived in a cross-border context. This is because short selling a financial instrument can be carried out wherever that instrument is listed, or over the counter, so even in markets other than the primary market of the issuer concerned. Moreover, many markets are by their nature cross border or international. Therefore, there is a real risk of national responses to short selling and credit default swaps being circumvented or ineffective in the absence of EU level action.

The divergent responses of Member States to issues relating to short selling pose the risk of regulatory arbitrage, as investors could seek to circumvent restrictions in one jurisdiction by carrying out transactions in another. This regulatory fragmentation could also lead to increased compliance costs for market participants, especially those operating on several markets, who would have to set up different systems to comply with different requirements in different Member States.

Furthermore, certain aspects of this issue are already partly covered by the *acquis*, notably: the Market Abuse Directive 2003/6/EC which prohibits short selling which is used to manipulate the market or in conjunction with insider information; the Transparency Directive 2004/109/EC[10], which requires the disclosure of significant long positions; and the Markets in Financial Instruments Directive ('MIFID') 2004/39/EC[11] which imposes high level requirements regarding settlement

[10] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).

[11] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directive 85/611/EEC and 93/6/EEC and Directive

arrangements. This proposal on short selling and these existing legal instruments should complement each other. This can best be achieved by common EU rules.

Against this background EU action appears appropriate in terms of the principles of subsidiarity and proportionality.

It is considered appropriate and necessary for the provisions to take the legislative form of a Regulation as some provisions impose direct obligations on private parties to notify and disclose net short positions relating to certain instruments. A Regulation is also necessary to confer powers on ESMA to coordinate measures by competent authorities and to take measures itself in exceptional situations where there is a serious threat to the orderly functioning and integrity of financial markets or the stability of the financial system. Moreover, the use of a Regulation will restrict the possibility of divergent measures being taken by competent authorities.

3.3. Detailed explanation of the proposal

3.3.1. Instruments covered by the proposals

The proposal covers all financial instruments but provides for a proportionate response to the risks that that short selling of different instruments may represent.

For instruments such as shares and derivatives relating to shares, sovereign bonds and derivatives relating to sovereign bonds and credit default swaps relating to sovereign issuers where taking short positions is more common and there are clearly identifiable risks or concerns, transparency requirements and requirements relating to uncovered short selling are applied.

In exceptional situations where there is a serious threat to financial stability or market confidence, the proposal provides for the possibility to impose further transparency measures on a temporary basis for other financial instruments.

3.3.2. Transparency requirements for short positions in certain instruments – Articles 5 to 11

The proposal applies transparency requirements to natural or legal persons with significant net short positions relating to EU shares and EU sovereign debt and to natural or legal persons with significant credit default swap positions relating to EU sovereign debt issuers.

The proposal for share transparency is based on the model recommended by CESR[12]. For companies that have shares admitted to trading on a trading venue in the Union, it provides for a two tier model for transparency of significant net short positions in shares. At a lower threshold notification of a position must be made privately to the regulator and at a higher threshold positions must be disclosed to the market. Notification to regulators should enable them to monitor and if necessary investigate short selling that may create systemic risks or be abusive. Publication of information

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2001/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

[12] CESR/10-088 and CESR/10-453. CESR only looked at rules relating to shares whereas the Commission's proposal covers all kinds of financial instruments.

to the market should provide useful information to other market participants about significant individual short selling positions.

As regards significant net short positions relating to sovereign debt issuers in the EU, private disclosure to regulators is required. Disclosure to regulators of such positions will provide important information to assist regulators in monitoring whether such positions are creating systemic risks or being used for abusive purposes. The regime also provides for notification of significant positions in credit default swaps that relate to EU sovereign debt issuers.

In order to enable the ongoing monitoring of positions, the transparency regimes require notification and/or disclosure where a change in a net short position results in an increase or decrease above or below certain thresholds.

The transparency requirements apply not only to short positions created by trading of shares or sovereign debt on trading venues but also to short positions created by trading outside trading venues (so called OTC-trading) and economic net short positions created by the use of derivatives such as options, futures, contracts for differences and spread bets relating to shares or sovereign debt.

The transparency requirements aim at ensuring that information provided to regulators and the market is complete and accurate. For example, information provided should take into account both short and long positions so that it provides meaningful information about the natural or legal person's net position.

As the transparency regimes will involve detailed and technical calculation of individual positions, the proposal provides for further technical details to be adopted by the Commission in delegated acts.

In addition to the transparency regime for the notification and disclosure of net short positions for shares, the proposal includes a requirement for the marking of short orders. A requirement for the marking or flagging of sell orders executed on trading venues as short orders where the seller is entering into a short sale of shares on that venue will provide additional information about volumes of short sales executed on the trading venue. A trading venue will be required to publish daily information about volumes of short sales executed on the venue that is obtained from the marking of orders.

3.3.3. Uncovered short sales – Articles 12 and 13

Uncovered or naked short selling of shares and sovereign debt is sometimes viewed as increasing the potential risk of settlement failure and market volatility. The proposals include detailed requirements aimed at addressing these risks. To this end, natural or legal persons entering into short sales of such instruments must at the time of the sale have borrowed the instruments, entered into an agreement to borrow the shares or made other arrangements which ensure that the security can be borrowed so that settlement can be effected when it is due. The requirement permits legitimate arrangements that are currently used to enter into covered short selling and which ensure that securities will be available for settlement. For example, some participants make arrangements with a prime broker before entering into the sale to ensure securities are available for settlement while others have existing arrangements with securities settlement systems that ensure the securities will be available for settlement. In this context, the Commission is given the power to adopt further standards about the agreements to borrow and other arrangements under this requirement.

Furthermore, trading venues must ensure that there are adequate arrangements in place for buy-in of shares or sovereign debt where there is a failure to settle a transaction. In case of non-settlement, daily fines must be imposed. In addition, trading venues will have the power to prohibit a natural or legal person who failed to settle to enter into further short sales.

However, the general issue of harmonisation of settlement periods and arrangements is a separate and broader issue that will be more fully considered in the context of other specific initiatives (such as the forthcoming Directive on legal certainty of securities holding and transactions as announced in the Commission's Communication of 2 June 2010).

3.3.4. Exemptions - Articles 14 and 15

In order to reflect the principle that all measures should be proportionate and address the risks of short selling without inadvertently harming legitimate activities that are beneficial to the efficiency and quality of European markets, a certain number of exemptions are included in the proposals.

An exemption is provided for shares of a company where the principal market for the shares is outside the European Union. This reflects that fact that shares in companies are increasingly traded on a number of different trading venues around the world. For example, many large overseas companies have shares traded not only on their home market but on a trading venue in the European Union. It is not appropriate or proportionate to apply short selling requirements where most trading of the share takes place outside the Union. This is potentially onerous for market participants and creates unnecessary complexity that may discourage issuers from having their shares traded on venues in the European Union.

An exemption is also provided for market making activities. Market making activities play a crucial role in providing liquidity to European markets and market makers need to take short positions to perform this role. Imposing requirements on such activities could severely inhibit the ability to provide liquidity and have a

significant adverse impact on the efficiency of European markets. Moreover, market makers generally do not take significant short positions except for during very brief periods. This exemption is intended to cover the different types of market making activities. However, proprietary trading is not excluded and consequently fully covered by the proposal. Competent authorities are required to be notified by persons wishing to use this exemption and may prohibit a person from using the exemption if the person does not fulfil the relevant criteria in the exemption. Competent authorities may also demand further information from a person using the exemption.

An exemption is also provided for primary market operations performed by dealers in order to assist issuers of sovereign debt or for the purposes of stabilisation schemes under the Market Abuse Directive. Like market making, these are legitimate functions that are important for the proper functioning of primary markets.

4.3.5. Intervention powers – Articles 16 to 25

The proposals recognise that in exceptional situations it may be necessary for competent authorities to prohibit or restrict short selling activities that would otherwise be legitimate or pose minimal risks. The proposal provides that in the case of adverse developments which constitute a serious threat to financial stability or to market confidence in a Member State or the European Union, competent authorities should have temporary powers to require further transparency or to impose restrictions on short selling and credit default swap transactions or limit natural and legal persons from entering into derivative transactions. These powers extend to a wide range of instruments. The proposals attempt to harmonise the powers and the conditions and procedures for use of the powers as much as possible.

Where an adverse development or event creates a threat to financial stability or market confidence that extends beyond one Member State or has other cross border implications, it is essential that there is close consultation and co-operation between competent authorities. The proposal introduces various procedural requirements aimed at ensuring that other competent authorities are notified if a competent authority intends to take exceptional measures related to short selling. The European Securities Market Authority (ESMA) is given a key co-ordination role in such a situation to try to ensure consistency between competent authorities. In addition to co-ordinating measures by competent authorities, ESMA will ensure that such measure is only taken where it is necessary and proportionate to do so. ESMA is required to issue an opinion on any proposed measure.

These measures should allow for swift reactions by national regulators in exceptional situations while ensuring consistency. ESMA would make sure that situations with cross-border effects would receive – to the extent possible - the same treatment, thus reducing the possibility of regulatory arbitrage and instability in the markets.

The powers of competent authorities to restrict short selling, credit default swaps and other transactions contemplate temporary measures (usually for up to a three month period) to the extent necessary to deal with the exceptional situation. Such a measure can be extended for further periods of three months at a time if the conditions for use of the power and procedural requirements are complied with. ESMA is required to issue an opinion and ensure that any extension can be justified.

In order to ensure a consistent approach to the use of the powers of intervention, the Commission is given the power to further define by means of delegated acts criteria and factors that must be taken into account by competent authorities and ESMA in determining when adverse events or developments create a serious threat to financial stability or market confidence.

In the case of a significant fall in the price of a financial instrument, competent authorities are given the power to impose a very short prohibition on short selling of the instrument or otherwise limit transactions to prevent a disorderly decline in the price. Such a 'circuit breaker' power should enable competent authorities to intervene if appropriate for a very short period to ensure that short selling does not contribute to a disorderly price fall in the instrument concerned. This power would be triggered by objective criteria and would not require an assessment of whether there is a serious threat to financial stability or market confidence.

Finally, although the proposal assumes that competent authorities often will be best placed to deal initially with exceptional situations in which there is a threat to financial stability or market confidence and gives ESMA a strong coordination role in such cases, it also confers powers on ESMA to take temporary measures in such a situation. ESMA is given the power to take measures where the situation has cross border implications and competent authorities have not adequately addressed the threat. ESMA can take the same types of measures as the competent authorities. In such cases, ESMA is required to notify competent authorities and market participants. Any measure taken by ESMA in such situations would override measures by competent authorities if there is any inconsistency.

The powers foreseen specify the powers of ESMA in case of short selling and are without prejudice to ESMA's general powers as set out in Regulation [ESMA …/2010].

3.3.6. Powers and sanctions – Articles 26 to 35

The proposal gives competent authorities all the powers necessary for the enforcement of the rules. For example, the powers cover access to documents, the right to obtain information from natural or legal persons and to take enforcement action.

In individual cases, competent authorities are given the power to request further information from natural or legal persons about the purpose for which a credit default swap transaction is entered into and to request information verifying that purpose.

ESMA is also given the power to conduct inquiries into specific issues or practices relating to short selling and to publish a report setting out its findings.

As certain measures may involve monitoring or enforcement against natural or legal persons outside the Union, EU regulators should be encouraged to reach cooperation agreements with regulators in third countries where EU shares or sovereign bonds and associated derivatives are traded. This would facilitate the exchange of information and enforcement of the obligations, as well the taking of similar measures by third country regulators in exceptional situations where there is a serious threat to financial stability or market confidence in the Union. ESMA should

play a role in coordinating the development of cooperation agreements and the exchange of information received from third country regulators.

The proposal requires Member States to provide for rules on administrative measures, sanctions and pecuniary measures necessary for the implementation and enforcement of the proposal.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Union budget.

2010/0251 (COD)

Proposal for a

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[13],

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

Having regard to the opinion of the European Economic and Social Committee[14],

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 the United States of America 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 legislative framework for dealing with short selling issues.

(2) To ensure the functioning of the internal market and to improve the conditions of its functioning, in particular the financial markets, and to ensure a high level of consumer and investor protection, it is therefore appropriate to lay down a common 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

[13] OJ C […], […], p. […].
[14] OJ C […], […], p. […].

in an exceptional situation. It is necessary to harmonise the framework for short selling and certain aspects of credit default swaps, to prevent the creation of obstacles to the internal market, as 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 as some provisions impose direct obligations on private parties to notify and disclose net short positions relating to certain instruments and regarding uncovered short selling. A regulation is also necessary to confer powers on the European Securities and Markets Authority (ESMA) established by Regulation (EU) No […/…] of the European Parliament and of the Council[15] to coordinate measures taken by competent authorities or to take measures itself.

(4) 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 the Regulation should be as broad as possible to provide for a preventive framework to be used in exceptional circumstances. The 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 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 such measures need to address.

(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 a 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 or be abusive; at a 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) Disclosure to regulators of significant net short positions relating to sovereign debt would provide important information to assist regulators in monitoring whether such positions are in fact creating systemic risks or being used for abusive purposes. Notification to regulators of significant net short positions relating to sovereign debt in the Union should therefore be provided for. 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 for sovereign debt should apply to the debt issued by the Union and Member States, including any ministry, department, central bank, agency or instrumentality

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15 OJ L […], […], p. […].

that issues debt on behalf of a Member State but excluding regional bodies or quasi public bodies that issue debt.

(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 the market, 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 position or long position should take into account any form of economic interest which a natural or legal person has in relation to the issued share capital of company or issued sovereign debt of the Member State or 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) In addition to the transparency regime for the disclosure of net short positions in shares, a requirement for the marking of sell orders that are executed on trading venues as short orders should be introduced to provide supplementary information about the volume of short sales of shares executed on trading venues. Information about short orders should be collated by the trading venue and published in summary form at least daily in order to also help competent authorities and market participants to monitor levels of short selling.

(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 purposes 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 or a 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 the ongoing monitoring of positions the transparency obligations 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 obligations 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.

(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. The detailed restrictions should take into account the different arrangements currently used for covered short selling. It is also appropriate to include requirements on trading venues relating to buy-in procedures and fines for failed settlement of transactions in those instruments. The buy-in procedures and late settlement requirements should set basic standards relating to settlement discipline.

(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. Further 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 to capture equivalent third country entities a procedure is necessary to assess the equivalence of the third country markets. The exemption should apply to the different types of market making activity but not to exempt 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 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 arise simply in one Member State only and not have any cross border implications. The powers need to be flexible enough to deal with a range of different exceptional situations.

(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 this situation, the powers 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 ability 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 to prevent a disorderly price fall of the instrument concerned.

(23) Where an adverse event or development extends beyond one Member State or has other cross border implications, 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 will assist it in its ability to perform such a role.

(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 to do so. ESMA should have the power to give opinions to competent authorities on the use of the 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 should also have the power to itself 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, 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 the 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 6a(5) of Regulation …/…. [ESMA]. The powers conferred on ESMA in exceptional situations should be without prejudice to the powers of ESMA in an emergency situation under Article 10 of Regulation …/…. [ESMA 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 10.

(27) Powers of intervention of competent authorities and ESMA to restrict short selling, credit default swaps and other transactions should only be temporary in 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 and authorities in third countries cooperate. Competent authorities should therefore enter into agreements with authorities in third

countries. ESMA should co-ordinate the development of such cooperation agreements 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 well functioning of the markets. In addition, such transparency may help avoiding 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 as 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[16]. Any exchange or transmission of information by ESMA should be in accordance with the rules on the transfer of personal data as 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[17], 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 the provisions 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[18].

(34) The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty. In particular, the delegated acts should be adopted in respect of details concerning calculating 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 the Union.

(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.

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16 OJ L 281, 23.11.1995, p. 31.
17 OJ L 8, 12.1.2001, p. 1.
18 OJ L 184, 17.7.1999, p. 23.

(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.

HAVE ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1
Scope

This Regulation shall apply to the following financial instruments:

(1) financial instruments that are admitted to trading on a trading venue in the Union, including such instruments when traded outside a trading venue;

(2) 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[19] that relate to a financial instrument referred to in paragraph (1) or an issuer of a financial instrument referred to in paragraph (1), including such derivatives when traded outside a trading venue;

(3) 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 to such debt instruments issued by a Member State or the Union or to an obligation of a Member State or the Union.

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 an issuer of sovereign debt 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;

[19] OJ L 145, 30.4.2004, p. 1.

(b) "central counterparty" means an entity that legally 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 compensation or a payment in the event of a default by a reference entity, or a credit event relating to that reference entity and any other derivative contract that has a similar economic effect;

(d) "financial instrument" means any of the instruments listed in Annex I, Section C of Directive 2004/39/EC

(e) "Home Member State" of a regulated market, an investment firm operating a multilateral trading facility or any other investment firm, means the Home Member State for that regulated market or investment firm within the meaning of Article 4(1)(20) of Directive 2004/39/EC;

(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 the Union, or a Member State including any ministry, department, central bank, agency or instrumentality of the Member State;

(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:

(i) in relation to a Member State, the total value of sovereign debt issued by the Member State or any ministry, department, central bank, agency or instrumentality of the Member State that has not been redeemed;

(ii) in relation to the Union, the total value of sovereign debt issued by the Union that has not been redeemed;

(j) "local firm" means a firm referred to in Article 2(1)(l) of Directive 2004/39/EC which deals for the account of other members of a market or makes prices for them;

(k) "market making activity" means an activity referred to in Article 15(1) ;

(l) "multilateral trading facility (MTF)" 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 a credit default swap relating to an obligation of a Member State, the competent authority of that Member State;

(ii) in relation to sovereign debt of the Union or a credit default swap relating to an obligation of the Union, the competent authority of the jurisdiction in which the European Financial Stability Facility is established;

(iii) in relation to a financial instrument other than an instrument referred to in point (i) or (ii), the competent authority for that financial instrument as defined in Article 2(7) of Commission Regulation (EC) No 1287/2006 and determined in accordance with Chapter III of that Regulation;

(iv) in relation to a financial instrument that is not covered under point (i), (ii) or (iii), the competent authority of the Member State in which the financial instrument was first admitted to trading on a trading venue.

(p) "short sale" in relation to a share or debt means any sale of the share or debt 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 for delivery at settlement;

(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 MTF 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 of 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 paragraph 1(p).

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 Member State or the Union:

(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 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 Member State or the Union:

(a) holding 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 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 credit default swap that relates to an obligation or a credit event relating to a Member State or the Union.

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 Member State or the Union from any short position that that natural or legal person holds in relation to the same debt shall be considered a net short position in relation to the issued sovereign debt of a Member State or the Union.

6. The calculation under paragraphs 1 to 5 for sovereign debt shall be for each single Member State or for the Union even if separate entities within the Member State or the Union issue sovereign debt on behalf of the Member State or Union.

7. The Commission shall adopt, by means of delegated acts in accordance with Article 36 and subject to the conditions of 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 credit default swap relating to an obligation of a Member State or the Union, to the extent that the credit default swap is not serving to hedge against the risk of

default of the issuer where the natural or legal person has a long position in the sovereign debt of that issuer or any long position in the debt of an issuer for which the price of its debt has a high correlation with the price of the obligation of a Member State or the Union. The party under a credit default swap that is obliged to make the payment or pay the compensation in the event of a default or a credit event relating to the reference entity does not by reason of that obligation have an uncovered position for the purposes of this paragraph.

2. The Commission shall adopt, by means of delegated acts in accordance with Article 36 and subject to the conditions of 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 value 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 of Articles 37 and 38, modify the thresholds mentioned in paragraph 2, taking into account the developments in financial markets.

Article 6

Marking of short orders on trading venue

A trading venue that has shares admitted to trading shall establish procedures that ensure that natural or legal persons executing orders on the trading venue mark sell orders as short orders if the seller is entering into a short sale of the share. The trading venue shall publish at least daily a summary of the volume of orders marked as short orders.

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 to the public details of the position whenever the position reaches or falls below a relevant publication threshold referred to in paragraph 2.

2. A relevant publication threshold is a percentage that equals 0.5% of the value 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 of Articles 37 and 38, modify the thresholds mentioned in paragraph 2, taking into account the developments in financial markets.

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 a relevant notification threshold for the Member State concerned or the Union:

   (a) a net short position relating to the issued sovereign debt of a Member State or of the Union;

   (b) an uncovered position in a credit default swap relating to an obligation of a Member State or the Union.

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 of Articles 37 and 38, specify the amounts and incremental levels referred to in paragraph 2. It shall take into account all of the following elements:

   (a) that the thresholds shall not be set at such a level as to require notification of positions which are of minimal value;

   (b) the total value of outstanding issued sovereign debt for each Member State and the Union and the average size of positions held by market participants relating to the sovereign debt of that Member State or the Union.

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 12.00 pm 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 3.30 pm on the next trading day.

3. The notification of information to a relevant competent authority shall be made in accordance with the system set out in Article 12(1) of Regulation (EC) No 1287/2006.

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. The information shall be made available to the officially appointed mechanism of the home Member State of the issuer of the shares referred to in Article 21(2) of Directive 2004/109/EC of the European Parliament and of the Council[20].

5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the details of the information to be provided for the purposes of paragraph 1.

   The regulatory standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation (EU) No …/….[ESMA Regulation].

   ESMA shall submit drafts for those 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 powers are conferred to the Commission to adopt implementing technical standards specifying the means by which information may be disclosed to the public.

   The implementing technical standards referred to in the first subparagraph shall be adopted in accordance with Article [7e] of Regulation (EU) No …/….[ESMA Regulation].

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

[20] OJ L 390, 31.12.2004, p. 38.

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 shares or sovereign debt, 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 shares or sovereign debt 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 a sovereign debt instrument where one of the following conditions is fulfilled:

   (a) the natural or legal person has borrowed the share or sovereign debt instrument;

   (b) the natural or legal person has entered into an agreement to borrow the share or sovereign debt instrument;

   (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 instrument has been located and reserved for lending for the natural or legal person so that settlement can be effected when it is due.

2. In order to ensure uniform conditions of application of paragraph 1 powers are conferred to the Commission to adopt implementing technical standards identifying the types of agreements or arrangements that adequately ensure that the share or sovereign debt instrument will be available for settlement.

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

The implementing technical standards referred to in the first subparagraph shall be adopted in accordance with Article [7e]of Regulation (EU) No …/….[ESMA Regulation].

ESMA shall submit drafts for those implementing technical standards to the Commission by 1 January 2012] at the latest.

Article 13

Buy-in procedures and fines for late settlement

1. A trading venue that has shares or sovereign debt admitted to trading shall ensure that it, or the central counterparty that provides clearing services for the trading venue, has procedures in place which comply with all of the following requirements:

   (a) where a natural or legal person who sells shares or sovereign debt instruments on the venue is not able to deliver the shares or sovereign debt instrument for settlement within four trading days after the day on which the trade takes place, or six trading days after the day on which the trade takes place in the case of market making activities, then procedures are automatically triggered for the trading venue or central counterparty to buy-in the shares or sovereign debt instrument to ensure delivery for settlement;

   (b) where the trading venue or central counterparty is not able to buy-in the shares or the sovereign debt instrument for delivery then cash compensation is paid by the trading venue or the central counterparty to the buyer based on the value of the shares or the debt to be delivered at the delivery date plus an amount for any losses incurred by the buyer;

   (c) the natural or legal person who fails to settle pays an amount to the trading venue or central counterparty to reimburse the trading venue or central counterparty for all amounts paid pursuant to points (a) and (b).

2. A trading venue that has shares or sovereign debt instruments admitted to trading shall ensure that it has procedures in place, or that the settlement system that provides settlement services for the shares or sovereign debt instrument has procedures in place, which ensure that where a natural or legal person who sells shares or sovereign debt instrument on the venue fails to deliver the shares or sovereign debt instrument 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 to the trading venue or settlement system for each day that the failure continues.

   The daily payments shall be sufficiently high not to allow the seller to make a profit from the settlement failure and to act as a deterrent to natural or legal persons failing to settle.

3. A trading venue that has shares or sovereign debt admitted to trading shall have in place rules that enable it to prohibit a natural or legal person that is a member of the trading venue from entering into further short sales of shares or sovereign debt instruments on the trading venue as long as that person fails to settle a transaction resulting from a short sale on that trading venue.

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.

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

3. Powers are delegated to the Commission to adopt regulatory technical standards specifying the method for calculation of the turnover to determine the principal venue for the trading of a share.

   The regulatory standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation (EU) No …/….[ESMA Regulation].

   ESMA shall submit drafts for those 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 powers are conferred on the Commission to adopt implementing technical standards to determine:

   (a) the date on which and period in respect of which any calculation of the principal venue for a share shall be made;

   (b) the date by which the relevant competent authority shall notify ESMA of those shares where the principal venue is outside the Union;

   (c) the date from which the list shall be effective following publication by ESMA .

   The implementing technical standards referred to in the first subparagraph shall be adopted in accordance with Article [7e] of Regulation (EU) No …/….[ESMA Regulation].

   ESMA shall submit drafts for those 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, 6, 7, 8 and 12 shall not apply to the activities of an investment firm 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 pursuant to paragraph 2, when it deals as principal in a financial instrument, whether traded on or outside a trading venue, in either or both of the following capacities:

   (a) 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;

   (b) as part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade, and by hedging positions arising out of those dealings.

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 resulting from Title III of Directive 2004/39/EC, from Directive 2003/6/EC of the European Parliament and of the Council[21] and Directive 2004/109/EC, 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 authorisation 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) it ensures market transparency and integrity 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.

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[21] OJ L 96, 12.4.2003, p. 16.

4. Articles 5, 6, 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[22].

5. The exemptions referred to in paragraphs 1 and 3 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 intends to use the exemption.

6. The competent authority of the home Member State 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 has been any changes in the circumstances of the 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 paragraph 5 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 its eligibility 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. The relevant 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 keep it up to date.

CHAPTER V
POWERS OF INTERVENTION OF COMPETENT AUTHORITIES AND OF ESMA

Section 1
Powers of Competent Authorities

[22] OJ L 336, 23.12.2003, p. 33.

Article 16

Disclosure in exceptional situations

1. 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 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 Chapter II.

Article 17

Restrictions on short selling and similar transactions in exceptional situations

1. 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 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.

3. The competent authority of the Member State may prevent natural or legal persons from entering into transactions relating to financial instruments or limit the value of transactions in the financial instrument that may be entered into.

4. A measure under paragraph 2 or 3 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 relevant 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. The competent authority of a Member State may limit natural or legal persons from entering into credit default swap transactions relating to an obligation of a Member State or the Union or limit the value of uncovered credit default swap positions that may be entered into by natural or legal persons that relate to an obligation of a Member State or the Union, 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 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 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 during a single trading day fallen by the value referred to in paragraph 4 from 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 debt prohibit or restrict 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.

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 fall in value shall be 10% or more in the case of a share and for other classes of financial instruments an amount to be specified by the Commission.

   The Commission shall, by means of delegated acts in accordance with Article 36 and subject to the conditions of Articles 37 and 38, specify the fall in value for financial instruments other than shares, taking into account the specificities of each class of financial instrument.

5. Powers are delegated to the Commission to adopt regulatory technical standards specifying the method of calculation of the 10% fall for shares and of the fall in value specified by the Commission as referred to in paragraph 4.

The regulatory standards referred to in the first subparagraph shall be adopted in accordance with Articles [7 to 7d] of Regulation (EU) No …/….[ESMA Regulation].

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

Article 20
Period of restrictions

Any measure imposed under Article 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.

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 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 those reasons and when the measures are intended to take effect.

3. Notification of a proposal to impose or renew a measure under Articles 16, 17 and 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 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 where it is satisfied that the measure is necessary to assist the other competent authority. The competent authority 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 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 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 the measures is justified. If ESMA considers that measure by other competent authorities is necessary to address the threat, it shall also state it 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

1. In accordance with Article [6a(5)] of Regulation (EU) No …/…. [ESMA Regulation], 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 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 credit default swap transactions relating to an obligation of a Member State or the Union or limit the value of uncovered credit default swap positions that a natural or legal person may enter into relating to an obligation of a Member State or the Union;

(d) prevent natural or legal persons from entering into transactions relating to a financial instruments or limit the value of transactions in the financial instrument that may be entered into.

A measure may apply in circumstances or be subject to exceptions specified by the relevant competent authority. 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 (d) of paragraph 1 address a threat to the orderly functioning and integrity of financial markets or 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 sufficiently 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 the stability of the whole or part of the financial system in the Union or 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 Articles 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, where appropriate, with the European Systemic Risk Board and 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 those reasons and when the measures are intended to take effect.

6. The notification shall be made not less than 24 hours before the 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.

8. A measure 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.

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 of 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 and the threats referred to in Article 24(2)(a) arise.

CHAPTER VI
ROLE OF COMPETENT AUTHORITIES

Article 26
Competent authorities

Each Member State shall designate a competent authority for the purpose of this Regulation. Member States shall inform the Commission, ESMA and the competent authorities of other Member States thereof.

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 competent authorities of Member States shall have, in conformity with national law, the following powers:

   (a) have access to any document in any form and to receive or take a copy thereof;

   (b) 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) carry out on-site inspections with or without announcement;

   (d) require existing telephone and existing data traffic records;

(e) require the cessation of any practice that is contrary to the provisions in this Regulation;

(f) request the freezing and/or the sequestration of assets.

3. The competent authorities of Member States shall, without limiting paragraphs 2(a) and (b) 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 about 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 28
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.

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 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 the other competent authorities.

Article 32

Cooperation with third countries

1. The competent authorities shall conclude cooperation agreements 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 by the competent authority to complement measures taken under Chapter V.

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

2. ESMA shall coordinate the development of cooperation agreements between the competent authorities of Member States and the relevant competent authorities of third countries. For that purpose, ESMA shall prepare a template agreement that may be used by competent authorities.

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

3. The competent authorities shall conclude cooperation agreements 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 must be intended 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 Member States and a third country, Member States shall apply Directive 95/46/EC. 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 and only on a case-by-case basis. The competent authority of the Member State shall be satisfied that the transfer is necessary for the purpose of this Regulation. The third country shall not transfer the data to another third country without the express written authorisation 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 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 the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The measures, sanctions and penalties provided for must be effective, proportionate and dissuasive.

Member States shall notify those provisions 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 powers 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 powers to adopt delegated acts are conferred on the Commission subject to the conditions laid down in Articles 38 and 39.

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 that period, 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 at 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. Where the European Parliament or the Council objects to a delegated act, it shall not enter into force. The institution which objects shall state the reasons for objecting to the delegated act.

Article 39
Committee procedure

1. The Commission shall be assisted by the European Securities Committee established by Commission Decision 2001/528/EC[23].

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 in Chapter II;

(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.

[23] OJ L 191, 13.7.2001, p.45.

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	*For the Council*
The President	*The President*