

Regulation (EU) No 236/2012 of the European Parliament and
of the Council of 14 March 2012 on short selling and certain
aspects of credit default swaps (Text with EEA relevance)

CHAPTER III

UNCOVERED SHORT SALES

Article 12

Restrictions on uncovered short sales in shares

1 A natural or legal person may enter into a short sale of a share admitted to trading on a trading venue only where one of the following conditions is fulfilled:

- a the natural or legal person has borrowed the share or has made alternative provisions resulting in a similar legal effect;
- b the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;
- c the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have a reasonable expectation that settlement can be effected when it is due.

2 In order to ensure uniform conditions of application of paragraph 1, ESMA shall develop draft implementing technical standards to determine the types of agreements, arrangements and measures that adequately ensure that the share will be available for settlement. In determining what measures are necessary to have a reasonable expectation that settlement can be effected when it is due, ESMA shall take into account, inter alia, the intraday trading and the liquidity of the shares.

ESMA shall submit those draft implementing technical standards to the Commission by 31 March 2012.

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

Article 13

Restrictions on uncovered short sales in sovereign debt

1 A natural or legal person may enter into a short sale of sovereign debt only where one of the following conditions is fulfilled:

- a the natural or legal person has borrowed the sovereign debt or has made alternative provisions resulting in a similar legal effect;
- b the natural or legal person has entered into an agreement to borrow the sovereign debt or has another absolutely enforceable claim under contract or property law to be

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transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;

- c the natural or legal person has an arrangement with a third party under which that third party has confirmed that the sovereign debt has been located or otherwise has a reasonable expectation that settlement can be effected when it is due.

2 The restrictions in paragraph 1 do not apply if the transaction serves to hedge a long position in debt instruments of an issuer, the pricing of which has a high correlation with the pricing of the given sovereign debt.

3 Where the liquidity of sovereign debt falls below the threshold determined in accordance with the methodology referred to in paragraph 4, the restrictions referred to in paragraph 1 may be temporarily suspended by the relevant competent authority. Before suspending those restrictions, the relevant competent authority shall notify ESMA and the other competent authorities about the proposed suspension.

A suspension shall be valid for an initial period not exceeding 6 months from the date of its publication on the website of the relevant competent authority. The suspension may be renewed for periods not exceeding 6 months if the grounds for the suspension continue to apply. If the suspension is not renewed by the end of the initial period or of any subsequent renewal period it shall automatically expire.

ESMA shall, within 24 hours of notification by the relevant competent authority, issue an opinion based on paragraph 4 on the notified suspension or renewal of suspension. The opinion shall be published on ESMA's website.

4 The Commission shall adopt delegated acts in accordance with Article 42 specifying the parameters and methods for calculating the threshold of liquidity referred to in paragraph 3 of this Article in relation to issued sovereign debt.

The parameters and methods for Member States to calculate the threshold shall be set in such a way that where it is reached, it represents a significant decline relative to the average level of liquidity for the sovereign debt concerned.

The threshold shall be defined based on objective criteria specific to the relevant sovereign debt market, including the total amount of outstanding issued sovereign debt for each sovereign issuer.

5 In order to ensure uniform conditions of application of paragraph 1, ESMA may develop draft implementing technical standards to determine the types of agreements or arrangements that adequately ensure that the sovereign debt will be available for settlement. ESMA shall, in particular, take into account the need to preserve liquidity of markets, especially sovereign bond and sovereign bond repurchase markets.

ESMA shall submit those draft implementing technical standards to the Commission by 31 March 2012.

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

Article 14

Restrictions on uncovered sovereign credit default swaps

1 A natural or legal person may enter into sovereign credit default swap transactions only where that transaction does not lead to an uncovered position in a sovereign credit default swap as referred to in Article 4.

2 A competent authority may temporarily suspend restrictions referred to in paragraph 1, where it has objective grounds for believing that its sovereign debt market is not functioning properly and that such restrictions might have a negative impact on the sovereign credit default swap market, especially by increasing the cost of borrowing for sovereign issuers or affecting the sovereign issuers' ability to issue new debt. Those grounds shall be based on the following indicators:

- a a high or rising interest rate on the sovereign debt;
- b a widening of interest rate spreads on the sovereign debt compared to the sovereign debt of other sovereign issuers;
- c a widening of the sovereign credit default swap spreads compared to the own curve and compared to other sovereign issuers;
- d the timeliness of the return of the price of the sovereign debt to its original equilibrium after a large trade;
- e the amounts of sovereign debt that can be traded.

The competent authority may also use indicators other than those set out in points (a) to (e) of the first subparagraph.

Before suspending restrictions under this Article, the relevant competent authority shall notify ESMA and the other competent authorities of the proposed suspension and the grounds on which it is based.

A suspension shall be valid for an initial period not exceeding 12 months from the date of its publication on the website of the relevant competent authority. The suspension may be renewed for periods not exceeding 6 months if the grounds for the suspension continue to apply. If the suspension is not renewed by the end of the initial period or of any subsequent renewal period, it shall automatically expire.

ESMA shall, within 24 hours of the notification by the relevant competent authority, issue an opinion on the intended suspension or on the renewal of that suspension, irrespective of whether the competent authority has based the suspension on the indicators set out in points (a) to (e) of the first subparagraph or on other indicators. Where the intended suspension or renewal of a suspension is based on the second subparagraph, that opinion shall also include an assessment of the indicators used by the competent authority. The opinion shall be published on ESMA's website.

Article 15

Buy-in procedures

1 A central counterparty in a Member State that provides clearing services for shares shall ensure that procedures are in place which comply with all of the following requirements:

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- a where a natural or legal person who sells shares is not able to deliver the shares for settlement within four business days after the day on which settlement is due, procedures are automatically triggered for the buy-in of the shares to ensure delivery for settlement;
- b where the buy-in of the shares for delivery is not possible, an amount is paid to the buyer based on the value of the shares to be delivered at the delivery date plus an amount for losses incurred by the buyer as a result of the settlement failure; and
- c the natural or legal person who fails to settle reimburses all amounts paid pursuant to points (a) and (b).

2 A central counterparty in a Member State that provides clearing services for shares shall ensure that procedures are in place, which ensure that where a natural or legal person who sells shares fails to deliver the shares for settlement by the date on which settlement is due, such person must make daily payments for each day that the failure continues.

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