

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 V

POWERS OF INTERVENTION OF COMPETENT AUTHORITIES AND OF ESMA

SECTION 1

Powers of competent authorities

Article 18

Notification and disclosure in exceptional circumstances

1 Subject to Article 22, a competent authority 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 where the position reaches or falls below a notification threshold fixed by the competent authority and where:

- a there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States; and
- b the measure is necessary to address the threat and will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits.

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

Article 19

Notification by lenders in exceptional circumstances

1 Subject to Article 22, a competent authority may take the measure referred to in paragraph 2 of this Article where:

- a there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States; and
- b the measure is necessary to address the threat and will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits.

2 A competent authority may require natural or legal persons engaged in the lending of a specific financial instrument or class of financial instruments to notify any significant change in the fees requested for such lending.

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Article 20

Restrictions on short selling and similar transactions in exceptional circumstances

1 Subject to Article 22, a competent authority may take one or more of the measures referred to in paragraph 2 of this Article where:

- a there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States; and
- b the measure is necessary to address the threat and will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits.

2 A competent authority may prohibit or impose conditions relating to natural or legal persons entering into:

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

Article 21

Restrictions on sovereign credit default swap transactions in exceptional circumstances

1 Subject to Article 22, a competent authority may restrict the ability of natural or legal persons to enter into sovereign credit default swap transactions or may limit the value of sovereign credit default swap positions that those persons are permitted to enter into where:

- a there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States; and
- b the measure is necessary to address the threat and will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits.

2 A measure taken under paragraph 1 may apply to sovereign credit default swap transactions of a specific class or to specific sovereign 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 22

Measures by other competent authorities

Without prejudice to Article 26, a competent authority in relation to a financial instrument for which it is not the relevant competent authority may impose or renew a measure under Article 18, 19, 20 or 21 only with the consent of the relevant competent authority.

Article 23

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

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

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

2 The measure under paragraph 1 shall apply for a period not exceeding the end of the trading day following the trading day on which the fall in price occurs. If, at the end of the trading day following the trading day on which the fall in price occurs, there is, despite the measure being imposed, a further significant fall in value of at least half of the amount specified in paragraph 5 of the financial instrument from the closing price of the first trading day, the competent authority may extend the measure for a further period not exceeding 2 trading days after the end of the second trading day.

3 The measure under paragraph 1 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 A competent authority of the home Member State of a venue where a financial instrument has during a single trading day fallen by the value referred to in paragraph 5 shall notify ESMA about the decision taken under paragraph 1 at the latest 2 hours after the end of that trading day. ESMA shall immediately inform the competent authorities of the home Member States of venues which trade the same financial instrument.

If a competent authority disagrees with the action taken by another competent authority on a financial instrument traded on different venues regulated by different competent authorities, ESMA may assist those authorities in reaching an agreement in accordance with Article 19 of Regulation (EU) No 1095/2010.

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The conciliation shall be completed before midnight at the end of the same trading day. If the competent authorities concerned fail to reach an agreement within the conciliation phase, ESMA may take a decision in accordance with Article 19(3) of Regulation (EU) No 1095/2010. The decision shall be taken before the opening of the next trading day.

5 The fall in value shall be 10 % or more in the case of a liquid share, as defined in Article 22 of Regulation (EC) No 1287/2006, and for illiquid shares and other classes of financial instruments an amount to be specified by the Commission.

6 ESMA may issue and send to the Commission an opinion on adjusting the threshold referred to in paragraph 5, taking into account the developments in financial markets.

The Commission shall be empowered to adopt delegated acts in accordance with Article 42 modifying the thresholds referred to in paragraph 5 of this Article, taking into account the developments in financial markets.

7 The Commission shall adopt delegated acts in accordance with Article 42 specifying what constitutes a significant fall in value for financial instruments other than liquid shares, taking into account the specificities of each class of financial instrument and the differences of volatility.

8 In order to ensure consistent application of this Article, ESMA shall develop draft regulatory technical standards specifying the method of calculation of the 10 % fall for liquid shares and of the fall in value specified by the Commission as referred to in paragraph 7.

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

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

Article 24

Period of restrictions

A measure imposed under Article 18, 19, 20 or 21 shall be valid for an initial period not exceeding 3 months from the date of publication of the notice referred to in Article 25.

The measure may be renewed for further periods not exceeding 3 months if the grounds for taking the measure continue to apply. If the measure is not renewed by the end of such a 3-month period, it shall automatically expire.

Article 25

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 18 to 23.

2 The notice shall specify at least details of:

- a the measures imposed including the instruments and classes of transactions to which they apply and their duration;

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- b the reasons why the competent authority believes it is necessary to impose the measures including the evidence supporting those reasons.

3 A measure under Articles 18 to 23 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 26

Notification to ESMA and other competent authorities

1 Before imposing or renewing any measure under Article 18, 19, 20 or 21 and before imposing any restriction under Article 23, a competent authority shall notify ESMA and the other competent authorities of the measure it proposes.

2 The notification shall include details of the proposed measures, the classes of financial instruments and transactions to which they will apply, the evidence supporting the reasons for those measures and when the measures are intended to take effect.

3 Notification of a proposal to impose or renew a measure under Article 18, 19, 20 or 21 shall be made not less than 24 hours before the measure is intended to take effect or to be renewed. In exceptional circumstances, a competent authority may make the notification less than 24 hours before the measure is intended to take effect where it is not possible to give 24 hours notice. A notification of a restriction under Article 23 shall be made before the measure is intended to take effect.

4 A competent authority that receives notification under this Article may take measures in accordance with Articles 18 to 23 in that Member State where it is satisfied that the measure is necessary to assist the competent authority making the notification. The competent authority that receives notification shall also give notice in accordance with paragraphs 1 to 3 where it proposes to take measures.

SECTION 2

Powers of ESMA

Article 27

Coordination by ESMA

1 ESMA shall perform a facilitation and coordination role in relation to measures taken by the competent authorities under Section 1. In particular ESMA shall ensure that a consistent approach is taken by competent authorities regarding measures taken, especially regarding where it is necessary to use powers of intervention, the nature of any measures imposed and the commencement and duration of such measures.

2 After receiving notification under Article 26 of any measure that is to be imposed or renewed under Article 18, 19, 20 or 21, ESMA shall within 24 hours issue an opinion on whether it considers the measure or proposed measure is necessary to address the exceptional circumstances. 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

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appropriate and proportionate to address the threat and whether the proposed duration of any such measure is justified. If ESMA considers that the taking of any measure by the other competent authorities is necessary to address the threat, it shall also state this in its 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 publish on its website within 24 hours of receiving ESMA's opinion a notice fully explaining its reasons for doing so. Where such a situation arises ESMA shall consider whether the conditions are satisfied and it is an appropriate case for the use of its powers of intervention under Article 28.

4 ESMA shall review measures under this Article regularly and in any event at least every 3 months. If the measure is not renewed by the end of such a 3-month period, it shall automatically expire.

Article 28

ESMA intervention powers in exceptional circumstances

1 In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA shall, subject to paragraph 2 of this Article, either:

- 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; or
- b prohibit or impose conditions on, the entry by natural or legal persons into a short sale or a transaction which creates, or relates to, a financial instrument other than financial instruments referred to in point (c) of Article 1(1) where the effect or one of the effects of the transaction is to confer a financial advantage on such person in the event of a decrease in the price or value of another financial instrument.

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

2 ESMA shall take a decision under paragraph 1 only if:

- a the measures listed in points (a) and (b) of paragraph 1 address a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and there are cross-border implications; and
- b no competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that do not adequately address the threat.

3 Where taking measures referred to in paragraph 1 ESMA shall take into account the extent to which the measure:

- a significantly addresses the threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union or significantly improves the ability of the competent authorities to monitor the threat;
- b does not create a risk of regulatory arbitrage;
- c does not have a detrimental effect on the efficiency of financial markets, including by reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure.

Where one or more competent authorities have taken a measure under Article 18, 19, 20 or 21, ESMA may take any of the measures referred to in paragraph 1 of this Article without issuing the opinion provided for in Article 27.

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

5 Before deciding to impose or renew any measure referred to in paragraph 1, ESMA shall notify the competent authorities concerned of the measure it proposes to take. The notification shall include details of the proposed measures, the class of financial instruments and transactions to which they will apply, the evidence supporting the reasons for those measures and when the measures are intended to take effect.

6 The notification shall be made not less than 24 hours before the measure is 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:

- a the measures imposed including the instruments and classes of transactions to which they apply, and their duration; and
- b the reasons why ESMA is of the opinion that it is necessary to impose the measures including the evidence supporting those reasons.

8 After deciding to impose or renew any measure referred to in paragraph 1, ESMA shall immediately notify the competent authorities of the measures taken.

9 A measure shall take effect when the notice is published on the ESMA website or at a time specified in the notice that is after its publication and shall only apply in relation to a transaction entered into after the measure takes effect.

10 ESMA shall review the measures referred to in paragraph 1 at appropriate intervals and at least every 3 months. If the measure is not renewed by the end of such a 3-month period it shall automatically expire. Paragraphs 2 to 9 shall apply to a renewal of measures.

11 A measure adopted by ESMA under this Article shall prevail over any previous measure taken by a competent authority under Section 1.

Article 29

ESMA's powers in emergency situations relating to sovereign debt

In the case of an emergency situation relating to sovereign debt or sovereign credit default swaps, Articles 18 and 38 of Regulation (EU) No 1095/2010 shall apply.

Article 30

Further specification of adverse events or developments

The Commission shall be empowered to adopt delegated acts in accordance with Article 42 specifying criteria and factors to be taken into account by the competent authorities and by ESMA in determining in which cases the adverse events or developments

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referred to in Articles 18 to 21 and Article 27 and the threats referred to in point (a) of Article 28(2) arise.

Article 31

Inquiries by ESMA

ESMA may, on the request of one or more of the competent authorities, the European Parliament, the Council or the Commission 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 that 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 within 3 months as from the end of any such inquiry.