

ESMA Technical Advice on the evaluation of certain elements of the Short Selling Regulation (SSR) of 21 December 2017

Economic and Monetary Affairs Committee
European Parliament

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Dear Members of the European Parliament

Ladies and Gentlemen

I would like to thank your Committee for hosting this scrutiny session on ESMA's Technical Advice on the evaluation of certain elements of the Short Selling Regulation. I am grateful for this opportunity to share with you some of the elements and the experience ESMA has learnt through its work on this challenging topic.

ESMA received a formal mandate from the European Commission on 19 January 2017 seeking Technical Advice on the evaluation of certain elements of the SSR that became applicable on 1 November 2012. After having publicly consulted, ESMA submitted to the Commission the Technical Advice in December 2017, in line with the deadline.

ESMA's technical advice focusses on three main topics related to the SSR:

- i. the exemption for market making activities and the definition of market making activities;
- ii. the procedure for imposing short-term restrictions on short-selling; and
- iii. the method of notification and disclosure of net short positions.

In preparing its Technical Advice, ESMA's focus has been to achieve more transparency and to promote a more effective supervision of the SSR requirements, while limiting if not avoiding the risk of circumvention.

ESMA conducted a survey amongst competent authorities and, as mentioned before, a public consultation. ESMA received 20 responses to the public consultation.

Given the limited feedback received to the public consultation and the potential impact that the recent application of MiFID II might have on some of the recommendations included in the Technical Advice, ESMA highlighted that it may revise some elements of the Advice at a later stage.

In particular, the Technical Advice could not benefit from a number of elements that became available as of the MIFID II/MIFIR application date. Among those elements are:

- the additional information to be provided by the new transaction reporting and record-keeping obligations under MiFIR;
- the number of firms that will become systematic internalisers; and
- the number of firms that will be engaged in a market making agreement under MiFID II.

In relation to the first main topic, the exemption for **market making activities**, the Technical Advice recommends:

- a. maintaining the differentiation between the definition of '*market making activities*' under the SSR and the definition of '*market makers*' under MIFID II;
- b. that for market making activities on-venue, market makers should be member of one of the trading venues where the market-making activity effectively takes place;
- c. that for OTC market making no market membership should be required;
- d. expanding the scope of the exemption to additional instruments (i.e. subscription rights, convertible bond and corporate debt);
- e. introducing a new reporting requirement for market makers, in the form of an alert to competent authorities where they hold a significant net short position for a long period of time to more effectively supervise the use of the exemption; and
- f. revising the notification procedure to benefit from the exemption to make it more flexible and simpler to manage for competent authorities.

In relation to the second main topic, **short-term restrictions on short selling**, given the lack of strong evidence about their effectiveness, their uneven application throughout the Union and their limited scope (that covers short selling while not affecting new net short positions or increasing existing ones through derivatives), the Technical Advice proposes:

- a. changing its scope from a ban on short selling into a ban on new net short positions or on increasing existing ones to avoid circumvention;

- b. that only the competent authority of the most relevant market in terms of liquidity for the instrument can adopt a short-term ban that applies to any investor irrespective of their Country of residence, with no power to oppose the ban by other competent authorities;
- c. limiting the scope of instruments to shares and sovereign debt traded on a European trading venue.

In relation to the last main topic, **transparency of net short positions and reporting requirements** the Technical Advice suggests:

- a. maintaining the current thresholds for notification to competent authorities and disclosure to the public (respectively 0.2% and 0.5% of the issued share capital);
- b. not imposing any requirement for competent authorities to periodically publish anonymised aggregated net short positions by issuers. Competent authorities may do so on a voluntarily basis;
- c. that where the relevant thresholds are crossed, notifications to competent authorities should be submitted no later than 15:30 of the following day, while publication should be made no later than 18:00;
- d. establishing a centralised reporting and disclosure system to reduce the burden of the notifying persons and further promote transparency by facilitating the access to the information;
- e. clarifying that the determination of the issued share capital for the purposes of calculating the net short positions should be based on the publicly available information;
- f. using the Legal Entity Identifier (LEI) for legal entities when notifying their net short positions; and
- g. the use of the nominal method for the calculation of net short positions in sovereign debt for both spot and derivative instruments.

To conclude, I would like to thank you for your interest in ESMA's technical advice and look forward to answering any questions you may have.