

European Securities and Markets Authority, ESMA
103, rue de Grenelle
F-75007 Paris
France

– Submitted online via ESMA's website –

13 February 2012

Comments of the EAPB on the on the ESMA consultation paper on short selling

Dear Madam or Sir,

The European Association of Public Banks, EAPB, welcomes the opportunity to comment on the ESMA consultation paper on the draft technical standards on the Regulation on short selling and certain aspects of credit default swaps (ESMA/2012/30) of 24 January 2012. The EAPB is aware that ESMA is not responsible for the very limited timeframe of this consultation and is under time constraints itself. It is at this point nonetheless important to state that a three-week consultation period available to market participants is insufficient for adequately considering the impact that the proposals will have. In general, clarification of the affected financial instruments and harmonisation are to be welcomed. Since the proposed measures will entail considerable costs once adopted, a certain degree of flexibility would be welcome so that market participants can react to changing market conditions.

Answers to questions:

Q1. A harmonized approach on short selling and an exhaustive list of types of agreement, arrangement and measure provide certainty and clarity to all market participants. However, as markets constantly change, the list should be reviewed on a regular basis.

Q2. Instruments with embedded options, futures, equity swaps, etc., and agreements with cash settlement for liquid shares or sovereign debt should be covered. Securities lending agreements should be supplemented by the automated procedure as part of the technical standards.

Q3. Yes. The drivers of costs would be

- the alignment of the processes for covering new or existing short positions with the new and more stringent regulatory requirements,
- the setting up and maintaining of new agreements and arrangements,

- third parties that do not directly benefit from the agreements or confirmations demanding fees,
- the documentation and verification expense,
- more frequently traded covering transactions.

Q4. The list of third parties should contain reliable counterparties to ensure only due settlement of agreed coverage transactions. Pension funds, which regularly act as lenders, can be summarised under the last bullet point of paragraph 16. A central counterparty should also include its clearing members. The last half a sentence of the last bullet point should be deleted since it would be too costly to fulfil this condition.

Q6. The provisions address legal persons as a whole. The test whether there is a long or a short position applies at the legal person's level, not at the desk level. The question of an arrangement intra-desk is of a purely organisational level and immaterial for the purpose of the Regulation on short selling as long as there is a long position in an instrument.

Q7+8. There should be criteria ensuring due settlement of shares sold short. Aspects are the reliability of the counterparty and comprehensive contractual agreements. The proven reliability of the counterparty should be essential for both liquid and illiquid instruments. Since a clear cut between liquid and illiquid instruments cannot be made, there should be internal rules for both liquid and illiquid instruments to evaluate the reliability of the counterparty and a regular ex-post control.

Q9. The MiFID definition of liquid shares does not work in the context of short selling because it is not the volume of trades but the availability for lending that is decisive.

Q10. Since there are various customs concerning the value dates of sovereign debt transactions, intraday and overnight short selling and repurchase on the next bank working day should suffice as reasonable expectation test.

Q11. Yes. A uniform reporting system will reduce the administrative burden and streamline the whole process for both investors and regulatory bodies.

Q12. Yes. In the case of special funds, there should be no disclosure of the individual identity of the funds. The general public should only be informed about net positions in an aggregated form.

Q13. Harmonisation of the identification of legal and natural persons is to be welcomed. The validation of the identity of the natural or legal person sending the notification/publication should be more difficult. There would need to be a secured personal identification process for each individual. LEI coding in regulatory actions would be advantageous. Using the BIC should merely be a transitional solution.

Q14. Yes. Disclosure should be in an aggregated form.

Q15. The ISIN code should be the unique single identifier of an issuer. Where different share classes are traded the ordinary shares should be nominated as the main class to identify the issuer. In case there are several main classes available the first class admitted to trading should be used as the nominated main class.

Q16. Yes.

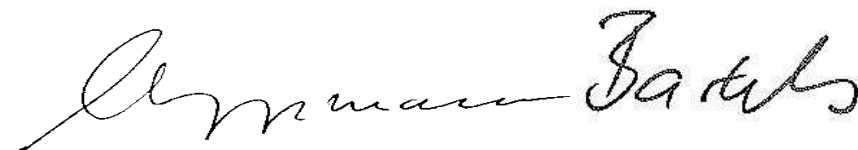
Q17. Paragraph 62(a) and (c) help to improve the process and give the opportunity to include explanatory information about the position background. Paragraph 62 (b) requires additional administrative efforts for investors who organize their notification and publication duties in different business areas or different venues. An efficient process concerning lost/missing communications could also be ensured by the competent authority sending an automated electronic receipt confirmation to the sender of a notification or publication.

Q18. Information should be available on a central website operated and supervised by the relevant competent authority – without prejudice to the use of other additional mechanisms. Already existing agreements with data service providers for other reasons should be respected and expandable to short selling requirements. The data published on the central website should allow electronic reading and download for further processing and should therefore be provided in a commonly used format.

Q19. Providing data on the date of the last notification involves a high expense.

Should you have additional questions or comments, please do not hesitate to contact us.

Kind regards,

Two handwritten signatures in black ink. The signature on the left is 'Henning Schoppmann' and the one on the right is 'Boris Bartels'.

Henning Schoppmann
EAPB

Boris Bartels
EAPB

The European Association of Public Banks (EAPB) represents the interests of 35 public banks, funding agencies and associations of public banks throughout Europe, which together represent some 100 public financial institutions. The latter have a combined balance sheet total of about EUR 3,500 billion and represent about 190,000 employees, i.e. covering a European market share of approximately 15%.