

BVI's response to the call for evidence by ESMA on the evaluation of the Regulation (EU) 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps

BVI¹ welcomes the opportunity to submit its views and suggestions regarding the functioning of the EU-Regulation on short selling and certain aspects of credit default swaps (subsequently referred to as EU-Regulation). As representatives of the German fund and asset management industry, we would like to focus our comments on the transparency and reporting requirements for significant net short positions which are of particular relevance to our members and additionally, to respond to some further selected questions of the call for evidence at hand.

Transparency and reporting requirements

Q1: *Do you consider that the initial and incremental notification/publication thresholds for net short positions in shares and sovereign debt have been set at the correct levels? If not, what alternative thresholds would you suggest and why?*

From the viewpoint of German fund managers, practical problems with the notification/publication requirements relate not so much to the level of the applicable thresholds, but to the methods of their calculation and monitoring. Under Article 12 of the Delegated Regulation 918/2012, fund managers are required to determine net short positions with regard to each individual fund or portfolio and as a second step, aggregate the net short positions of all funds or portfolios pursuing either long or short investment strategies. This entails a huge administrative burden for the management companies, especially since by far most of the investment funds follow dedicated long strategies and use short positions only for hedging purposes. Moreover, under the current approach a fund manager must perform ongoing monitoring of short positions in all funds, even if only a handful of them may be holding short positions to an extent relevant for reaching the thresholds.

Different measures to remedy this situation could be envisaged: The notification/publication requirements could be relieved or even suspended for funds not engaging in physical short sales and using short derivatives solely for hedging purposes where such limitation of the investment strategy is clearly visible in the applicable law or the fund investment rules. Another avenue would be to accept a formal declaration from the fund manager that in certain funds short derivatives are used solely with the aim of hedging and to an extent which is immaterial and does not impinge upon the notification/publication duties under the EU Regulation. Such statement should be submitted to the competent supervisory authority and would relieve the fund manager from the obligation of daily position monitoring in terms of specified funds.

¹ BVI represents the interests of the German investment fund and asset management industry. Its 78 members currently handle assets of more than EUR 2.0 trillion in both investment funds and mandates. BVI enforces improvements for fund-investors and promotes equal treatment for all investors in the financial markets. BVI's investor education programmes support students and citizens to improve their financial knowledge. BVI's members directly and indirectly manage the capital of 50 million private clients in 21 million households. BVI's ID number in the EU register of interest representatives is 96816064173-47. For more information, please visit www.bvi.de.

In any event, we would be grateful if ESMA could reconsider the general obligation to calculate net short positions for each individual fund being the major source of operational problems for fund managers. In general terms, it would also be helpful to adopt a more pragmatic approach to the treatment of positions acquired through investments in indices or baskets as suggested in our reply to Q4 below.

Q2: *What use are you currently making of information made available by competent authorities or the central website operated or supervised by the relevant competent authority on public disclosures of net short positions in shares?*

We are not aware that the publicly available information on net short positions is of any use for the asset management operations of BVI members.

Q3: *If you had taken short positions in shares and sovereign debt before the Regulation applied, what impact have the notification/disclosure requirements had on your trading behaviour since 1 November 2012?*

Most investment funds managed by BVI members have adopted “long” investment strategies and acquire selected short positions solely for hedging purposes. Therefore, we do not believe that the notification/disclosure requirements applicable since November 2012 had any discernible impact on the trading behaviour of BVI members.

Q4: *Do you have any comments on the method of calculating net short positions in shares and sovereign debt (e.g. the requirement to duration adjust cash positions in sovereign debt)?*

The inclusion of long/short positions in single shares acquired through investments in baskets or financial indices in the calculation of thresholds as stipulated by Articles 5 and 6 of the Commission Delegated Regulation 918/2012 is very cumbersome for fund managers. It is quite common that fund investments are hedged by acquiring short derivatives on indices representing suitable benchmarks for the relevant markets. However, the index components are often subject to frequent rebalancing and the actual composition is disclosed ex-post after a certain time lag. In these cases, it is hardly possible for fund managers to accurately determine the index composition on a daily basis. In order to reduce the administrative burden to a commensurate level, we believe that only indices or baskets with less than five constituents should be taken into account for calculation of long/short positions. The relevance of single shares in more diversified products is anyway only marginal and thus should be of no weight for reaching the notification/publication thresholds.

Also in this regard, it would be very helpful to accept a formal declaration from the fund manager that the use of short derivatives in the managed funds does not trigger any notification/publication duties under the EU Directive which would provide a relief from the obligation of daily monitoring (cf. our reply to Q1 above).

Q5: *What is your view of the decision to adjust the monetary trigger thresholds for reportable short positions in sovereign debt every three months? Is there an alternative you would favour and if so please explain why.*

We recommend extending the timeframe for determining the initial thresholds for short positions in sovereign debt instruments to one year, but at least reducing the frequency of such adjustments to a semi-annual cycle. This would increase planning security for market participants and allow for better coordination of the necessary implementing measures.

Q6: *Do you consider that reporting mechanisms are operating efficiently? If not, explain why and how they could be improved.*

Currently, different national platforms are in place for reporting purposes which per se adds to the complexity of the reporting process. In our view, it would be preferable to have one single internet platform at the EU level which could be operated by ESMA and should be accessible to market participants and authorities. Such a common system would simplify the registration procedure in terms of reporting as well as considerably reduce the workload associated with submitting the notifications. It would also speed up the notification process and make it easier for market participants to adhere to the deadline for notifications.

Q7: *Do you have any other comments on the reporting and transparency requirements or on their operation since 1 November 2012?*

We would like to stress once again that the current approach to notification/publication of short positions held by investment funds produces no valuable information due to the netting requirement for all funds managed by one company, but entails significant operational efforts for fund managers. Hence, for proportionality reasons, the operational burden for fund managers should be reduced in line with our suggestions relating to Q1 above.

Restrictions on entering into uncovered sovereign credit default swap positions

Q17: *Have the restrictions on entering into an uncovered sovereign CDS led you to use any alternative methods for hedging your exposures? If so, please elaborate.*

Our members report that they make more use of “traditional” hedging alternatives like outright cash sales, futures and options (where available and liquid in the sovereign space) in order to increase flexibility with regard to the underlying assets.

Q18: *Do you have any other comments on the requirements concerning uncovered sovereign CDS positions or on how they have operated since 1 November 2012?*

There are problems with regard to uncovered positions in sovereign CDS created before entry into force of the EU Regulation. Even though such positions are formally exempt from the ban, any further sale of the underlying would effectively increase the short position and is thus prohibited. As a result, the investors' ability to dispose of the underlying assets is gravely restricted.

Intervention powers and emergency measures

Q27: *In case of emergency bans,*

- a) Is the information to be published according to Article 25 of the Regulation sufficient?*
- b) If no, please explain what other/additional information should be provided when introducing an emergency measure.*

We strongly suggest that national authorities be required to publish emergency bans also in English. This would significantly ease and speed up the dissemination of information in the financial market. In this context, it would also be very helpful to have one common EU platform as a reliable single source of such information (cf. recommendations made in our answer to Q6 above). As it stands, market participants must conduct extensive research on the websites operated by the national authorities potentially every morning in order to discern any new restrictions or bans which is extremely burdensome and hardly practicable especially for smaller fund managers.

Q29: *Do you consider thresholds should be set for significant price falls in UCITS and commodity derivatives? If so, how should they be set and at what levels?*

In our view, there is no need to define thresholds for significant price falls in either UCITS or commodity derivatives. As regards the latter, the relevant underlying assets are commodity futures and options which are exchange listed and subject to regulation by the US CFTC or other national authority. The applicable local regulations regarding inter alia market disruptions are generally well reflected in the OTC contracts. We have no indications that these mechanisms are not sufficient to warrant market stability.