

Set up in 1960, the European Banking Federation is the voice of the European banking sector (European Union & European Free Trade Association countries). The EBF represents the interests of some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions. The EBF is committed to supporting EU policies to promote the single market in financial services in general and in banking activities in particular. It advocates free and fair competition in the EU and world markets and supports the banks' efforts to increase their efficiency and competitiveness.

Short selling

EBF Response to CESR Consultation Paper on a Proposal for a Pan-European Short Selling Disclosure Regime

Key Points:

- The EBF believes that a short selling transparency regime should primarily serve the purpose of helping to detect market abuse. The EBF would support that persons holding short positions above a certain threshold be required to report these positions to regulatory authorities.
- To be practical and genuinely meaningful such rules should be fully harmonised across the EU, including with regard to the basis for calculation and the practicalities of reporting.
- The EBF does however not believe that there is a case for the public disclosure of short positions to the market. On the contrary, public disclosures might be harmful in that they would act as a strong deterrent to short selling. The EBF recalls in this regard CESR's statement that it considers short selling a positive and important feature of efficient and liquid securities markets.
- Investors might nevertheless have a legitimate interest in aggregate information about short selling activity, per type of financial instrument rather than per investor. Such information could be provided by the regulatory authorities, on the basis of information received from individual investors.
- Going forward, European banks believe that the reporting regime should be complemented with a harmonised framework on short selling activities *per se*. Common rules should be achieved at least EU-wide, and be coordinated with the regulatory activities of other jurisdictions of major relevance in financial services.

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Related documents: CESR consultation document: <http://www.cesr-eu.org/popup2.php?id=5791>

General remarks

1. The European Banking Federation welcomes the opportunity to comment on CESR's proposals for a pan-European short selling transparency regime. The EBF welcomes CESR's balanced assessment of the role of short selling in the financial markets. It is right and important to note the positive effects of short selling on market efficiency. **In view of these benefits, the EBF would clearly oppose proposals to generally prohibit short selling.**
2. The EBF has in the past regretted the divergences in supervisory approaches, even within the EU, towards restrictions of short selling activity under certain market conditions. Efforts to achieve further regulatory convergence are therefore supported.
3. CESR's proposals for transparency on short selling activities can be one first step to achieve such convergence. This should however be more clearly focused on the **objective of deterring and more easily detecting any cases of market abuse**. As opposed to this, the EBF believes that CESR should be even more explicit in clarifying that it is not its intention to discourage market participants from entering into short positions, *per se*.
4. Going forward, the EBF does not believe that a short selling transparency regime is sufficient. The Federation would rather renew its **call for more convergence on the rules themselves, ideally at an international scale but at least Europe-wide**.
5. This should be based on the principles proposed by IOSCO for short selling regulation, which the EBF broadly welcomed through its membership of the International Banking Federation (IBFed). However, further specifications of IOSCO's principles would be necessary to achieve genuinely harmonised regulations.
6. Furthermore, CESR's proposals for a short selling transparency regime raise a **number of difficult practical questions**. For example, calculations of net positions on a firm-wide basis, and taking into account derivative exposures, are not current practice in all EU Member States and would be difficult to implement for some firms, especially the more complex ones. Related to this is the important question of the firm-internal level at which reporting requirements should apply.

Responses to CESR's questions

Why CESR proposes enhanced transparency of short selling

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| Q1: | Do you agree that enhanced transparency of short selling should be pursued? |
| Q2: | Do you agree with CESR's analysis of the pros and cons of flagging short sales versus short position reporting? |
| Q3: | Do you agree that, on balance, transparency is better achieved through a short position disclosure regime rather than a 'flagging' requirement? |

7. CESR's stated objective in proposing disclosure requirements for short selling activity is that of reducing the scope for the abuse of short selling to drive down the price of financial instruments to a distorted level. The Federation acknowledges the concern that short selling as a tool can be misused as one way to manipulate the market. Effective means to prevent such manipulation are of great importance for integer markets.
8. Such means include, most importantly, comprehensive and effective supervision. Regulators must ensure that they have the necessary means for this, including meaningful data as well as the right technology and sufficient staffing and resources to analyse this data. In light of this, **the EBF supports the principle of reporting short selling activities to regulators.**
9. As opposed to this, the Federation is **concerned about the potential implications from requiring the public disclosure of short selling activities to the markets.** In a first instance, public disclosure might complicate the relationship between the short seller and the issuer of a financial product. Indeed, it appears that CESR might consider public disclosure for the very purpose of discouraging short exposures above the suggested disclosure level. European banks would not find such an intention appropriate, given the acknowledged benefits of short selling.
10. Furthermore, public disclosure might be misleading to the market in situations where a certain financial instrument is shorted for hedging purposes, and not because the short seller considers the specific instrument overvalued. In particular where the short seller is well known in the market, such an interpretation by other market participants might lead to herding behaviour and trigger an exaggerated price drop of the financial instrument in question. In other words, the **ultimate effect of public disclosure in certain situations might be that of destabilising, rather than stabilising the markets.**
11. The EBF would therefore suggest that CESR restrict its proposals to regulatory reporting and refrain from imposing disclosure requirements directly on market participants. However, aggregate information about short positions in the market might be useful for market participants to better understand overall price movements. Building on data received from individual market participants, **CESR should consider publishing short selling data in an aggregated way, by financial instrument;** but with the short selling parties remaining anonymous.
12. European banks would concur that the targeted objectives would be **best achieved through position reporting,** rather than flagging requirements. Equivalently, aggregate information to the market by financial instrument should be made on the basis of positions, rather than on the basis of filed orders or executed orders.
13. As regards CESR's observation about the costs that would be incurred by market participants to comply with a position reporting regime, it is important to be aware of the **practical difficulties that are expected to arise in calculating short positions on a net basis; i.e. in consolidating data across the firm, and taking into account derivatives.**

14. The EBF cautions that a **short selling transparency regime, if introduced, must be fully harmonised** across the EU to be practicable to implement and genuinely meaningful.

Proposed scope of the disclosure regime

Q4: Do you have any comments on CESR's proposals as regards the scope of the disclosure regime?

15. CESR's proposal that a permanent pan-European disclosure regime should apply to all positions held in EEA issuers traded on regulated markets or MTFs, as well as to all non-EEA issuers solely or primarily admitted to trading on such platforms, is consistent with its objective of facilitating the detection of market abuse. The EBF would support this approach.
16. The EBF also agrees with the proposed limitation to short positions that create an economic exposure. As noted above, it should be considered whether the reporting of straight holdings might provide a sufficient amount of information for CESR's purposes.

Two tier disclosure system

Q5: Do you agree with the two tier disclosure model CESR is proposing? If you do not support this model, why not and what alternative(s) would you suggest?

17. The EBF does not agree with the suggestion of a two-tier model. As set out above, European banks do not consider public disclosure of short selling positions to the market necessary for CESR's objectives, and rather believe that a public disclosure requirement would be a too strong deterrent from short selling.
18. European banks would instead suggest a simple reporting regime. This could possibly be complemented by the regulatory disclosure of short selling position data, aggregated by financial instrument.

Disclosure thresholds

Q6: Do you agree that uniform pan-European disclosure thresholds should be set for both public and private disclosure? If not, what alternatives would you suggest and why?

19. The EBF believes that the transparency system should remain as straight-forward as possible in implementation. The Federation would therefore support the introduction of a single threshold across the EU for reporting to regulators.
20. However, should CESR insist on public disclosure, in addition to reporting to regulators, then the EBF would support that this be triggered at a higher threshold than that for reporting to regulators.

Q7: Do you agree with the thresholds for public and private disclosure proposed by CESR? If not, what alternatives would you suggest and why?

21. The thresholds proposed by CESR are set at rather low levels. Before recommending such low thresholds and intervals, banks would suggest that CESR at a minimum carry out further research to establish the amount of reporting that such thresholds would trigger to European regulators, and how regulators would proceed to systematically analyse the expected amount of data. Appropriate thresholds would be at a level that would point regulators systematically to those cases of short selling that warrant targeted analysis.

Rights issues

Q8: Do you agree that more stringent public disclosure requirements should be applied in cases where companies are undertaking significant capital raisings through share issues?

Q9: If so, do you agree that the trigger threshold for public disclosures in such circumstances should be 0.25%?

Q10: Do you believe that there are other circumstances in which more stringent standards should apply and, if so, what standards and in what other circumstances?

22. Whilst banks do in general not support the suggestion of public disclosure of short selling positions to the market, there is agreement that there is some justification for a mechanism to deter short selling during periods of significant capital raisings. Public disclosure could be further considered for such circumstances.

The basis for calculating short positions

Q 11: Do you have any comments on CESR's proposals concerning how short positions should be calculated? Should CESR consider any alternative method of calculation?

23. Banks expect that both proposed requirements for calculating short positions – that of including derivatives and that of making the calculations at legal entity level – would result in a significant administrative burden for firms.

24. The question of application levels within the firm will need thorough consideration. Decisions about investment strategies are taken at different levels in different firms, and reporting at legal entity level might be of little meaning for many firms. CESR might consider possibilities of introducing some flexibility in this respect to better allow adjusting the reporting regime to firms' actual internal functioning.

25. In any case, European banks would underline that methods for calculation and reporting should be fully harmonised across the EU. Otherwise, the administrative burden of the regime would be multiplied for market participants, as well as making information less reliable and less meaningful for regulatory authorities.

The mechanics of disclosure

Q 12: Do you have any comments on CESR's proposals for the mechanics of the private and public disclosure?

Q 13: Do you consider that the content of the disclosures should include more details? If yes, please indicate what details.

26. The EBF agrees with CESR's proposal that private disclosures to regulators are made to a dedicated e-mail address. The Federation also concurs that disclosure should be made to the competent authority of the most relevant market in terms of liquidity as per Article 25(3) of MiFID; and that the home state authority of the issuer as defined in the Transparency Directive may need access to this information.

27. The Federation furthermore considers important CESR's specification that the responsibility for making the disclosures should lie with the position holder, although the handling of disclosures might be delegated.

Timing of disclosures

Q 14: Do you have any comments on CESR's proposals concerning the timeframe for disclosures?

28. CESR is right to state that real-time disclosure would not be feasible under a position disclosure regime. The EBF would expect the daily calculations of positions, and disclosure on the following trading day, to be a realistic target. However, the timing will have to be reconsidered once that the specifics of the mechanism – for example the application level – have been determined.

Exemptions to disclosure obligations

Q 15: Do you agree, as a matter of principle, that market makers should be exempt from disclosure obligations in respect of their market making activities?

Q 16: If so, should they be exempt from disclosure to the regulator?

Q 17: Should CESR consider any other exemptions?

29. European banks agree with CESR's proposal, that market makers should be exempt from both public disclosure and from the reporting of short positions to regulators.

The legal basis for a permanent disclosure regime

Q 18: Do you agree that EEA securities regulators should be given explicit, stand-alone powers to require disclosure in respect of short selling? If so, do you agree that these powers should stem from European legislation, in the form of a new Directive or Regulation?

30. The EBF welcomes CESR's recognition that short selling should not be seen in the context of market abuse. Including the proposed additional rules in the Transparency Directive or foreseeing a separate legal act would both be viable alternatives, in the view of the EBF.
31. In addition and more importantly, CESR should consider ways of effectively ensuring world-wide compliance with the disclosure rules, regardless of the location of the short seller.

Impact assessment

32. The EBF welcomes CESR's initial impact assessment. However, many aspects of the envisaged regime remain to be specified. The Federation therefore believes that a more detailed impact assessment will have to be undertaken once that there is more clarity around the actual form the transparency regime would take.