INTESA SANPAOLO

**International Affairs**

**INTESA SANPAOLO RESPONSE TO THE**
**CESR PROPOSAL FOR A PAN-EUROPEAN SHORT SELLING DISCLOSURE REGIME**
**CESR/09-581**
**SEPTEMBER 2009**

The Intesa Sanpaolo Group is one of the largest European banking groups active on different EU markets both through Banca IMI, its investment bank and through its subsidiaries based also in the new Member States.
Intesa Sanpaolo is an active participant in European financial markets, both as a market maker and a trader.

We welcome the CESR proposal for a pan European short selling disclosure regime and would like to submit the following comments.

## General comments

We are pleased to note that CESR acknowledges the beneficial role played by short selling in the financial markets in improving market efficiency by helping a more efficient price discovery, increasing turnover, narrowing bid ask spreads and facilitating hedging. We therefore welcome its approach and in particular the fact that a general ban on short selling is not envisaged. We believe that short selling is a legitimate trading technique that needs to be maintained. In fact, as evidenced during the crisis, temporary restrictions on shorting some instruments did not reduce their volatility, but rather had an impact on their liquidity.

We are aware that, especially in extremely volatile or stressed market conditions, any potential adverse implication of short selling activities should be monitored and avoided. Under this perspective, we believe that the regulators' aim of establishing a pan European disclosure regime that would enable them to monitor the building up of positions and detect possible reprehensible market behaviours can be supported. However, we have some concerns about a full individual disclosure to the market, since this could generate some unintended effects such as herding behaviours, short squeeze and implicit and explicit costs for investors and intermediaries. We rather believe that aggregate anonymised short positions would help CESR achieving its stated aims and at the same time issuers and investors would gain access to relevant information.

We also welcome the fact that with this proposal CESR aims to adopt a harmonized approach, thus overcoming the fragmented one adopted by national regulators in respect of short selling. This should definitively help market participants active across EU markets being compliant with rules.

As already mentioned in the response to the Commission consultation on the revision of the Market Abuse Directive, the Intesa Sanpaolo Group believes that there is a clear need for a sensible and proportionate regulation crafted after a thorough cost benefit analysis and should take into account the related costs and the necessary distinction between normal market conditions and exceptional ones.

## Enhanced transparency of short selling

*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 through a 'flagging' requirement*?

We agree with CESR analysis on the benefits of a disclosure regime on short sellers. More transparency would be beneficial for the regulators to fulfill their tasks in monitoring the building up of positions and of detecting market abuses, but also for all market participants and investors.

As already mentioned in our general comments, we welcome the fact that CESR is not considering a general ban of short selling.

We fully concur with CESR in the analysis of the pros and cons of flagging short sales versus short positions reporting and with the idea that a disclosure regime better achieves its stated aim rather than through a flagging requirement, which would also be costly for firms to implement. On the contrary, short position reporting will be less costly and easier to achieve in terms of internal procedures, since the positions are internally monitored on a daily basis for risk management purposes, provided that the same calculation methodology is applied.

**Scope**

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

We agree with the objective scope of application of the proposed regime, that will apply to EEA securities admitted to trading on EU regulated markets or MTFs, and on any EEA issuers solely or primarily admitted to trading on such platforms.

On the subjective scope of application we note that on one side non EEA resident market participants may face problems in reporting their positions to the relevant competent authorities, while on the other, the authorities could face problems in enforcing their decisions against market participants located in third countries. Against this background, in order to ensure an efficient enforcement and a level playing field among market participants irrespective of their country of incorporation, it is crucial that supervisory authorities have cooperation arrangements in place with foreign jurisdictions that grant them all the necessary powers to fulfill their supervisory tasks and allow them to exchange information.

**A two tier disclosure system**

*Q5 Do you agree with the two tier disclosure model CESR is proposing? If you do not support this model, please explain why you do not and what alternative(s) you would suggest. For example, should regulators be required to make some form of anonymised public disclosure based on the information they receive as a result of the first trigger threshold (these disclosures would be in addition to public disclosures of individual short positions at the higher threshold)?*

As already mentioned in our general comments, we believe that a disclosure system addressed to the regulators would enable them to fulfill their tasks and to mitigate market participants concerns in making public their positions. On the contrary, we have some reserves in supporting a full individual disclosure regime to the market, since this could have the unintended effect of creating herding effects, short squeeze and would generate implicit and explicit costs to investors and intermediaries. We would suggest CESR to make available to the market aggregate anonymised short positions. This solution has the benefit of enabling regulators to fulfill their tasks and issuers and investors to have access to relevant information.

**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?*

Yes, applying a single uniform pan European threshold would minimize compliance costs for participants active on several EU markets.

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

The Intesa Sanpaolo Group believes that the proposed disclosure thresholds are too low and would have the two faceted effects of generating substantial compliance costs for firms and investors to comply with, in particular when considering that the proposed objective scope of application is considerably larger than that applied only to financial entities during the ban. On the other side, regulators would be confronted by a flood of information which may be problematic to assess. We would therefore suggest it to be set at 1%. As to the incremental thresholds, we would suggest setting the incremental and the decremental ones at 0.25%. These thresholds would capture more sizeable short positions that would impact the market and would enable regulators to focus on larger positions that would warrant their 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?*

We support the idea of more stringent public disclosure for companies undertaking significant capital raisings, provided that all rights attached to the instruments are included in the Delta adjusted basis for calculation of the exposure.
In order to ensure a consistent implementation of this requirement across Member States, it would be appropriate to define the notion of significant capital raising.
We support the proposed threshold and do not believe that other circumstances should be envisaged for applying more stringent standards.

**The basis for calculating short positions**

*Q11 Do you have any comments on CESR's proposals concerning how short positions should be calculated? Should CESR consider any alternative method of calculation?*

Defining objective and unambigous calculation methods is of the foremost importance in order to ensure that data provided by market participants coming from different Member States are consistent and homogenous. This would ensure that data would be interpreted in a consistent manner across the EU both by regulators and by the market and would avoid any market disturbance. Nevertheless, the standardization and the complexity of the methodology can bring about considerable costs that need to be adequately taken into account in crafting the regulation.

While we do not have specific comments on the proposal for calculating cash short positions, we believe that CESR should better spell out how derivative positions have to be calculated on a Delta adjusted basis.

**The mechanics of disclosure**

*Q12 Do you have any comments on CESR's proposals for the mechanics of the private and public disclosure?*
*Q13 Do you consider that the content of the disclosures should include more details? If yes, please indicate what details (e.g. a breakdown between the physical and synthetic elements of a position).*

The Intesa Sanpaolo Group believes that in order to enable investors to disclose their positions, it would be more efficient to provide for that the reporting is made to a single web entry point at CESR level. This solution offers a number of benefits, in that it would make easier for short sellers to be compliant, would enable also EU national regulators to have a comprehensive view of all short positions on a specific security and would overcome the inconvenience for regulators to receive non formatted emails.

In any case, should our proposal not be taken up, we believe that the responsibility for making the disclosure should ultimately rest with the position holder, even if in some cases his broker could be required to make the reporting to the competent authority on his behalf.

We further believe that the details of the disclosure are appropriate. In our view, in order to achieve a truly pan European regime, the level of details should be subject of maximum harmonization at EU level.

**Timing of disclosures**

*Q14 Do you have any comments on CESR's proposals concerning the timeframe for disclosures?*

We concur with CESR that information about short selling should be disclosed as soon as possible and practicable. When determining the timeframe disclosure, CESR should consider the fact that since investors receive the confirmation that a transaction has been executed on a T+1 basis, it would be impossible for them to make the disclosure on the same T+1 basis. Therefore, we would suggest CESR when specifying the timing of the disclosure obligation, to take into account market practices. In any case we believe that the disclosure should occur close of business,, when markets are closed.

**Exemptions to disclose obligations**

*Q15 Do you agree, as a matter of principle, that market makers should be exempt from disclosure obligations in respect of their market making activities?*
*Q16 If so, should they be exempt from disclosure to the regulator?*
*Q17 Should CESR consider any other exemptions?*

We fully agree that market makers would be exempt from the two tier disclosure regime, because of the benefits they generate for the liquidity in the markets.
We do not believe that any other exemption should be considered.

*Q18 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?*

First of all, we believe that all EU securities regulators should have the powers to monitor the markets and adopt appropriate actions.
As already mentioned in our Group's response to the Commission consultation on the revision of the Market Abuse Directive, we believe that there is a need for a coherent ad hoc

regulation of short selling, as the non-coordinated and fragmented actions taken by national Authorities during the current financial crisis have well shown. Therefore, the current proposal for a disclosure regime should be included neither as an amendment to the Market Abuse Directive nor to the Transparency one for the following reasons:

i) Short selling should be assimilated neither to an abusive behaviour that needs to be prohibited nor to an activity to be included among the safe harbour exemptions;

ii) The MAD is not a maximum harmonization directive; therefore it would not lend itself to include a regime that needs to be of maximum harmonization in order to achieve CESR stated objectives. We believe that any regulation of short selling should be identical in all Member States, in order to ensure a balance in the market and fair competition among market players.

iii) The Transparency Directive pursues a different aim and therefore, should not be amended in order to include also the proposed disclosure mechanism.

As to the legal instrument to adopt, we believe that a Regulation should be preferred to a Directive, so as to avoid any time mismatch in the transposition process and any discrepancies in the transposition language.

For any further comments or questions, please contact:

Alessandra Perrazzelli
Head of International Affairs
Intesa Sanpaolo S.p.A.
Square de Meeûs, 35
B – 1000 Brussels
alessandra.perrazzelli@intesasanpaolo.com

Francesca Passamonti
Regulatory Advisor
Intesa Sanpaolo S.p.A.
Square de Meeûs, 35
B - 1000 Brussels
francesca.passamonti@intesasanpaolo.com

Stefano Mazzocchi
Regulatory Advisor
Intesa Sanpaolo S.p.A.
B – 1000 – Brussels
stefano.mazzocchi@intesasanpaolo.com