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Milan, 13 February 2012
Prot. 13/12
MFE/lm

**ESMA**
Rue de Grenelle 103
75007 Paris
France

**Re: Draft technical standards on the Regulation (EU) xxxx/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps**

ASSOSIM[1] welcomes the opportunity to comment on the **Draft technical standards on the Regulation (EU) xxxx/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps** and is pleased to provide the following observations.

**Preliminary remarks**

Assosim would like to bring to ESMA's attention some general issues related to the importance of a harmonized implementation of the Short Selling Regulation across EU countries. In particular, article 15 of the Regulation does not provide for any implementing measure in relation to buy-in procedures. In this respect, we believe that it is crucial that buy-in procedures are introduced in all EU markets and are consistently and concomitantly applied across the EU. To this regard, ESMA could play an important coordination role together with national competent Authorities. We have concerns that an uncoordinated implementation of the buy-in provision could produce distortive effects on the market, regulatory arbitrages, where market participants shortening instruments traded in different trading venues and different member States could choose the settlement place with the looser penalty regime.

[1] ASSOSIM (*Associazione Italiana Intermediari Mobiliari*) is the Italian Association of Financial Intermediaries, which represents the majority of financial intermediaries acting in the Italian Markets. ASSOSIM has nearly 80 members represented by banks, investment firms, branches of foreign brokerage houses, active in the investment services industry, mostly in primary and secondary markets of equities, bonds and derivatives, for some 82% of the Italian total trading volume.

In the same vein, we also believe that a harmonized regime of penalties and sanctions should be introduced and applied in all Member states. Also in this respect ESMA could play an important coordination role.

**Annex I - Summary of questions**

**Q1**: Do you agree with the approach of providing an exhaustive list of types of agreement, arrangement and measure that adequately ensure shares or sovereign debt instruments will be available for settlement and setting out the criteria these should fulfill?
*We think that an exhaustive list could be too stiff; rather, the substantial effects of such agreements, arrangements and measures should be taken into account. In any case, as regards the types of agreements, the proposal makes reference to the residual category of other claims or agreements (letter f.), that is in line with our view.*

**Q2**: Do you agree with the proposed list of agreements and enforceable claims and the criteria they should meet? Are there any other types of agreement or enforceable claims or criteria which should be added?
*The proposed list seems to be sufficiently comprehensive. See also answer to Q1.*
*As regards the criteria, we do not understand why the sixth and last subsection, providing the obligation of recording the agreements or the enforceable claims in a durable medium, refers to the third party. Indeed, in presence of the conditions set in art. 12(1)(b), there should not be the involvement of the third party, as instead requested by art. 12 (1)(c).*
*Moreover, we ask how long the recorded data have to be stored.*

**Q3**: Do you consider that these criteria will entail additional costs as compared to current practices on the market? If so, could you specify the drivers for those additional costs and any indication of their amount?
*We think that the proposed criteria will undoubtedly generate additional costs. Nevertheless, due to the limited consultation period, it is difficult to provide evidence about them.*

**Q4**: Do you agree with the proposed list of third parties which may be parties to the arrangements or measures and the criteria proposed by ESMA that they should fulfill?
*We would suggest adding to the proposed list of third parties the following entities: banks, investment funds, ICSDs and "locals"(registered in a European member State, they do not have a European passport).*

**Q5**: Are there further criteria which should be added?
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**Q6**: Does the fact that a third party should be a distinct legal entity from the entity entering into the short sale entail costs? If so please provide estimates of those costs.
*We do not agree with the proposal requiring the third party be a distinct legal entity because it does not reflect current practices and generate additional costs for intermediaries that generally make use of internal desks in charge of lending/borrowing. To this regard, if the internal desk lends securities that belong to the proprietary portfolio, the sale of the securities carried out by another desk cannot be considered short (internal netting of the positions); on the contrary, if the securities belong to a different legal entity, the role of the lending/borrowing desk is limited to the management of the contractual relationship with this entity and the intermediary itself. In both cases we believe that the proposed requirement does not work properly.*

**Q7**: Do you agree with the approach proposed by ESMA on the standard/same day/liquid shares locate confirmation arrangements and measures and the criteria that they must fulfill?
*We believe that the proposed approach is too complex and requires a timing not consistent with the operational standards. In addition it is not clear if the intermediary executing the sale order has to assess the investor compliance with the process required. To this regard, we are against any responsibility for the executing intermediary.*
*Moreover, the confirmation arrangements imply a third party responsibility on the assumption ("to meet the reasonable expectation test") that the shares are easy to borrow or purchase which can be easily belied in all those cases where the third party does not own the securities. Furthermore, Articles 12(1)(c) and 13(1)(c) of the Regulation shall be read only in one sense, namely that the burden to ensure the reasonable expectation of settlement is on the natural or legal person, as they do not state that it is the third party that has to confirm the natural or legal person has a reasonable expectation of settlement when due.*

**Q8**: In circumstances other than intraday short selling or short selling on liquid shares, can you suggest any additions to the methods for effective allocation set out in this consultation paper which would provide the necessary comfort that shares can be delivered for settlement in due time?
*We believe that in normal market conditions intraday short selling on liquid shares should not be excessively restricted: it will be the investor's responsibility to ensure that a purchase will be done within the same day, letting settlement occurs when it is due.*
*To this extent, ESMA, either directly or through national competent Authorities, should define the normal market conditions (for example, shares under corporate events shall not fall into normal market conditions).*
*The third party confirmation could make reference only to the existence of: a) normal market conditions, b) shares liquidity, without introducing discretionary evaluation related to the easiness of buying/borrowing the relevant securities.*

**Q9:** In relation to the approach suggested for liquid shares, do you consider it appropriate to use the MiFID definition of liquid shares? Do you think ESMA should consider different approaches to determine the reasonable expectation test for liquid and illiquid shares? If not, can you provide indications as to the criteria to consider to define liquid shares or to take into account the liquidity of the shares in these circumstances? Is securities lending activity an additional factor to consider when determining liquidity of a share?
*We propose to adopt a definition of liquidity broader than the one expressed by MiFID, taking into account the securities lending market too.*
*As regards the reasonable expectation test, see answers to questions no. 7 and 8.*

**Q10**: Do you agree with the approach proposed by ESMA on the location confirmation and reasonable expectation arrangement in relation to sovereign debt and that the reasonable expectation test should only apply in the case of intraday short selling of sovereign debt?
*As regards the reasonable expectation test, we think that the approach should be adjusted. See answers to questions no. 7 and 8.*

**Q11**: Do you agree that there should be one standard format for notifying relevant competent authority for each type of instrument?
*We agree with the proposal.*

**Q12**: Do you agree that there should be one standard form for public disclosure of information on significant net short position in shares?
*We agree with the proposal.*

**Q13**: Do you agree with the proposed way to identify natural and legal persons, including the contact information details?
*In principle, we believe that the full name specification is agreeable only for the reporting to the Authority, while a code could be more appropriate for public disclosure. The ultimate goal is to avoid the herding effect.*

**Q14**: Do you agree with the proposed way to notify and disclose the size of the relevant position?
*We agree with the proposal.*

**Q15**: Do you have any comments on the proposed way to identify the issuer in relation to which the relevant net short position is held, including how to use the ISIN code in this matter?
*As to the way of identifying the issuer in relation to which the relevant net short position is held, we would tend to prefer the reference of ISIN codes of ordinary shares.*

*We propose to adopt the ISIN code also for Sovereign Debt, in order to identify the relevant instrument.*
*We agree with the remaining proposals.*

**Q16**: Do you agree with the ISO 8601 2004 standard use to notify and publicly disclose the date on which relevant position was created, changed or ceased to be held?
*Yes, we agree.*

**Q17**: Do you agree that the additional information as described above should be provided?
*Yes, we agree it can be useful for supervisors to have the additional information related to the third party submitting the notification and the date of the previous notification of the net short position.*

**Q18**: Do you agree that information on the central website should be provided at least in a machine-readable format?
*Yes, we agree.*

**Q19**: Do you agree that information on the central websites should at least include data as provided in Annex 1 of the draft implementing standard presented in appendix to this consultation paper?
*We agree with the proposal.*

**Q20**: Do you foresee any other situation that might merit an update of the list of exempted shares within the two-year effectiveness period?
*We do not foresee different situations.*

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We remain at your disposal for any further information or clarification.

Yours faithfully,

Gianluigi Gugliotta
Secretary General