

OPINION

Renewal of emergency measure by the Greek HCMC under Section 1 of Chapter V of Regulation No 236/2012 on short selling and certain aspects of credit default swaps

I. Legal basis

1. According to Article 27(2) of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (the Regulation), the European Securities and Markets Authority (ESMA) shall within 24 hours of the notification having been made by a competent authority under Article 26 of the Regulation issue an opinion on whether it considers the measure or proposed measure necessary to address the exceptional circumstances.
2. ESMA's competence to deliver an opinion is based on Article 29(1) (a) of Regulation (EC) No 1095/2010 (ESMA Regulation). In accordance with Article 44(1) of the ESMA Regulation the Board of Supervisors has adopted this opinion.

II. Background

3. On the 29th of June 2015, ESMA issued an opinion on the emergency measure introduced by the Hellenic Capital Market Commission (HCMC) under Article 20 of the Regulation. The measure consisted of a temporary prohibition of transactions in any financial instrument that create, or increase, a net short position on any of the shares admitted to trading on the Athens Exchange and the Multilateral Trading Facility of "EN.A" (Alternative Market of the Athens Exchange) of which the relevant Competent Authority is HCMC and was applied from 30th June 2015 at 00.00.01 CET to the 6th July 2015 at 24:00:00 (CET).
4. The measure concerned the following financial instruments: all shares admitted to trading on the Athens Exchange and the Multilateral Trading Facility of "EN.A", as well as all related instruments included in the calculation of the net short position in accordance with Regulation (EU) NO 236/2012 and Commission Regulation (EU) No 918/2012 of 5 July 2012 (see in particular Annex I, Part I thereof). It applied to any person irrespective of their country of residence, and did not envisage any exemption for market maker activities.

5. In the original notification to ESMA, the HCMC indicated that the measure was a complementary action to the ones already established on the 29th of June 2015 by the Greek Authorities, namely:
 - closure of the ATHEX regulated market and the Multilateral Trading Facility of “EN.A” until the 6th of July (included);
 - closure of The Electronic Secondary Market “HDAT” for government bonds operated for the same period;
 - suspension of redemption of mutual funds’ units;
 - suspension of operation of ATHEXClear for the securities traded on the Greek market and the MTF “EN.A”;
 - suspension of the settlement of securities traded on the Greek market by the Hellenic Central Securities Depository;
 - trading suspension of all the securities of listed companies covered by the above measures, as well as the related financial instruments (the trading suspension is effective also in other Member States).
6. The reason for proposing a temporary prohibition for the creation, or increase, of net short position on the shares admitted to trading on the Athens Exchange and on “EN.A” was that the HCMC deemed it necessary for the protection of the investors and the preservation of financial stability. In fact, such prohibition was considered a relevant component to ensure the effectiveness of the other measures adopted by the Greek authorities. The HCMC also stated that given that the main liquidity and trading activity on those instruments normally is located within the Hellenic Republic, the measure would have not created disproportionate negative effects, since it would have affected a fairly small part of the EU overall market.
7. On the 6th, the 13th and the 20th of July 2015, the measures described in paragraph 5 were renewed by the Greek authorities. On the same days, the HCMC notified ESMA and competent authorities of its intention to renew the short selling measure and ESMA issued in all cases a positive opinion concerning these renewals pursuant to Article 27 of the Regulation.
8. The renewals concerned the same financial instruments of the original measure (see paragraph 5), but the HCMC specified in the related notification that although the ban covers all transactions in the financial instruments listed in Part I of Annex I of Commission Regulation (EU) No 918/2012, transactions in index-related instruments and ETFs are included to the extent that the shares admitted to trading on the Athens Exchange and the Multilateral Trading Facility of “EN.A” of which the relevant Competent Authority is the HCMC represent more than 5% of the total value (or composition) of these instruments.

9. The renewal notified on the 20th of July entered into force at 00:00:01 hours (CET) on the 21th of July 2015 and will expire at 24:00:00 (CET) on the 27th of July 2015.
10. On the 27th of July 2015, while the measures described in paragraph 5 were still in force. in accordance with Article 26 of the Regulation, the HCMC has notified ESMA and other competent authorities of its intention to make use of its powers of intervention in exceptional circumstances and to renew again the current emergency measure under Article 20 of the Regulation.
11. In the notification for this fourth renewal, the HCMC explains that it believes the circumstances that justified the imposition of the original measure and of the previous renewals did not improve yet and therefore the measure should be extended again. Moreover, being the other measures adopted by the Greek authorities still in force, the short selling measure remains a relevant component to ensure their effectiveness.
12. The proposed fourth renewal would concern exactly the same instruments as of the previous renewals. The latest notification featured the same wording used in the 20th of July 2015 notification to ESMA and competent authorities, where the HCMC revised its previous wording to the benefit of legal certainty regarding the nature of the emergency measure and the scope of the financial instruments concerned. In particular, the HCMC latest notification refers to short sales of shares under Article 20(2)(a) and any transaction referred to in Article 20(2)(b) of the Regulation (EU) No 236/2012. The notification also lists explicitly all the categories of financial instruments relating to the concerned shares to which the measure will apply, rather than identifying these related instruments by cross referring to the Annex of Commission Regulation No 918/2012. Thus, the following financial instruments under MiFID are included: options, covered warrants, futures, index-related instruments, contracts for difference, shares/units of exchange-traded funds, swaps, spread bets, packaged retail or professional investment products, complex derivatives, certificates linked to shares, and global depository receipts.
13. The renewed measure shall apply for a period of seven days and shall be in force as of 00:00:01 hours (CET) on the 28th of July 2015 until 24:00:00 (CET) on the 3rd of August 2015.

III. Opinion

14. ESMA is adopting the following opinion on the notified measure, on the basis of Article 27(2) of Regulation 236/2012 on Short selling and certain aspects of credit default swaps:

On the adverse events or developments

ESMA considers that adverse developments which constitute a serious threat to market confidence in the Greek market still persist. Comparing the current situation in the Hellenic

Republic with related events over the past few years, the threat to financial stability and investor protection at least in the Hellenic Republic is obvious. Despite the partial reopening of credit institutions on 20 July 2015, the situation of fragility in the financial system and in the broader Greek economy persists. The relation between this situation and the financial markets is clear, as evidenced by the continued closure of Greek financial markets.

On the appropriateness and proportionality of the measure

ESMA considers that the measure is appropriate and proportionate to address the above mentioned threats that persist in the Hellenic Republic. Allowing short positions to be built at this stage could exacerbate the threats to financial stability, especially as regards the financial sector. Besides, the inclusion of short positions built through related instruments is appropriate and proportionate since tolerating the build-up of over-the-counter (OTC) short positions and short positions through related instruments would put retail investors at a disadvantage compared to professional investors (who can access OTC wholesale markets more easily), given that the main markets are still closed for trading, and would ultimately undermine the overall efficiency of the measure.

On the duration of the measure

ESMA considers that the duration of the measure is justified. It is a relatively short renewal period that indicates that the measure is linked with specific events and allows its reconsideration at short intervals, which ensures that the assessment of the risks is also performed frequently. Besides, ESMA appreciates HCMC's statement in its notification of intent that the measure may be lifted before the end of the established period or renewed in accordance with the provisions of Regulation (EU) No 236/2012 if circumstances that justified the imposition of the measure improve, persist or worsen.