OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 6 July 2016

on a proposed emergency measure by CONSOB under Section 1 of Chapter V of Regulation (EU) No 236/2012

In accordance with Article 44(1) of Regulation (EC) No 1095/2010 the **Board of Supervisors** has adopted the following opinion:

I. Legal basis

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[1], the European Securities and Markets Authority (ESMA) shall within 24 hours of the notification made by a competent authority under Article 26 of that Regulation, issue an opinion on whether it considers the measure or proposed measure is necessary to address the exceptional circumstances.

II. Background

1. In accordance with Article 26 of Regulation (EU) No 236/2012, CONSOB notified ESMA on 5 July 2016 of its intention to make use of its powers of intervention in exceptional circumstances and to introduce an emergency measure under Article 20(2)(b) of that Regulation.

2. The concerned emergency measure consists of a ban on net short positions on Banca Monte dei Paschi di Siena spa (“BMPS” - ISIN IT0005092165) shares, either directly or through related instruments and irrespectively of the venue or market in which the transactions leading to those positions are conducted.

3. The proposed measure will not apply to trading in index-related instruments.

[1] OJ L 86, 24.3.2012, p. 1–24.

4. CONSOB has not exempted entities performing market making activities from the scope of the prohibition. CONSOB justifies the absence of an exemption for market makers on the fact that the definition of market makers is not convergent across different jurisdictions.

5. The proposed measure is expected to enter into force on 7 July 2016 at 00:00:01 CET and to be applicable until 5 October 2016 at 24:00:00 CET.

6. On 4 July 2016 BMPS published a press release whereby it informed the public of a draft regulatory request coming from the European Central Bank ("ECB").

7. In particular, the ECB has requested BMPS to reduce the amount of non-performing loans ("NPL") by close to 15 billion euro by 2018 and provide the ECB, by 3 October 2016, with a credible plan outlining the measures to be taken by BMPS in order to reduce the NPL compared to the total loans (i.e. from an actual ratio NPL/total loans of 42% to a target ratio of 20% by 2018).

8. BMPS should submit the above plan by Monday 3 October 2016.

9. Following the publication of the press release, BMPS price fell by 13.99% in a single day (4 July 2016) in respect to the reference price of the day before. The drop in price continued, more intensely, the following day (-19.39% on 5 July 2016).

III. On the adverse events or developments

10. ESMA considers that the circumstances described above are adverse events or developments which constitute a serious threat to market confidence in Italy.

11. More specifically, it should be noted that the BMPS share price already fell by 26.29% in the period starting from 24 June to 1 July 2016, following the results of the UK referendum. Overall, the price of BMPS shares has fallen by 50% in the last thirteen days, and a substantial selling pressure and unusual volatility in the price of shares issued by BMPS could be reasonably expected as market uncertainty remains. Moreover, BMPS is among the Italian issuers with the highest net short position (roughly equal to 6% of the share capital as at 1 July 2016).

12. As a result, and at least until the abovementioned BMPS plan to reduce the amount of non-performing loans has been submitted to the ECB, a threat to market confidence persists regarding BMPS shares. If an abrupt decline in the price of BMPS shares continues, there is a risk of contagion effect to other shares of the Italian banking sector.

13. In this respect, it should be considered that the ECB has requested BMPS to reduce the amount of NPL by close to 15 billion euro by 2018 and that BMPS net equity, according to the Consolidated Report on Operations as at 31 December 2015, was close to 9.5 billion euro. Therefore, the realisation of the plan may require significant adjustment.

14. The combination of large short positions, severe decline movements in price in the last weeks and the impact of the actions that the bank will need to undertake in view of the relevance of the required measures constitutes in ESMA´s view a clearly adverse scenario for the stability of the bank and, given its relative size, of the Italian banking sector.

IV. On the appropriateness and proportionality of the measure

15. ESMA considers that the emergency measure under Article 20(2)(b) of Regulation (EU) No 236/2012 in relation to BMPS shares is appropriate and proportionate to address the threat in the Italian financial markets.

16. The measure is adequate to address the expected substantial selling pressures and the unusual volatility causing significant downward spirals in BMPS shares (adverse events and developments as indicated in letter c) of Article 24(1) of Commission Delegated Regulation (EU) No 918/2012), given that it limits the ability to enter into short positions, which may be a relevant factor behind the severe falls experienced in recent dates. In that sense, to the extent that the measure restricts the ability to adopt short positions, it may also indirectly reduce the risk of a contagion effect to other shares of the Italian banking sector.

17. The measure is appropriate because it is the least stringent of all the measures that would sufficiently address the threat. A temporary restriction on short selling according to Article 23 of the Regulation (EU) No 236/2012 (which CONSOB also adopted on 5 July 2016) would not address the long period of risk as it may not be extended to the described period of three months. Similarly, a mere short sale prohibition would not cover activities through derivatives. Above that, a total ban including all products could have been considered, but CONSOB has decided to minimise possible detrimental effects on the efficiency of financial markets, and does not extend the restrictions to index-related instruments.

18. As to the non-exemption for entities performing market making activities (market makers), ESMA notes that CONSOB considers that, given the broad dispersion of what is considered a market maker in different Member States, should the exemption be introduced, it would apply to a potentially very wide number of entities, affecting therefore the effectiveness of the prohibition. On the one hand, ESMA acknowledges that such a diversity exists and that the exemption for market makers could reach a wide number of entities compared to those that usually perform market making on a regular basis. On the other hand, ESMA considers that the non-application of the exemption to active market makers could dis-incentivise or make more complex the quoting of BMPS shares by market makers active in this specific share, which could detract additional liquidity from the market.

V. On the duration of the measure

19. ESMA considers that the duration of the measure, although it consumes the maximum period envisaged in the Regulation and is therefore a long-lasting measure, is justified, given the intention of covering the deadline BMPS was given by the ECB to deliver the plan to reduce the amount of non-performing loans (3 October 2016).

20. Besides, the measure may be lifted before the end of the established period if circumstances that justified the imposition of the measure improve. ESMA recommends CONSOB to monitor closely the situation and to consider lifting the measure before the initial deadline if the situation so permits, to ensure that the restrictions remain in place for the shortest possible time.

This opinion will be published on ESMA's website.

Done at Paris, 6 July 2016

For the Board of Supervisors
[…]
Steven Maijoor

Chairperson