



**ESMA – Consultation paper –
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**

**RESPONSE TO THE
PUBLIC CONSULTATION**

13 February 2012

I. EXECUTIVE SUMMARY AND GENERAL COMMENTS

This document contains the views of NYSE Euronext with regard to ESMA's Public Consultation on 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 (hereafter "The Consultation").

NYSE Euronext welcomes the opportunity to comment on the Draft technical standards to be put in place by ESMA to complement the EU Regulation cited above (hereafter "The Regulation") which should come into force in November 2012. NYSE Euronext understands that the process of preparing technical standards and elaborating the advice on all delegated acts, and especially the present one, is being significantly compressed by the EU compared to normal ESMA practice.

The health of financial markets and confidence in their effective regulation and monitoring is crucial for the European economy. The soundness of our financial institutions – in terms of capital, governance and business practices – is essential to preventing systemic risk and ultimately protecting investors. NYSE Euronext supports the importance of focusing on the needs of investors and issuers, and the EU's role in creating the necessary protection and confidence in our markets to ultimately deliver the growth and job creation that a truly integrated European capital market can provide.

II. RESPONSES TO THE CONSULTATION

II.I. AGREEMENTS, ARRANGEMENTS AND MEASURES THAT ADEQUATELY ENSURE THAT THE SHARE OR THE SOVEREIGN DEBT WILL BE AVAILABLE FOR SETTLEMENT

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 fulfil?

NYSE Euronext agrees with the approach of providing a list of types of agreements, arrangements and measures. NYSE Euronext believes that strict requirements should be adopted in order to ensure that the agreement to borrow or the arrangement with a third party guarantees that the assets will be available for settlement in due time. Nonetheless, sufficient flexibility is needed in respect of these agreements and arrangements leaving space for innovation. Therefore, NYSE Euronext does not consider that adopting an exhaustive list of types of appropriate agreement, arrangement and measure is adequate. This list should be non-exhaustive in order to have the flexibility to include any other agreements or arrangements if needed. In addition, and in a similar vein, while NYSE Euronext agrees that strict criteria should be used to assess the adequacy of these agreements and arrangements, we believe that the technical standards should comprise a non-exhaustive list of these criteria, and not an exhaustive one as currently suggested.

II.II. AGREEMENTS TO BORROW OR OTHER ENFORCEABLE CLAIM HAVING SIMILAR EFFECT

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?

As mentioned in the response to question 1, NYSE Euronext believes that while it is important to provide a list of criteria and a list of agreements and arrangements deemed appropriate, such lists should not be exhaustive, in order to allow for the necessary degree of flexibility. NYSE Euronext believes that while the Point *f* of the list (*"Other claims or agreements leading to physicals exchanges of the shares or sovereign debt"*) provides for a certain degree of flexibility, it would be legally more stable to make the list non-exhaustive.

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?

NYSE Euronext believes that these criteria might entail additional costs compared to current practices on the market. However, NYSE Euronext is not in a position to assess the drivers for those additional costs, nor to provide an indication of their amount.

II.III. THIRD PARTY ARRANGEMENTS

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 fulfil?

The Group believes it crucial to ensure that the third party with which agreements are passed have an involvement in the process for the location, borrowing or purchasing of the financial instruments, as prescribed in paragraph 17 of the consultation. Furthermore, it is also important to note that data vendors cannot necessarily provide a reasonable source of whether an instrument is easy to borrow or not, only the third party can ensure absolute certainty (even for General Collateral stocks).

Q5: Are there further criteria which should be added?

NYSE Euronext does not propose any further criteria to be added.

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.

NYSE Euronext agrees that strict requirements in respect to third parties are necessary in order to ensure that agreements and arrangements are appropriate. NYSE Euronext believes that requiring the third party to be a distinct legal entity from the entity entering into a short sale might entail disproportionate costs, which may significantly impact short-selling activities. In fact, in practice, most

parties which would act as third parties for the purpose of the Regulation are currently located within the same legal entity as the party entering into the short sale. Requiring these parties to be part of distinct entities will imply significant changes to current market practices, and will negatively impact the liquidity available in the borrowing and lending market on the whole. NYSE Euronext does not believe there to be any additional systemic risk linked to allowing intra-entity locate arrangements so long as the requirements are strict. Such requirements should ensure, *inter alia*, that the assets located for potential loan are uniquely allocated to the borrower. Therefore, NYSE Euronext considers that it would be more appropriate to adopt strict requirements for third-parties (along what is suggested in paragraphs 16 and 17 of the Consultation paper) rather than to prevent them to be part of the same legal entity as the party entering into the short sale. In order to ensure the effective application of these requirements by third-parties, these technical standards could include a list of sanctions to be applied in case of non-compliance.

II.IV. LOCATE CONFIRMATION ARRANGEMENTS AND MEASURES IN RELATION TO SHARES

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 fulfil?

NYSE Euronext generally agrees with the requirements suggested in respect to the standard locate confirmation arrangements described in paragraphs 21 to 24 of the Consultation paper. NYSE Euronext is concerned by the practical application of less stringent requirements in the case of intraday short sales, which, by definition, can only be qualified as “intraday” at the end of the trading day, that is to say ex-post, while this “intraday” criteria would be used ex-ante to apply less stringent locate requirements. The fact that the investor might be asked, as suggested in the Consultation paper, to state that the short sale will be an intraday one does not guarantee that it will really be so, since no sanctions are suggested in the case where the investor does not comply with its statement.

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?

NYSE Euronext believes that in circumstances other than intraday short selling or on liquid shares, default fees requested by the clearing houses should be sufficiently high in order to complement the methods for effective allocation and provide the necessary comfort that shares can be delivered for settlement in due time.

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?

NYSE Euronext believes, as stated in the response to Question 8, that it is important to take into consideration the liquidity of the underlying borrowing and lending markets.

In respect to the definition of liquidity that should be used, NYSE Euronext believes that this definition of liquidity could include elements such as velocity, market capitalisation and market depth..

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?

NYSE Euronext believes that it is important to assure a level playing field between different financial instruments. In this respect, NYSE Euronext considers it uneven if the suggested requirements that would apply to sovereign debt instruments are considerably less stringent than those that would apply for shares.

II.V.DETAILS OF THE INFORMATION ON NET SHORT POSITIONS TO BE NOTIFIED TO COMPETENT AUTHORITIES AND DISCLOSED TO THE PUBLIC

Q11: Do you agree that there should be one standard format for notifying relevant competent authority for each type of instrument?

NYSE Euronext believes that in order to create uniformity there should be one standard format for notifying relevant competent authority for each type of instrument. However, even if it is already prescribed in Article 11 of the Regulation on short-selling that "Competent authorities shall provide information in summary form to ESMA on a quarterly basis on net short positions relating to the issued share capital of companies ", NYSE Euronext believes that this information could be provided more often than on a quarterly basis. NYSE Euronext believes that this could help ESMA to better monitor the net short positions and to adjust more rapidly to market changes.

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

NYSE Euronext believes that there should be one standard form for public disclosure of information on significant net short position in shares in order to insure uniformity.

Q13: Do you agree with the proposed way to identify natural and legal persons, including the contact information details?

NYSE Euronext agrees with the proposed way to identify natural and legal persons, including the contact information details.

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

NYSE Euronext agrees with the proposed way to notify and disclose the size of the relevant position.

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?

NYSE Euronext does not agree with 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. In fact, in cases where the issuer has several classes of shares with different ISINs, a single ISIN code should be used to identify the issuer. The option favoured by ESMA would be to use the ISIN of the shares class first admitted to trading. An alternative would be to use a concept like “main class” of shares, typically referring to the ordinary shares although ESMA considers this would provide less clarity. NYSE Euronext believes it inappropriate to use the ISIN code of the first class of shares admitted to trading as this information can be misleading and is also difficult to keep track of.

NYSE Euronext therefore proposes to use liquidity (as defined in MiFID) as the criteria to determine ISIN code in cases where the issuer has several classes of shares with different ISIN codes. The ISIN code to be used would be the one of the most liquid class of share.

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?

NYSE Euronext agrees 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.

Q17: Do you agree that the additional information as described above should be provided?

NYSE Euronext agrees with ESMA proposition to require all of the following additional information: (a) the identity and contact details of a third party submitting the notification on position holder's behalf, (b) the date of the previous notification of the net short position in shares or sovereign debt and (c) any comment information (optional).

II.VI. MEANS BY WHICH INFORMATION ON NET SHORT POSITIONS IN SHARES MAY BE DISCLOSED TO THE PUBLIC

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

NYSE Euronext agrees that information on the central website should be provided at least in a machine-readable format as proposed by ESMA.

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?

NYSE Euronext agrees that the 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 which includes the public disclosure of significant net short positions (including the position holder, the name of the issuer, the ISIN code, the net short position and the date the position was created, changed or ceased to be held).

Q20: Do you foresee any other situation that might merit an update of the list of exempted shares within the two-year effectiveness period?

NYSE Euronext does not foresee any other situation that might merit an update of the list of exempted shares within the two-year effectiveness period.