



ESMA – Consultation paper – Consultation Paper – ESMA Draft technical advice on possible Delegated Acts concerning the regulation on short selling and certain aspects of credit default swaps ((EC) No XX/2012)

**RESPONSE TO THE
PUBLIC CONSULTATION**

09 March 2012

I. GENERAL COMMENTS

This document contains the views of NYSE Euronext with regard to ESMA's draft technical advice on possible Delegated Acts concerning the regulation on short selling and certain aspects of credit default swaps ((EC) No XX/2012) (hereafter "The Consultation").

NYSE Euronext welcomes the opportunity to comment on the Delegated Acts to be put in place by ESMA to complement the EU Regulation cited above (hereafter "the Regulation") which will come into force on November 1, 2012. NYSE Euronext understands that the process of preparing technical advice on delegated act concerning the Regulation (hereafter "technical advice"), and especially the present one, is being significantly compressed by the EU compared to normal ESMA practice. This response follows NYSE Euronext's response to the previous ESMA Consultation of February 14, 2012 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.

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.

Short selling plays an important role in financial markets. It contributes significantly to price discovery and provides liquidity¹. Short selling is associated with more efficiency in the Markets thus reducing the overall cost of capital for issuers². However, this practice, as described in the Regulation and the Discussion paper might give rise to significant risks, which need to be mitigated.

Because of the importance of the effects of the short-selling Regulation, more time should have been granted to ESMA from the Commission in order for ESMA

¹ Robert Battalio, Hamid Mehran, and Paul Schultz, "Market Declines: Is Banning Short Selling the Solution?", September 26, 2011, Electronic copy available at: <http://ssrn.com/abstract=1939884>.

² Ekkehart Boehmer, Julie Wu, Short Selling and the Price Discovery Process, Working Paper, EDHEC-Risk Institute May 2010.

to deliver the best possible advice, based on an evidence-based policy approach and including a more detailed impact analysis.

II. RESPONSES TO THE CONSULTATION

Ownership of a financial instrument for the purposes of the definition of short-sale and holding of a share or debt instrument

Q1: Do you agree with the proposal concerning Article 2(1)(r) of the Regulation?

Q2: Are there other cases which need to be excluded from the definition of a short sale?

Q3: Are there other definitions in Article 2(1), which need further clarification? Please explain which one(s) and why further clarification is required.

Q4: Do you agree with the above proposal? If not, please give reasons.

Q5: Do you have any suggestions on possible further criteria to describe the holding of a share or sovereign debt?

NYSE Euronext agrees with ESMA's proposed advice relating to the definitions of "ownership" of article 2(1)(r) of the Regulation, in particular specifying when a natural or legal person is considered to own a financial instrument for the purposes of the definition of short sale. This definition needs to apply accordingly to the respective civil law or securities law applicable for the relevant sale. The concept of ownership in the Member States concerning securities is presently not harmonized and the proposed advice by ESMA helps clarify the concept.

NYSE Euronext also agrees with ESMA's proposed advice relating to the definition of "holding". The word is used in the Transparency Directive, which requires notification of major holdings. However, both the scope and the purpose of the notifications under both pieces of legislation are different. Differences therefore appear to be necessary, notably with regards to financial instruments held in the trading book and regarding the contracts which are to be included.

Concept of net short position and methods of calculation

Q6: Do you agree with the above proposal? If not, please give reasons.

Q7: Do you agree with setting a quantitative threshold for high correlation? If so what would be the best correlation co-efficient to use for this purpose?

Q8: Do you think it is practicable to measure correlation for sovereign debt with a liquid market price and a long price history on a historical basis using data for the 24 month period before the position in the sovereign debt is taken out? Do you consider that a 24 month reference period is the most appropriate one?

Q9: Do you think it is practicable to measure correlation for assets with no liquid market price or with no sufficiently long price history by using a proxy? What could be a good proxy? What criteria do you think are necessary?

Q10: Do you consider that this Delegated Act needs to provide further specifications on the calculation of whether the high correlation test is met? Do you have any suggestions on what they may contain (e.g. use of a maturity bucket)?

Q11: Do you think that there is a need for a buffer period addressing the issue of temporary fluctuations in the correlation of the sovereign debt (e.g. period of 3 months during which the correlation is less than the standard level (e.g. 90% or 80%) but at least met a prescribed lower threshold (e.g. 75% or 70%))?

Q12: Do you think it is appropriate the “delta adjusted method” for the calculation of short position for shares?

Q13: Is there any comment you would like to make in relation to the calculation of the position in shares set out in Box 4?

Q14: Is there any additional method of calculation for shares that you would suggest ESMA to consider?

Q15 Which in your view is the most appropriate method for the calculation of short position for debt instruments of a sovereign issuer? Are there methods other than the nominal or sensitivity adjusted ones outlined above which you think ESMA should consider?

Q16: Is there any comment you would like to make in relation to the calculation of the position in sovereign debt of a sovereign issuer set out in Box 4?

NYSE Euronext believes that a precondition for netting off short positions and long positions for the purpose of calculating net short positions is to define short positions and long positions.

NYSE Euronext also agrees that a short position is composed of a) positions obtained by a short sale of an instrument (Article 3(1)(a) of the Regulation) and b) positions developed by entering into a transaction in instruments, whose value depends on the value of the share or sovereign debt, in respect to which a net short position has to be calculated, and which confer a financial advantage in the event of a decrease in the price or value of the share or sovereign debt (Article 3(1)(b) of the Regulation). According to article 3(4) of the Regulation, *“the position remaining after deducting any long position that a natural or legal person holds in relation to the issued share capital of a company from any short position that that natural or legal person holds in relation to that capital shall be considered a net short position in relation to the issued share capital of that company”*.

There might be several possible methods of calculation. However, NYSE Euronext does not fully support ESMA's proposition as to the advice on the method of calculation of net short position. NYSE Euronext believes that transactions that confers a financial advantage in the event of a change in price or value of the share held as part of a basket, index or exchange traded fund (ETF) should not be included when calculating the position in each individual share.

Options, futures, swaps, forward rate agreements and other derivative instruments including financial contracts for difference

Q51: Do you agree with the proposal of having a differentiated approach depending on whether the concerned derivative has a single financial instrument that is traded on a trading venue and for which a significant fall in value has been specified according to this Delegated Act as underlying? If not, please state your reasons.

Q52: Do you agree that a 3/4 ratio of the margin level set by the clearing house per underlying of a derivative is the appropriate level to use for an option, future, swap, forward rate agreement or other derivative instrument, including financial contracts for difference? If not, what alternative would you propose?

Q53: What could be an appropriate threshold to define a significant fall in price of a derivative compared to the closing price of the previous day

when that derivative does not have a single underlying instrument admitted to trading on a trading venue and is not centrally cleared?

NYSE Euronext believes it especially complex to establish a concept of significant fall in price looking only at the evolution of the price of the derivative itself. NYSE Euronext believes that no differentiated and specific measures for derivatives should be put in place in the context of the above mentioned Delegated Act. NYSE Euronext believes that prices of derivatives will not significantly move away from the equilibrium. It is therefore inefficient to apply Article 23 of the Regulation in those circumstances which may include the suspension of trading of futures contracts based on an excessive fall of the futures price if the underlying asset has not fallen.

NYSE Euronext also believes that the price variation is not an appropriate indicator for non delta-1 instruments. NYSE Euronext believes that the price of options is the premium.

Since Article 23 of the Regulation has already been adopted, NYSE Euronext believes that, at this stage, competent authorities should be granted adequate mechanisms and powers to analyse these significant price falls in order to ensure the better efficiency of the markets.