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ESMA
Rue de Grenelle 103
75007 - Paris
France

Re: Consultation - ESMA's draft technical advice on possible Delegated Acts concerning the Regulation on short selling and certain aspects of credit default swaps

ASSOSIM[1] welcomes the opportunity to comment on the 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) and is pleased to provide the following observations.

Feedbacks

Box 3(i)(2) – positions in funds

According to article 3.3 of the Regulation "*the calculation of a short or a long position, in respect of any position held by the relevant person indirectly, including through or by way of any index, basket of securities or any interest in any exchange traded fund or similar entity, shall be determined by the natural or legal person in question acting reasonably having regard to publicly available information as to the composition of the relevant index or basket of securities, or of the interests held by the relevant exchange traded fund or similar entity. In calculating such a short or long position, no person shall be required to obtain any real-time information as to such composition from any person.*".

ESMA's draft advice requires that "*A holding of a share via a long position in a basket of shares should also be taken into account to the extent that the share in question is represented in the basket.*".

[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.

It seems clear that an investor must calculate his position in funds when their composition is publicly available (as in the case of some ETFs); on the contrary it is not clear what the investor has to do if he holds a position in a fund the composition of which is not known.

One possibility would be for the investor not to consider at all the position when he is not able to know the composition of the index, basket or ETF. Another solution would be for the investor to use a "proxy" according to the data available (for example, the benchmark of index) for the sake of calculation his position.

We believe that a clear instruction must be provided.

Box 3 – derivatives on different underlying (*e.g.* dividend future)

The Regulation [art. 3(2)(b)] considers as a long position "*entering into a transaction which creates or relates to a financial instrument other than an instrument referred to in point (a)*[e.g. the share or debt instrument] *and the effect or one of the effects of the transaction is to confer a financial advantage on that natural or legal person in the event of an increase in the price or value of the share or debt instrument".*

Therefore, according to the ESMA's draft advice, the investor must consider in the calculation of his long position any exposure in financial instruments "*on the condition that their value depends on the value of the share in respect to which a net short position has to be calculated, and which confer a financial advantage in the event of an increase in the price or value of the share*". The reverse applies to short position.

So derivatives instruments which have shares as underlying assets are definitely included in the calculation of the investor's position. The same applies to derivatives instruments which have as underlying assets a basket of securities or an index which includes shares.

However, it is not crystal clear whether derivatives instruments that have an underlying asset different from shares, but with a price anyway correlated to the price of share instruments, should be included too. One relevant example is dividend future – even though other factors may be relevant, expectations on dividend are indeed one of the big "movers" of stock prices.

Box 3(i)(3) – subscription rights, convertible bond and comparable instruments

We do not agree with the exclusion of subscription rights from the instruments which are to be considered in the calculation of the investor's position.

From an economical point of view, subscription rights are similar to call options, and we note that call option are (correctly) included in the calculation. The fact that subscription rights "*give a claim to shares not in issue*" does not seem to be relevant.

From a legal perspective, article 3(2)(b) of the Regulation requires that all instruments which confer a financial advantage in the event of an increase in the price of the share are to be included in the calculation, and subscription rights actually confer such advantage.

In the same vein, the above argument applies to convertible bonds and comparable instruments.

Therefore, we suggest to insert subscription rights, convertible bonds and comparable instruments in the list of Box 3(i)(2) and delete Box 3(i)(3) as well as explanatory paragraph no. 15.

<u>Box 4(11) – new shares issued from capital increase</u>

According to the ESMA's draft advice "*New shares issued from a capital increase shall be accounted for the calculation of the total issued share capital from to the day they are admitted to trading on a trading venue*".

We note however that there might not be a formal procedure or an exact day for the admission to trading of the new shares, as the new shares have the same characteristics of the shares already issued. So we suggest to add to the existing provision a second solution according to which the new shares must be considered in the total issued share capital from the day after they are credited on the securities accounts of the intermediaries participating in the issuer CSD.

Therefore, we propose to amend the proposed text accordingly.

<u>Box 5 – fund management activities and groups</u>

According to the explanatory text (paragraphs 70-71), in case of fund management activities, the net short position is to be calculated up to three levels (*e.g.* at fund level, at decision maker level and at fund management company level where applicable); however, only the highest of the three net short positions is to be reported and disclosed.

As a consequence, we understand that if fund manager "A" manages funds "X" and "Z" using the same investment strategy, and if fund "X" has a net short position of 0,3% in issuer ALFA and fund "Z" has a long position of 0,1% in the same issuer, only the 0,3% position will be reported.

In the same vein, the above argument applies to reporting obligation for groups and legal entity constituted of several sub entities.

With reference to the above proposal, we believe that the method suggested is too complex; so, we support the Italian approach (which is line with the CESR one) as it has proved to work quite efficiently up to the present. Pursuant to this approach the relevant net short position is always the one calculated at the decision maker level.

Moreover we suggest to extend such method of calculation to all intermediaries that manage client portfolios on a discretional basis.

<u>Box 10(1)(b) – penny shares</u>

According to the ESMA's draft advice "*For an illiquid share, a significant fall in value during a single trading day in relation to the closing price of the previous trading day is (…) (b) A 20% or more decrease in the price where the share price is EUR 0.50 or higher (or the equivalent in the local currency), or otherwise a 30% or more decrease in the price*.".

Therefore, for illiquid shares not included in the main indexes, two trigger thresholds would be set (20% and 30%) depending on the shares price.

On this regard, we believe that having two thresholds based on stock price could increase complexity of the rules without providing enough benefits to the market. For example, it would not be clear which threshold (the 20% or the 30%) applies to shares that during the trading day fall below the price of EUR 0,5.

Accordingly, we suggest to amend the ESMA's draft advice in order to set only one threshold (for example, 20%).

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

Yours faithfully,

Gianluigi Gugliotta
Secretary General