

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 15 April 2020

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

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

I. Legal basis

1. In accordance with 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 swaps¹ (the Regulation), 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 necessary to address the exceptional circumstances as further specified in Article 24 of Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012.

II. Background

The measure adopted by the FMA on 18 March 2020

2. On 23 March 2020 ESMA issued an opinion on the emergency measure introduced by the Austrian Finanzmarktaufsicht (FMA) under Article 20(2)(a) and (b) of Regulation (EU) No 236/2012 (ESMA70-155-9604).
3. The measure entered into force on 18 March 2020 at 20:00 after publication of the relevant Resolution and will expire on 18 April 2020 at 23:59.
4. The FMA considered that the measure was justified by the existence of specific adverse circumstances that constituted a serious threat to market confidence in Austria, and to the general impact on the Austrian economy of the pandemic. Should prices of financial

¹ OJ L 86, 24.3.2012, p. 1–24.

instruments and assets in general continue to fall, there could also be risks to financial stability.

The proposed measure notified on 15 April 2020

5. On 15 April 2020, pursuant to Article 26 of Regulation (EU) No 236/2012, the FMA notified ESMA of its intention to renew the temporary preventive measure under Article 20(2) (a) and (b) of that Regulation. FMA clarified that upon entry into application of the new restrictive measure, the previous restrictive measure will be lifted.
6. In particular, the concerned measure bans any legal or natural person from entering into short selling and transactions which might constitute or increase net short positions on shares admitted to trading on the Regulated Market of the Vienna Stock Exchange (Amtlicher Handel; WBAH) and for which the FMA is the Relevant Competent Authority under Article 2(1)(j) of Regulation (EU) No 236/2012. Shares that, according to Article 16 of Regulation (EU) No 236/2012, are exempted from the requirements of Articles 5, 6 and 12 of Regulation (EU) No 236/2012, are not subject to the measure. The ban applies to transactions executed both on a trading venue and over the counter.
7. The measure applies to any natural or legal person domiciled or established within the Union or in a third country.
8. The measure does not apply to:
 - a. market making activities, as defined in Article 2(1)(k) and pursuant to Article 17 of Regulation (EU) No 236/2012;
 - b. transactions that only lead to an indirect short position pursuant to Article 3 (1)(b) of Regulation (EU) No. 236/2012, that is assessed by the FMA as being immaterial, namely positions:
 - i. held via the composition of an index or a basket of securities or an exchange traded fund pursuant to Article 3 (3) of Regulation (EU) No. 236/2012, and
 - ii. this composition is such that the total weight of financial instruments concerned by the measure in this index, basket or ETF is at all times less than 50 percent.
9. The FMA will re-evaluate these exemptions depending on market circumstances and could amend the decision accordingly if the need arises.
10. The proposed renewed measure is expected to enter into force on 16 April 2020 and to expire on 18 May 2020 at 11:59 PM. The proposed measure may be lifted before the deadline or further extended after the deadline, taking into account the development of market conditions.

11. The FMA considers that the measure is justified by the existence of specific adverse circumstances that constitute a serious threat to market confidence in Austria, and to the general impact of the pandemic on the Austrian economy, which keeps on spreading further in Austria, keeping the uncertainty on financial markets high. As a consequence of the above, the FMA deems that, should prices of financial instruments and assets, in general, continue to fall, there could also be risks to financial stability.
12. The FMA's notification refers to the existence of similar factual circumstances which backed the adoption of its measure on 17 March 2020, and to a similar state of uncertainty as regards future perspectives.
13. In particular, the World Health Organisation pointed out that the COVID-19 contagion may peak in the coming weeks. The FMA reports that Austria has kept on registering during the last days an increase in the number of both infected people and people needing continuous medical treatment in intensive care units.
14. In light of the above situation, the FMA confirms that there are three different specific threats to market confidence.
15. First, the FMA considers that as opposed to a deterioration affecting just one issuer, based on fundamental economic factors, in the current context investors do not have accurate and public information on the impact of the public health crisis on each listed company, since events develop quickly and restrictions adopted by the Government might come with little or no advance notice. Hence, price formation may still take place in an environment of partial information.
16. Second, the FMA has observed examples of disinformation, rumours and false news in media and social networks regarding activities that could be affected by decisions of the Government or by the evolution of the crisis. Such rumours may affect listed companies and damage the confidence of investors in an efficient market, where prices should be formed with public, reliable information.
17. Third, the FMA considers that, although Regulations (EU) No 236/2012 and Article 24 of Regulation (EU) No 918/2012 were drafted without considering the scenario of a pandemic, when identifying situations that could be considered a threat to market confidence, they refer to "natural disasters" that may damage financial institutions, market infrastructures, clearing and settlement systems and supervisors. The effect of the restrictions within the state of emergency on the availability of resources (including human and IT) could be similar to some natural disasters. The FMA considers that the restrictions to the movement of workers and the fact that key personnel of infrastructures may be affected and unable to continue working, puts the market infrastructures, clearing and settlement systems at enormous strain to monitor, supervise and manage markets.
18. In this context, the FMA considers that a growth of net short positions betting on negative news (be them real or ill-based) affecting companies admitted to trading on the above

mentioned trading venues could adversely affect market confidence and increase systemic risk through downward price spirals of the type observed since the outbreak of the COVID-19 pandemic.

19. The FMA also deems that, as a consequence of the above, a negative effect on the financial stability of the system cannot be discarded. According to the FMA, prices of Austrian credit institutions stocks were rapidly falling, and the risk of weaker confidence of the public in financial stability based on false rumours cannot be dismissed. However, the FMA also notes that, while they have not observed signs of these effects on financial stability since the outbreak of the COVID-19 pandemic, these scenarios could develop quickly if selling panic as that recently experienced happens again.

III. Opinion

20. ESMA considered the information provided by the FMA and is adopting the following opinion on the notified measure, on the basis of Article 27(2) of Regulation (EU) No 236/2012:

On the adverse events or developments

21. The proposed measure by the FMA extends for a further month the one imposed on 18 March 2020.
22. ESMA agrees that the outbreak of the COVID-19 pandemic continues to have serious adverse effects on the real economy and on the financial markets of the Union, and that stock markets in the Union continue to be impacted by it. The effect of the outbreak of the COVID-19 on the real economy was previously assessed by ESMA in March in ESMA Decision ESMA70-155-9546 and the ESMA Opinions ESMA70-155-9556, ESMA70-155-9565, ESMA70-155-9851, ESMA70-155-9587, ESMA70-155-9590 and ESMA70-155-9604 respectively on emergency measures by the Comisión Nacional del Mercado de Valores (CNMV), the Commissione Nazionale per le Società e la Borsa (CONSOB), the Autorité des marchés financiers (AMF), the Hellenic Capital Markets Commission (HCMC), the Financial Securities and Markets Authority (FSMA) and the Austrian Finanzmarktaufsicht (FMA) under Section 1 of Chapter V of Regulation (EU) No 236/2012.
23. ESMA considers that the adverse situation, linked to the COVID-19 pandemic, has greatly increased the vulnerability of EU financial markets. This is partly due to the adoption by EU Member States of restrictive measures which aim at containing the contagion and which impact all economic sectors. In this respect, since the start of 2020, ESMA has observed steep downward trends in European stocks, with a relative improvement after mid-March, which has not however restored the extremely large losses incurred by EU financial markets. As a matter of fact, the Eurostoxx50 index,

which was at 3,577.68 on 26 February 2020, reached its lowest point at 2,385.82 on 18 March 2020 and subsequently recovered only partially to 2,892.79 on 9 April 2020 (see the Annex).

24. The pandemic contributed also to extremely high volatility levels. As of January 1st, 2020, the volatility level for the Eurostoxx50 index (VSTOXX) was at 13.95. It reached its highest level on 16 March with the value of 85.62 (+514%) and slowly decreased (-45%) in the following days, reaching 43.03 on 6 April 2020 (see the Annex). The data shows that volatility at European level, even though decreasing if compared to the levels reached in mid-March, is still extremely high compared to the pre COVID-19 situation and is a relevant sign of the instability and vulnerability that keeps affecting European financial markets.
25. ESMA believes that downward pressure and high volatility may continue in the coming weeks, since the COVID-19 pandemic continues spreading across Europe and there is uncertainty as to when the restrictive measures might be, albeit partially, lifted.
26. Pursuant to Article 20(1)(a), the measure under Article 20(2) of Regulation (EU) No 236/2012 requires the presence of adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned as also further specified in Article 24 of Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012.
27. The FMA considers in its notification that the measure is justified by the adverse circumstances which constitute serious threats to market confidence, and potentially to financial stability, in Austria. Namely, in line with the assessment performed for the measure issued on 18 March 2020, the FMA considers that the current context is not compatible with the availability of accurate information, with the consequence that price formation may take place in an environment of partial information. Rumours of false news linked to the pandemic may have the effect of impacting listed companies and damage the confidence of investors in the markets. A third source of threat to market confidence is that the COVID-19 pandemic is at the origin of restrictions on the availability of human resources at issuers and financial market participants.
28. ESMA notes that, following the ban imposed by the FMA and applicable as of 18 March 2020, the data concerning the main Austrian financial indices shows that, even though an improvement may be observed, there are still risks of downward price pressures.
29. In particular, the Austrian main index (the WB ATX) decreased by 44.90% between 26 February and 18 March 2020. It then recovered approximately 33.92% between 18 March and 9 April 2020. Nevertheless, observing the values of the WB ATX since start of the year, it fell by 32.37% from 2 January to 9 April 2020. Similar or greater decreases can be observed in other main Austrian indices (see the Annex), amounting in one case to a drop of approximately 31.33% for the WB ATX Prime (comparing its values on 2 January 2020 to those of 9 April 2020). As regards financial issuers, the ATX Financials

dropped by approximately 46.08% from 26 February to 18 March 2020, and subsequently recovered by approximately 24.67% until 9 April 2020. The drop from 2 January to 9 April 2020 for this index was approximately 34.12%. It should be noted that the WB ATX and the ATX Financials indices include relevant financial issuers and insurance companies (such as Erste Bank, Raffeisen International, BAWAG, Vienna Insurance Group, Uniqa Insurance Group) and in that sense the circumstances described in Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 are met. As also noted by the FMA, volatility in Austrian markets tended to drop after mid-March. ESMA observes though that it is still higher compared to the start of 2020.

30. In addition, ESMA believes that the observed downward trends may continue in Austria, like for Europe as a whole, as long as the ongoing contagion does not allow to limit the pandemic containment measures adopted by relevant authorities.
31. For the purpose of assessing whether serious threats to market confidence or financial stability are currently present in Austria, ESMA is mainly considering the developments of prices and volatility of Austrian stocks. ESMA notes that the pattern of the net short positions, which would typically provide a meaningful source of observable market trends, was impacted by the ban imposed by the FMA on 18 March 2020. In fact, ESMA notes that, since the ban became applicable, a decrease of net short positions in Austria can be observed.
32. ESMA agrees with the FMA that the severe losses observed, the uncertainty as regards the spreading of the COVID-19 pandemic and the possible consequent further volatility and downward price pressure still constitute risks to market confidence. In this regard, ESMA is of the view that the circumstances underpinning the proposed measure by the FMA are generally consistent with those observed in March 2020, which justified the adoption of a positive opinion by ESMA.
33. ESMA also considers that, since the decrease in net short positions is mainly linked to the application of the ban, should the latter be lifted, it is likely that such net short positions would increase again. ESMA agrees that such building up of net short positions in a volatile environment and in the potential absence of accurate and reliable information to support the price formation mechanism could exacerbate any downward price spirals, further weakening market confidence in Austria.
34. Furthermore, taking also into account the losses observed in the main Austrian indices, ESMA agrees that such circumstances impact market confidence, in general, with consequences for all listed issuers.
35. ESMA agrees with the FMA's assessment that the impact of COVID-19 and the extraordinary market conditions caused by it, continue to constitute "adverse events or developments" under Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 and qualify in ESMA's view as serious threats to market confidence.

36. With reference to the broader EU-markets scenario, ESMA has assessed that there are threats to market integrity, orderly functioning of markets and to financial stability. On that basis, on 16 March 2020 ESMA has adopted a decision to temporarily lower the notification thresholds of net short positions to national competent authorities in accordance with point (a) of Article 28(1) of Regulation (EU) No 236/2012 (ESMA70-155-9546). ESMA considers that its decision has enabled national competent authorities to better monitor the existing threats.
37. At the same time, ESMA considers that the circumstances described above are adverse events or developments which constitute a serious threat to market confidence in Austria under Article 20(1) of Regulation (EU) No 236/2012.

On the appropriateness and proportionality of the measure

38. In order to assess whether the renewal of the measure would be appropriate and proportionate in relation to the threat, ESMA has analysed how and the degree to which sharp price declines pose a risk to the orderly functioning, integrity and stability of the Austrian market as a whole, looking not only at the range of shares affected by the latest market developments but also at the build-up of net short positions in shares in scope before the measure now being renewed was adopted.
39. From the analysis of the shares impacted by these sharp price declines, it becomes evident that the downward spiral spread across the Austrian markets and across different sectors, including systemically important institutions. Such widespread impact is consistent with the nature of the outbreak of a global pandemic (COVID-19), as announced by the World Health Organisation², that has proven to be serious in Austria.
40. From that perspective, ESMA understands that limiting the scope of this measure to one or several sectors or to a subset of the issuers may not achieve the desired outcome. Without the broad scope applied by this measure, the FMA may have to adopt additional restrictive measures in the near future at a time when their effectiveness may be limited.
41. As also indicated by the FMA, the latest developments in relation to COVID-19 have put an extremely wide range of Austrian shares in a situation of vulnerability. Without the proposed extension of the restrictive measure, short-selling strategies could start targeting those shares, the prices may start dropping further, potentially triggering other downward spirals and further 'runs' on the market.
42. ESMA considers that suspending the capacity of market participants in the Austrian market to enter into transactions that would confer a financial advantage on a natural or legal person in the event of a decrease in the price or value of shares admitted to trading on the Regulated Market of the Vienna Stock Exchange would not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to its

² https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200310-sitrep-50-covid-19.pdf?sfvrsn=55e904fb_2

benefits. ESMA rather deems this measure appropriate to provide a uniform level of protection to all Austrian issuers and investors and the wider Austrian market as a whole.

43. ESMA considers that the measure is less stringent than other more intrusive measures that could adequately address the threat to confidence in the Austrian market. On the other end, a simple short-term restriction on short selling according to Article 23 of the Regulation (EU) No 236/2012 would not address the threat to market confidence as it would remain applicable for a few days only and would be limited to short selling without covering any opening new or increasing existing net short positions.
44. Additionally, ESMA notes that the proposed renewed measure maintains the exemption for baskets of financial instruments and index-related instruments, where the weight of the shares covered by the ban does not reach more than 50% of the total index or basket weight. The measure also maintains the exemption for market making activity.
45. This is done with a view to limit the measure to the strictly necessary scope and not to be overly restrictive regarding trading strategies of market participants, with particular reference to those ones that provide an important service in terms of increasing liquidity and reducing volatility, which is particularly relevant in the current situation. ESMA also welcomes that the exemption for index and basket related instruments is aligned with exemptions provided in measures adopted by other national competent authorities. ESMA considers that this alignment provides for a more consistent approach across the Union and facilitates the compliance with the different national bans for market participants.
46. For the above reasons, ESMA considers that the emergency measure proposed by the FMA under Article 20(2)(a) and (b) of Regulation (EU) No 236/2012 as further specified by Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 in relation to the shares in scope of the measure is appropriate and proportionate to address the existing threat to market confidence in the Austrian market.

On the duration of the measure

47. In terms of duration of the measure, ESMA considers that renewing the prohibition for one month is justified considering the information publicly available at the moment. While the FMA expressed its intention to lift the ban as soon as the evolution of the situation allows, it does not discard the possibility of extending the measure if the situation so requires.

Conclusion: on the necessity of the measure

48. Having considered the adverse situation linked to the COVID-19, the appropriateness, proportionality and justified duration, ESMA considers the renewed emergency measure proposed by the FMA as necessary under Article 20(2)(a) and (b) of Regulation (EU) No



236/2012 as further specified in Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 in relation to Austrian shares.

This opinion will be published on ESMA's website.

Done at Paris, 15 April 2020

For the Board of Supervisors

Steven Maijor

Chair

ANNEX

FIGURE 1 – MAIN AUSTRIAN INDICES

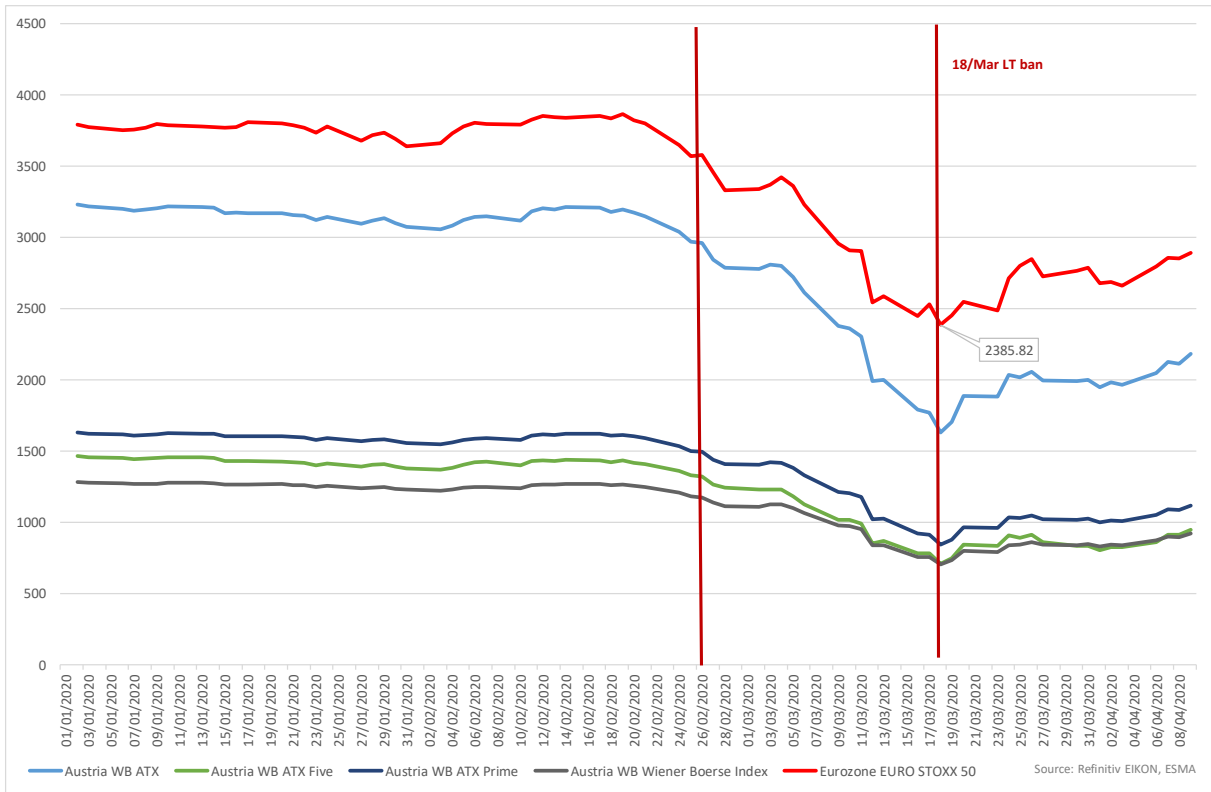


FIGURE 2 – SECTORIAL AUSTRIAN INDICES

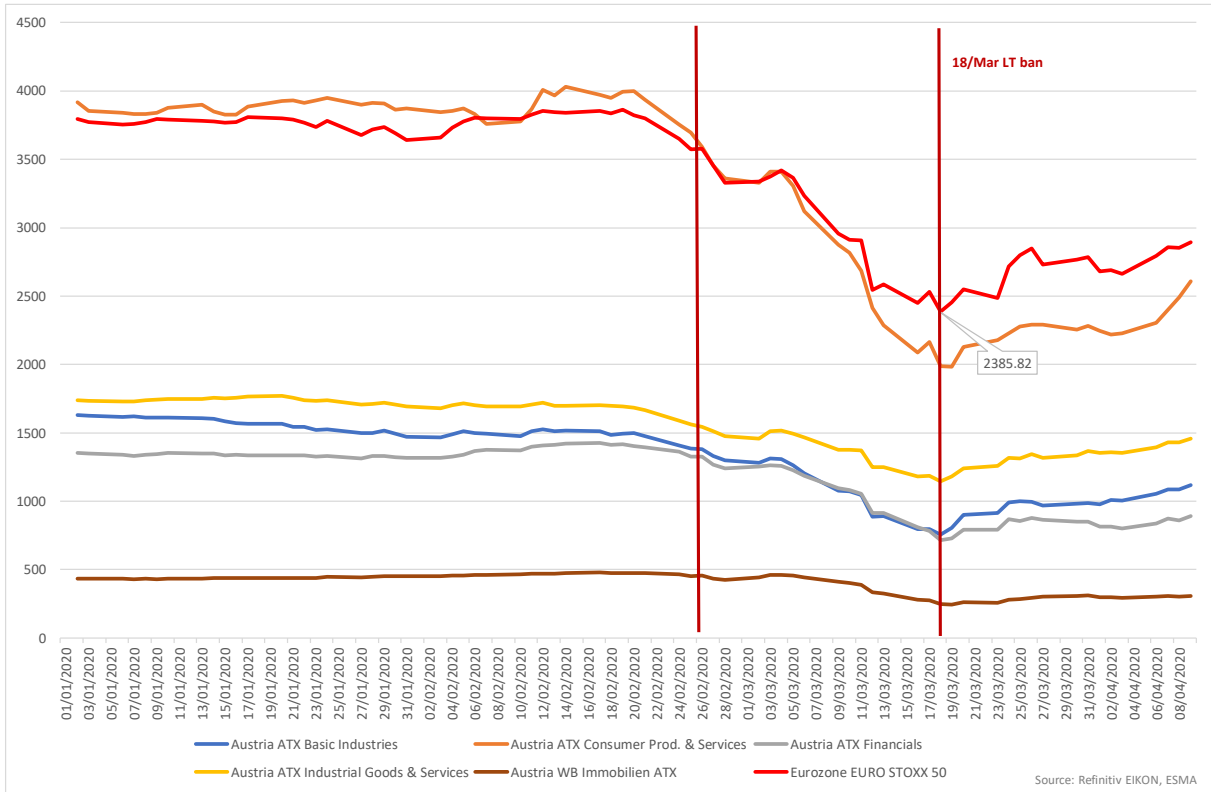
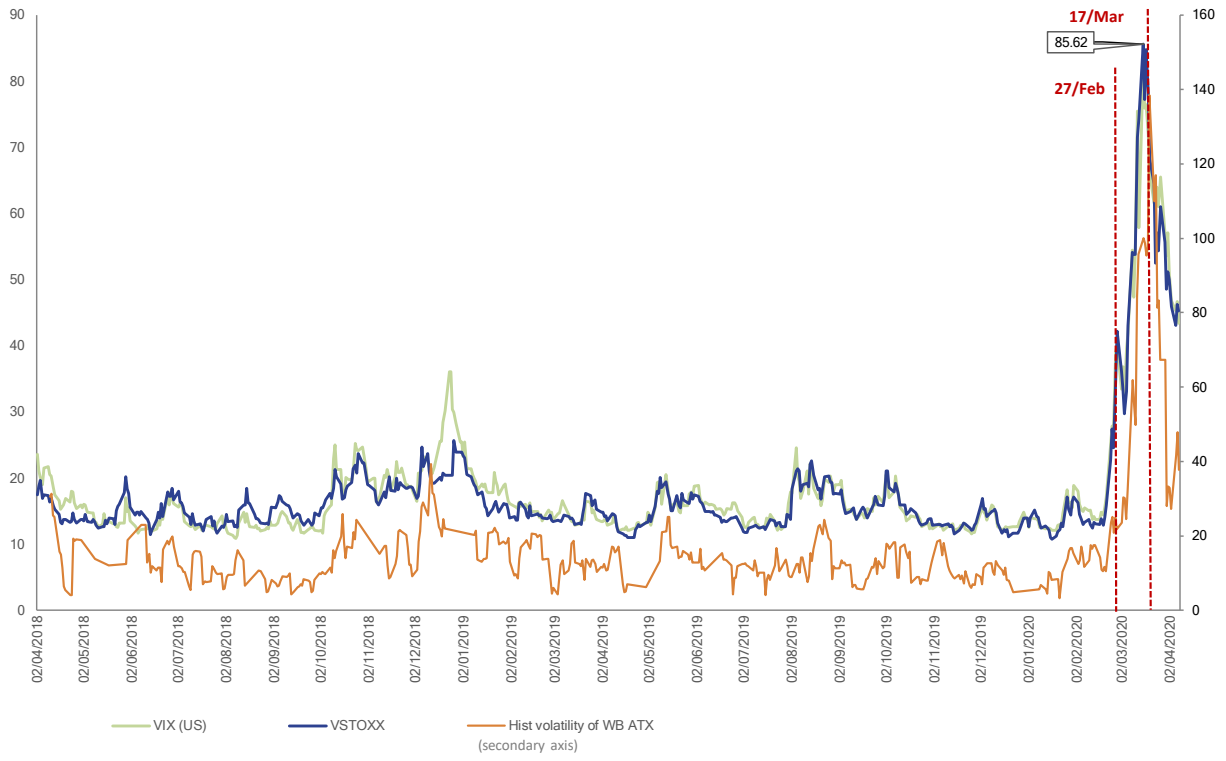
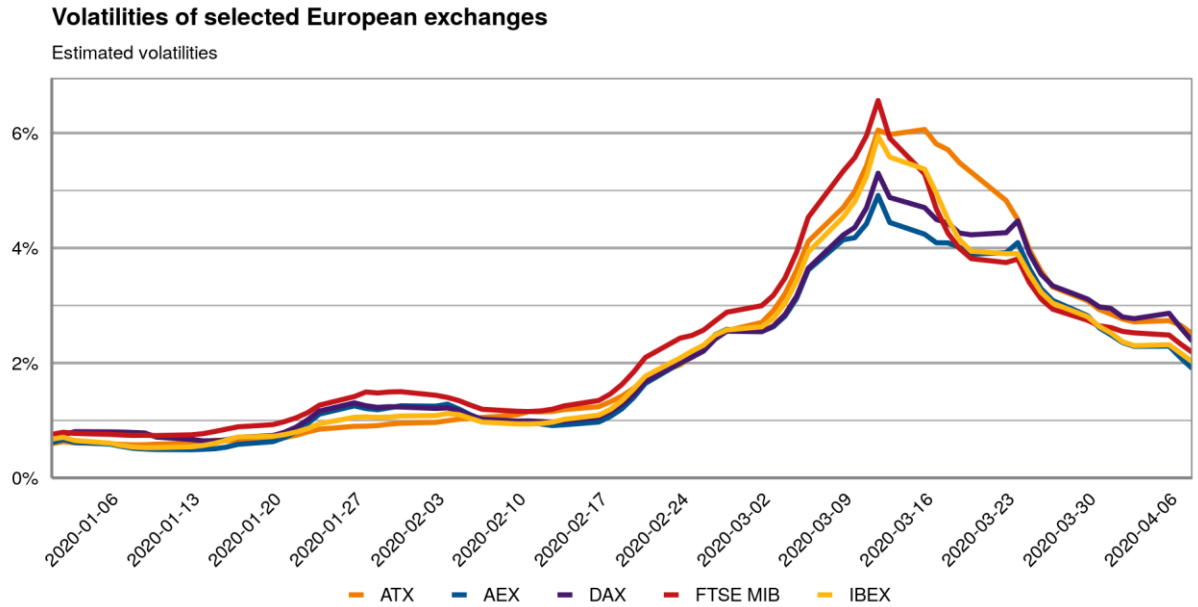


FIGURE 3 – VOLATILITY: EU - US – WB ATX



Note: Implied volatility of EURO STOXX 50 (VSTOXX), S&P 500 (VIX), Historical volatility of the national index in %.
Sources: Refinitiv Datastream, Refinitiv EIKON, ESMA.

FIGURE 4 – VOLATILITY ON CERTAIN EU MARKETS (PROVIDED BY THE FMA)



Source: Thomson-Reuters Eikon. FMA-calculations based on Kastner and Frühwirth-Schnatter (2014).