

Evaluation of certain elements of the Short Selling Regulation

Committee on Economic and Monetary Affairs Scrutiny Session of 22 February 2018

This briefing has been drawn up to support ECON's work on the scrutiny of delegated acts, in particular as regards the discussion of 22 February 2018 on the evaluation of certain elements of the **Short Selling Regulation (EU) No 236/2012** ([SSR](#)¹).

In brief

The Short Selling Regulation (**SSR**) applies as of 1 November 2012. The stated [objectives](#) of the SSR are to increase transparency on short positions, to ensure Member States (**MS**) can address risks arising from short selling and credit default swaps (**CDS**), to ensure coordination between MS and the European Securities and Markets Authority (**ESMA**) and to reduce risks with uncovered or naked short selling as well as risks to the stability of sovereign debt markets posed by naked CDS positions. On 19 January 2017, the Commission [mandated](#) ESMA to provide advice on the evaluation of certain elements of the SSR. This briefing provides an overview of the three building blocks of the final [Technical Advice](#) (**TA**) provided by ESMA on 21 December 2017: the exemption for market making activities, the short term restrictions on short selling in case of a significant decline in prices under Article 23 SSR ('short-term bans'), and the transparency of net short positions (**NSP**) and related reporting and disclosure requirements.

I. EXEMPTION FOR MARKET MAKING ACTIVITIES

Under Article 17 SSR, certain requirements concerning the notification or disclosure of significant NSPs in shares and sovereign debt, and the restrictions on uncovered short sales in shares or sovereign debt or on uncovered sovereign CDS do *not* apply to transactions performed by market makers. The Commission already announced in the *Call for Evidence on the EU regulatory framework for financial services* ([COM\(2016\) 855](#)) an assessment of the definition of this exemption for 'market making activities'.

In this context, ESMA puts forward, i.a., the following proposals:

- ESMA recommends retaining the differentiation between the **definitions of 'market making activities'** under Article 2(1)(k) SSR and of '**market maker**' under Article 4(1)(7) of Directive 2014/65/EU (**MiFID II**) based on stakeholders' feedback to its [Consultation Paper](#) (CP) of 7 July 2017. The definition under the SSR should however be revised to ensure that certain market making

¹ 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, OJ L 86, 24.3.2012, p. 1–24.

activities carried out on a trading venue and over-the-counter (**OTC**) benefit from the exemption and that the exemption's scope is extended to 'pure' OTC instruments.

- As to the **financial instruments falling under the exemption**, ESMA maintains the list of instruments² of its 2013 [Guidelines](#). ESMA proposes to add subscription rights and convertible bonds and, with regard to sovereign debt, corporate debt - which is highly correlated with the sovereign debt in question -, through amendments in the SSR and [Delegated Regulation \(EU\) No 918/2012](#). ESMA considers this correlation should be specified through technical standards (**TS**).
- Regarding on-exchange market making activity on instruments admitted to trading on a trading venue, ESMA considers that the market maker should be member of one of the trading venues where the market making activity effectively takes place. ESMA proposes not to require the **membership requirement** in the context of OTC market making activity.
- Apart from *ad hoc* requests by National Competent Authorities (**NCA**s) on NSPs of market makers, the SSR provides for a blanket exemption from all **reporting requirements** for market makers. ESMA recommends amending the SSR to ensure NCAs are notified by market makers of NSPs above a threshold and when maintained over a certain period. TS should specify the technical details.
- Finally, ESMA questions whether the instrument-by-instrument **notification procedure** when the exemption is used imposes a too heavy administrative burden on NCAs and market makers. ESMA proposes a notification of instruments via indices - subject to certain conditions -, as well as changes in the maximum delay to benefit from the exemption. TS should be developed regarding the assessment of NCAs upon receipt of notifications.

II. SHORT-TERM BANS

Article 23(1) SSR grants NCAs the power to temporarily restrict short selling of financial instruments on a trading venue in case of significant declines in price, subject to fixed thresholds. So far, only two NCAs have adopted short-term bans. Hence, ESMA recommends keeping current thresholds but amending the **procedure for adopting the bans**. Only the NCA with the most relevant market in terms of liquidity for the instrument should be able to adopt the ban, which would then be effective in all MS upon publication on the NCA's website. Other NCAs should no longer have the power to oppose the decision.

ESMA also addresses the **scope of the short-term ban**, and proposes changing it from bans on short selling to bans on 'entering into or increasing NSPs'. The latter includes short selling but also short positions obtained through derivatives and OTC trading. ESMA notes that index trading is not be included in this scope, and that the scope should be restricted to shares and sovereign debt instruments traded on trading venues.

II. TRANSPARENCY OF NET SHORT POSITIONS AND REPORTING REQUIREMENTS

Articles 5 and 7 SSR require that investors notify NCAs of their NSPs of shares and sovereign debt, and Article 9 contains rules for timing for notification and disclosure, including in Article 9(4) a website for public disclosures. In its Call for Evidence, the Commission announced it would assess the possibility of introducing an **EU centralised reporting platform**. In this context, ESMA proposes, i.a., a reviewed **timing for publication** of NSPs and the levying of a **fee on position holders** to have access to and report through a centralised system.

² I.e. shares, sovereign debt and CDS in sovereign debt, as well as those listed financial instruments to be taken into account when calculating the NSP.

Furthermore, the TA suggests that Legal Entity Identifiers (LEI) should be used to identify in the notification the position holder. For groups, the LEI of the parent company should be used and natural persons are to be identified following Article 6 of [Commission Delegated Regulation \(EU\) 2017/590](#).

CONTACTS

- ECON Secretariat
econ-secretariat@ep.europa.eu
- ECON Committee webpage
<http://europarl.europa.eu/econ>
- All ECON Scrutiny papers can be found on the [ECON Policies pages](#)