Basic information

2010/0251(COD) COD - Ordinary legislative procedure (ex-codecision procedure) Regulation	Procedure completed
Financial markets: short selling and certain aspects of credit default swaps Amended by 2012/0029(COD) **Subject** 2.50.03 Securities and financial markets, stock exchange, CIUTS, investments 2.50.08 Financial services, financial reporting and auditing 2.50.10 Financial supervision	

Key players

European Parliament

Committee responsible	Rapporteur	Appointed
ECON Economic and Monetary Affairs	CANFIN Pascal (Verts /ALE)	21/09/2010

Committee for opinion	Rapporteur for opinion	Appointed
JURI Legal Affairs	LEHNE Klaus-Heiner (PPE)	27/10/2010

Council of the European Union

Council configuration	Meetings	Date
Economic and Financial Affairs ECOFIN	3088	2011-05-17
Economic and Financial Affairs ECOFIN	3076	2011-03-15
Economic and Financial Affairs ECOFIN	3054	2010-12-07
Economic and Financial Affairs ECOFIN	3148	2012-02-21

European Commission

Commission DG	Commissioner
Financial Stability, Financial Services and Capital Markets Union	BARNIER Michel

Key events

Date	Event	Reference	Summary
15/09/2010	Legislative proposal published	COM(2010)0482	Summary

07/10/2010	Committee referral announced in Parliament, 1st reading		
07/12/2010	Debate in Council		Summary
07/03/2011	Vote in committee, 1st reading		Summary
15/03/2011	Debate in Council		Summary
19/04/2011	Committee report tabled for plenary, 1st reading	A7-0055/2011	
17/05/2011	Debate in Council		Summary
04/07/2011	Debate in Parliament		
05/07/2011	Decision by Parliament, 1st reading	T7-0312/2011	Summary
05/07/2011	Results of vote in Parliament		
15/11/2011	Decision by Parliament, 1st reading	T7-0486/2011	Summary
15/11/2011	Results of vote in Parliament		
21/02/2012	Act adopted by Council after Parliament's 1st reading		
14/03/2012	Final act signed		
14/03/2012	End of procedure in Parliament		
24/03/2012	Final act published in Official Journal		

Technical information

Procedure reference	2010/0251(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Regulation
Amendments and repeals	Amended by 2012/0029(COD)
Legal basis	Treaty on the Functioning of the European Union TFEU 114-p1
Stage reached in procedure	Procedure completed
Committee dossier	ECON/7/03846

Documentation gateway

European Parliament

Document type	Committee	Reference	Date	Summary
Committee draft report		PE454.372	24/11/2010	
Amendments tabled in committee		PE456.773	20/01/2011	
Amendments tabled in committee		PE456.805	26/01/2011	
Committee opinion	JURI	PE454.492	27/01/2011	
Committee report tabled for plenary, 1st reading/single reading		A7-0055/2011	19/04/2011	
Text adopted by Parliament, partial vote at 1st reading				

/single reading		T7-0312/2011	05/07/2011	Summary
Text adopted by Parliament, 1st reading/single reading		T7-0486/2011	15/11/2011	Summary

Council of the EU

Document type	Reference	Date	Summary
Draft final act	00068/2011/LEX	14/03/2012	

European Commission

Document type	Reference	Date	Summary
Legislative proposal	COM(2010)0482	15/09/2010	Summary
Document attached to the procedure	SEC(2010)1055	15/09/2010	
Document attached to the procedure	SEC(2010)1056	15/09/2010	
Commission response to text adopted in plenary	SP(2012)29	11/01/2012	
Follow-up document	COM(2013)0885	13/12/2013	Summary

National parliaments

Document type	Parliament /Chamber	Reference	Date	Summary
Contribution	AT_NATIONALRAT	COM(2010)0482	18/10/2010	
Contribution	PT_PARLIAMENT	COM(2010)0482	01/12/2010	
Contribution	CZ_SENATE	COM(2010)0482	31/01/2011	
Contribution	IT_SENATE	COM(2010)0482	23/03/2011	

Other institutions and bodies

Institution/body	Document type	Reference	Date	Summary
EESC	Economic and Social Committee: opinion, report	CES0066/2011	19/01/2011	
ECB	European Central Bank: opinion, guideline, report	CON/2011/0017 OJ C 091 23.03.2011, p. 0001	03/03/2011	Summary

Additional information

Source	Document	Date
National parliaments	IPEX	
European Commission	EUR-Lex	

European Commission	EUR-Lex	

Final act	
Regulation 2012/0236 OJ L 086 24.03.2012, p. 0001	Summary

Delegated acts	
Reference	**Subject**
2013/2765(DEA)	Examination of delegated act
2013/2766(DEA)	Examination of delegated act
2013/2805(DEA)	Examination of delegated act
2014/2910(DEA)	Examination of delegated act
2021/2899(DEA)	Examination of delegated act

Financial markets: short selling and certain aspects of credit default swaps

2010/0251(COD) - 03/03/2011 - European Central Bank: opinion, guideline, report

OPINION OF THE EUROPEAN CENTRAL BANK on a proposal for a regulation of the European Parliament and of the Council on short selling and certain aspects of credit default swaps.

General observations: the ECB welcomes the main aim of the proposed regulation, which is to establish a Union regulatory framework to cover short selling and equivalent practices based on the use of credit default swaps (CDSs).

Specific observations

Scope: the ECB **recommends that sovereign debt instruments covered by the proposed regulation are defined as those which are issued or guaranteed by the entities belonging to the public sector** of the Member States or of the Union, where the applicable definition of the 'public sector' should be the one already present in the Union secondary legislation. This will ensure that the debt instruments issued by the ESCB central banks as part of the implementation of the monetary policy are not classified as sovereign debt instruments, which would be contrary to the prohibition of the central bank financing of the public sector expressed in Article 123 of the Treaty.

Furthermore, certain specified market making and primary market activities are exempted from the transparency and regulatory interventions regime envisaged by the proposed regulation. Potential abuses of the market making exemption should be avoided, in particular by ensuring that the proprietary business of a market maker does not benefit from this exemption. The ECB **recommends thatpowers are delegated to the Commission to adopt relevant technical standards**, on the basis of a proposal by ESMA which would adequately balance the above considerations. Such technical standards may consider: (a) detailed features of the market making activities benefiting from this exemption; (b) reporting procedures to disclose the market making activity to the competent authorities; and (c) portfolio structures and booking procedures to be used by market makers with a view to clearly identifying the character of a transaction as either market making or another type of transaction, and excluding the rebooking of transactions without a notification to the competent authority.

The ECB also **recommends that powers are delegated to the Commission to adopt, on the basis of a proposal by ESMA, the implementing technical standards ensuring uniform application of the exemption for stabilisation measures under the short selling regime.** Such technical standards would complement the technical standards developed with regard to the exemption for stabilisation measures under the market abuse regime.

Reporting and public disclosure standards: under the proposed regulation, powers are delegated to the Commission to adopt (a) regulatory technical standards specifying the details of the information to be provided to the competent authorities with respect to net short positions exceeding the specified reporting threshold; and (b) implementing technical standards specifying the means by which information will be provided to the public with respect to net short positions exceeding the specified public disclosure threshold. The ECB recommends **specifying the legislative delegation to the Commission to the effect that the formats used for the purposes of reporting and public disclosure in such cases should allow for timely Union-wide consolidation and assessment** of short selling positions affecting specific issuers. Consistency of reporting formats will be crucial for ensuring an effective response to potential market disturbances by ESMA and the competent national authorities, as well as, in relation to their respective competences, by the ESCB and the European Systemic Risk Board (ESRB).

Regarding the specific issue of the **public disclosure obligations imposed on entities engaged in short selling**, the ECB understands that the proposed regulation envisages that such disclosure will be performed through the use of **officially appointed mechanisms for the central storage of regulated information**, introduced as part of the Union's tran sparency regime for securities. In principle the ECB supports this method of disclosure, while recommending that it should be based on interactive reporting, using standard data formats, so as to allow efficient consolidation and flexible access to Union-wide information on an integrated basis. For instance, all disclosed information could be available through ESMA by way of centralised access to officially appointed mechanisms. This would reflect the cross-border implications of risks generated by short selling and the coordination role envisaged for ESMA under the proposed regulation.

Information sharing: the proposed regulation establishes information sharing arrangements between the competent national authorities and ESMA with respect to net short positions reported to those competent authorities. The ECB makes the following recommendations in this respect:

- as a minimum, the proposed modalities for information sharing between the competent authorities and ESMA should become more efficient, in particular by allowing ESMA to make requests for real-time information sharing where this is necessary for it to perform its tasks effectively. In the longer term ESMA should obtain automatic access to all information reported under the proposed regulation. Hence, the ECB recommends that ESMA initiates work on establishing centralised Union information collection mechanisms that apply a common identifier of reporting entities and a minimum common taxonomy; such mechanisms should allow for flexible real-time access to information for policy purposes, while ensuring the confidentiality of the received data. The ECB considers that the establishment of such centralised mechanisms would help to overcome the limits inherent in the usage of uncoordinated micro-data pools and would also allow the information collected under the proposed regulation to be used in connection with other available datasets, minimising the administrative burden for the reporting entities and public authorities;
- the proposed regulation should also expressly provide for information sharing between ESMA and ESCB central banks in order to facilitate performance of the ESCB functions of collecting statistical data and monitoring and assessing financial stability;
- the proposed regulation should provide for information sharing between the ESMA and the ESRB, with a view to facilitating the ESRB's collection of information for the performance of its tasks and identifying and prioritising systemic risks that may arise from developments within the financial system.

Intervention powers: the ECB recommends that ESMA should also have the right to consult the ESRB when it is notified of measures introduced by the competent national authorities. Appropriate time constraints could be laid down to ensure the efficient handling of ESRB consultations. Moreover, the European Supervisory Authorities (ESA), including ESMA, must cooperate closely with the ESRB and provide it with all information necessary for the fulfilment of its tasks in a regular and timely manner, while the ESRB may request additional information from the ESA. . Provisions envisaging the consultation of the ESRB by ESMA on contemplated short selling interventions will allow the ESRB (i), to make an informed and timely assessment if a request for further information is needed in a specific situation in view of the potential systemic risks, and (ii) to formulate such requests, if any, in a pragmatic and consistent manner.

Financial markets: short selling and certain aspects of credit default swaps

2010/0251(COD) - 07/12/2010

The Council **took note** of a presidency **progress report** regarding work on a draft regulation on short selling and certain aspects of credit default swaps.

Financial markets: short selling and certain aspects of credit default swaps

2010/0251(COD) - 15/03/2011

The Council was briefed by the presidency on ongoing work on a draft regulation on short selling and credit default swaps. The short selling of securities is a practice whereby an investor sells a security he doesn't own with the intention of buying it back when the price has fallen. A credit default swap is a financial instrument with the characteristics of insurance, guaranteeing the creditworthiness of a loan.

The Council asked the Permanent Representatives Committee rapidly to resolve the remaining outstanding issues so as to establish a general approach that will enable the presidency to start negotiations with the European Parliament.

Financial markets: short selling and certain aspects of credit default swaps

2010/0251(COD) - 15/09/2010 - Legislative proposal

PURPOSE: to establish a common framework concerning requirements and powers in relation to short selling and credit default swaps.

PROPOSED ACT: European Parliament and Council Regulation.

BACKGROUND: short selling of securities is a practice where a natural or legal person sells a security he does not own with the intention of buying back an identical security at a later point in time. It is an established and common practice in most financial markets. Short selling can be divided into two types: covered short selling where the seller has borrowed the security, or made arrangements to ensure they can be borrowed before the short sale and uncovered or naked short selling (where at the time of the short sale the seller has not borrowed the securities or ensured they can be borrowed).

At the height of the financial crisis, in September 2008, competent authorities in several EU Member States and the USA adopted emergency measures to restrict or ban short selling in some or all securities. The measures adopted by Member States were divergent as the European Union lacks a specific legislative framework for dealing with short selling issues.

Earlier this year concerns were expressed by some Member States about the possible role played by derivative transactions, notably credit default swaps, in relation to the prices for Greek sovereign bonds. A number of Member States (notably Germany and Greece) have recently adopted temporary or permanent restrictions at national level relating to short selling of shares and/or credit default swaps.

The **current fragmented approach to short selling and credit default swaps** limits the effectiveness of supervision and the measures imposed and results in regulatory arbitrage. It may also create confusion in markets and costs and difficulties for market participants.

In its communication of 2 June 2010 on Regulating Financial Services for Sustainable Growth, the Commission considered that it would be desirable to **have a regulation** addressing the potential risks arising from short selling. The intention is to i) harmonise requirements relating to short selling across the European Union, ii) harmonise the powers that regulators may use in exceptional situations where there is a serious threat to financial stability or market confidence and iii) ensure greater co-ordination and consistency between Member States in such situations.

IMPACT ASSESSMENT: the Commission undertook an impact assessment of policy alternatives. Policy options related to the scope of the proposals, the proposed transparency regimes, requirements relating to uncovered short selling, exemptions and exceptional powers to restrict short selling.

LEGAL BASE: **Article 114** of the Treaty on the Functioning of the European Union (TFEU). Although all the problems outlined above have important implications for each individual Member State, their overall impact can only be fully perceived in a cross-border context.

CONTENT: the proposal covers **all financial instruments** but provides for a proportionate response to the risks that that short selling of different instruments may represent. Its main features are as follows:

Transparency requirements for short positions in certain instruments: for instruments such as shares and derivatives relating to shares, sovereign bonds and derivatives relating to sovereign bonds and credit default swaps relating to sovereign issuers where taking short positions is more common and there are clearly identifiable risks or concerns, transparency requirements and requirements relating to uncovered short selling are applied.

For companies that have shares admitted to trading on a trading venue in the Union, the proposal provides for a two tier model for transparency of significant net short positions in shares. At a lower threshold **notification of a position must be made privately to the regulator** and at a higher threshold positions must be **disclosed to the market**.

As regards significant net short positions relating to sovereign debt issuers in the EU, private disclosure to regulators is required.

The proposal includes a **requirement for the marking of short orders**. A requirement for the marking or flagging of sell orders executed on trading venues as short orders where the seller is entering into a short sale of shares on that venue will provide additional information about volumes of short sales executed on the trading venue. A trading venue will be required to publish daily information about volumes of short sales executed on the venue that is obtained from the marking of orders.

Uncovered short sales: uncovered or naked short selling of shares and sovereign debt is sometimes viewed as increasing the potential risk of settlement failure and market volatility. The proposals include detailed requirements aimed at addressing these risks.

To this end, natural or legal persons entering into short sales of such instruments must at the time of the sale have borrowed the instruments, entered into an agreement to borrow the shares or made other arrangements which ensure that the security can be borrowed so that settlement can be effected when it is due.

Furthermore, trading venues must ensure that there are adequate arrangements in place for buy-in of shares or sovereign debt where there is a failure to settle a transaction. Trading venues will have the power to prohibit a natural or legal person who failed to settle to enter into further short sales.

Exemptions: provisions are made for exemptions – for example, for shares of a company where the principal market for the shares is outside the European Union and for market making activities which play a crucial role in providing liquidity to European markets.

Intervention powers:in exceptional situations which constitute a serious threat to financial stability or to market confidence, competent authorities should have temporary powers to require further transparency or to impose restrictions on short selling and credit default swap transactions or limit natural and legal persons from entering into derivative transactions.

Where an adverse development or event creates a threat to financial stability or market confidence that extends beyond one Member State or has other cross border implications, the proposal introduces various procedural requirements aimed at ensuring that other competent authorities are notified if a competent authority intends to take exceptional measures related to short selling. The European Securities Market Authority (ESMA) is given a key coordination role in such a situation to try to ensure consistency between competent authorities.

Powers and sanctions: the proposal gives competent authorities all the powers necessary for the enforcement of the rules. For example, the powers cover access to documents, the right to obtain information from natural or legal persons and to take enforcement action.

BUDGETARY IMPLICATION: the proposal has no implication for the EU budget.

Financial markets: short selling and certain aspects of credit default swaps

2010/0251(COD) - 05/07/2011 - Text adopted by Parliament, partial vote at 1st reading/single reading

The European Parliament amended, at first reading of the ordinary procedure, the proposal for a regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps.

The vote on the legislative resolution was postponed to a later date.

Reduction of risk: Members consider that the requirements to be imposed should address the identified risks taking into account differences in the Member States and the potential economic impact of the requirements and without unduly detracting from the benefits that short selling provides to the quality and efficiency of markets by increasing market liquidity (as the short seller sells securities and then later repurchases those securities to cover the short sale) and by allowing investors to act when they believe a security is overvalued short selling leading therefore to the more efficient pricing of securities.

Scope: commodity markets and, in particular, agricultural markets do not fall within the scope of the Regulation. The report states that the Commission should, by 1 January 2012, report to the European Parliament and the Council on the risks existing on those markets, taking into account their specificities, and put forward any appropriate proposals. Commodities relevant to the energy sector should be addressed in the Commission's proposal for a Regulation on energy market integrity and transparency.

Furthermore, the technical details of the settlement discipline regimes should not be included in the scope of this Regulation and should be defined in the appropriate post-trading legislative proposal of the Commission. The latter should therefore make concrete proposals by the end of 2011, in parallel with a proposal to create a harmonised legal framework for central securities depositories.

Uncovered position in a credit default swap: the amended proposal specifies that a natural or legal person shall be considered to have an uncovered position in a credit default swap relating to an obligation of a Member State or the Union, to the extent that the credit default swap is not serving to hedge against:

either the risk of default of the issuer where the natural or legal person has a long position in the sovereign debt of that issuer

or the risk of decline in the value of any asset or portfolio of assets to the natural or legal person holding such asset or portfolio of assets where the decline of the price of those asset or portfolio of assets has a high correlation with the decline of the price of the obligation of a Member state or the Union in the case of a decline in the creditworthiness of a Member State or the Union.

Effective transparency regime and marking of sell orders: Members state that transparency requirements should include short positions created by trading outside trading venues and economic net short positions created by the use of derivatives, such as options, futures, index-related instruments, contracts for differences and spread bets relating to shares or sovereign debt. The calculation of short position or long position should include indices, baskets and exchange traded funds.

In addition to the transparency regime for the reporting of net short positions in shares, Parliament includes a requirement for the **marking of sell orders that are executed as short sales as observed at the end of the day** should be introduced to provide supplementary information about the volume of short sales of shares executed. Information about short sell transactions should be collated by the firm and communicated to the competent authority at least daily in order to help competent authorities to monitor levels of short selling.

A failure to cover a short position at the end of the trading day should result in sufficiently high penalties so as not to allow the seller to make a profit.

In order to improve transparency on short sales, the European Supervisory Authority (European Securities and Markets Authority) (ESMA) may issue and send to the European Parliament, the Council and the Commission an opinion on adjusting the thresholds, taking into account the developments in financial markets.

Notification to competent authorities of significant net short positions in sovereign debt and credit default swaps: a natural or legal person who has a net short position relating to the issued sovereign debt of a Member State or of the Union shall notify the relevant competent authority whenever such position reaches or falls below a relevant notification threshold for the Member State concerned or the Union.

Method of notification and disclosure: any disclosure shall include details, in anonymous form, of the size of the relevant position, the issuer in relation to which the relevant position is held and the date on which the relevant position was created, was changed or ceased to be held. Natural and legal persons that hold significant net short positions shall keep, for a period of five years, records of the gross positions which make a significant net short position.

Information to be provided to ESMA: the proposal stated that the competent authority shall provide the requested information to ESMA at the latest within seven calendar days. Members add that where there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State or in another Member State, the competent authority shall provide the requested information to ESMA within 24 hours.

In order to ensure consistent harmonisation, ESMA shall develop draft regulatory technical standards specifying the details of the information to be provide. ESMA shall submit drafts for those regulatory technical standards to the Commission by 31 December 2011.

Sovereign credit default swap: these should be based on the insurable interest principle whilst recognising that there can be interests in a sovereign state other than bond ownership.

Temporary restrictions on short selling: in the case of a significant fall in the price of a financial instrument on a trading venue a competent authority should also have the ability to temporarily restrict short selling of the financial instrument on that venue within its own jurisdiction or request to ESMA such restriction in other jurisdictions in order to be able to intervene rapidly where appropriate to prevent a disorderly price fall of the instrument concerned.

Disclosure in exceptional situations: Parliament inserted a provision stating that the competent authority of a Member State may require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify it details of the position whenever the position reaches or falls below a notification threshold fixed by the competent authority, where both of the following conditions are fulfilled: (i) there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State or one or more other Member States; (ii) the measure will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits.

Penalties: based on guidelines adopted by ESMA and taking into consideration the Commission's Communication on reinforcing sanctioning regimes in the financial services sector, Member States shall establish rules on administrative measures, sanctions and pecuniary penalties applicable to infringements of the provisions of this Regulation. The measures, sanctions and penalties provided for shall be effective, proportionate and dissuasive.

Delegated acts: power to adopt acts in accordance with Article 290 TFEU is delegated to the Commission in respect of details concerning calculating short positions, when a natural or legal person has an uncovered position in a credit default swap, and notification or disclosure thresholds. SMA should play a central role in the drafting of delegated acts by delivering advice to the Commission.

Financial markets: short selling and certain aspects of credit default swaps

2010/0251(COD) - 17/05/2011

The Council agreed a **general approach** on a draft regulation on short selling and credit default swaps. This will enable the presidency, on behalf of the Council, to start negotiations with the European Parliament, with a view to reaching agreement at **first reading**.

The draft regulation is aimed at harmonising rules for short selling and certain aspects of credit default swaps. It introduces common EU transparency requirements and harmonises the powers that regulators may use in exceptional situations where there is a serious threat to financial stability.

As the EU lacks a common regulatory framework for dealing with short selling, Member States adopted divergent measures. The current fragmented approach limits the effectiveness of the adopted measures and results in regulatory arbitrage. It may also create confusion in the markets and impose additional costs on market participants.

The draft regulation is intended to address these issues, whilst acknowledging the role of short selling in ensuring the proper functioning of financial markets, in particular in providing liquidity and contributing to efficient pricing.

Scope: the proposal covers all types of financial instruments, providing for a response that is proportionate to the potential risks posed by short selling of different instruments. In particular, for shares of companies listed in the EU, it creates a **two-tier model** for transparency of significant net short positions: While at a lower threshold, notification of a position must be made privately to the regulator, at a higher threshold; positions must be disclosed to the market.

Sovereign debt: for sovereign debt, on the other hand, significant net short positions relating to issuers in the EU would always require private disclosure to regulators. The proposed regime also provides for notification of significant positions in credit default swaps that relate to EU sovereign debt issuers.

Uncovered short sales: to tackle the increased risks posed by uncovered short sales (practice whereby an investor sells a security he doesn't own with the intention of buying it back when the price has fallen), the proposal requires that anyone entering into a short sale must at the time of the sale have borrowed the instruments, entered into an agreement to borrow them or made other arrangements to ensure they can be borrowed in time to settle the deal.

However, these restrictions don't apply to the short selling of sovereign debt if the transaction serves to hedge a long position in debt instruments of an issuer. Moreover, if the liquidity of sovereign debt falls below a specified threshold, the restrictions on uncovered short selling may be temporarily suspended by the relevant competent authority.

In exceptional situations that threaten financial stability or market confidence in a Member State or the EU, the draft regulation provides that competent authorities have temporary powers to require further transparency or to impose restrictions on short selling and credit default swap transactions or to limit individuals from entering into derivative transactions.

In such a situation, the European Securities Market Authority (ESMA) is given a coordination role to ensure consistency between competent authorities and to guarantee that such measures are only taken where it is necessary and proportionate to do so. ESMA is also given the power to take measures where the situation has cross-border implications.

Financial markets: short selling and certain aspects of credit default swaps

2010/0251(COD) - 15/11/2011 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 507 votes to 25, with 109 abstentions, a legislative resolution on theproposal for a regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps.

The vote had been postponed from the 5 July session.

Parliament adopted its position at first reading under the ordinary legislative procedure. The amendments adopted in plenary are the result of a compromise negotiated between the European Parliament and the Council. They amend the Commission's proposal as follows:

Purpose: to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regard to the financial markets, and to ensure a high level of consumer and investor protection, it is therefore appropriate to lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional situations.

It is recalled that while in certain situations it may have adverse effects, under normal market conditions short selling plays an important role in ensuring the proper functioning of financial markets, in particular in the context of market liquidity and efficient price formation.

Transparency of net short positions: a natural or legal person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue shall disclose details of that position to the public whenever the position reaches or falls below a relevant publication threshold referred to in the Regulation. A relevant publication threshold is a percentage that equals 0.5% of the issued share capital of the company concerned and each 0.1% above that.

The European Supervisory Authority (European Securities and Markets Authority – ESMA) may issue an opinion to the Commission on adjusting the thresholds referred to in the regulation, taking into account the developments in financial markets.

In addition, a natural or legal person who has a net short position **relating to the issued sovereign debt of a sovereign issuer** shall notify the relevant competent authority whenever such position reaches or falls below the relevant notification thresholds for the Member State concerned or the Union. **ESMA shall publish on its website** the notification thresholds for each Member State.

Natural and legal persons that hold significant net short positions **shall keep, for a period of five years**, records of the gross positions which make a significant net short position.

The text stipulates the relevant time for calculation of a net short position shall be at **midnight at the end of the trading day** on which the natural or legal person has the relevant position. It shall apply to all transactions irrespective of the means of trading used, including transactions executed through either manual or automated trading, and irrespective of whether the transactions have taken place during normal trading hours.

The notification of information to a relevant competent authority shall ensure the confidentiality of the information and incorporate mechanisms for authenticating the source of the notification. This information shall be posted on a central website operated or supervised by the relevant competent authority. The competent authorities shall communicate the address of this website to ESMA, which, in turn, shall put a link to all such central websites on its own website.

The competent authority shall provide the requested information to ESMA at the latest within seven calendar days. **Where there are adverse events or developments** which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in another Member State, the competent authority shall provide ESMA with any available information based on the notification requirements outlined in the Regulation within 24 hours.

In order to ensure **consistent application of these provisions**, ESMA shall develop draft regulatory technical standards specifying the details of the information to be provided. ESMA shall submit drafts for those regulatory technical standards to the Commission by 31 March 2012.

Uncovered Short Sales: uncovered short selling of shares and sovereign debt is sometimes viewed as increasing the potential risk of settlement failure and volatility. To reduce such risks it is appropriate to place **proportionate restrictions** on uncovered short selling of such instruments.

- Restrictions on uncovered short sales in shares and in sovereign debt:

A natural or legal person may only enter into a short sale of a share admitted to trading on a trading venue where one of the following conditions is fulfilled:

(a) the natural or legal person has borrowed the share; or has made alternative provisions resulting in a similar legal effect ;

(b) the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due ;

(c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have reasonable expectation that settlement can be effected when it is due.

Where the liquidity of sovereign debt falls below the threshold determined in accordance with the methodology referred to in paragraph 4, the restrictions referred to in paragraph 1 may be **temporarily suspended** by the relevant competent authority. Before suspending these restrictions, the relevant competent authority shall notify ESMA and other competent authorities about the proposed suspension.

The suspension shall be valid for an initial period not exceeding six months from the date of its publication on the website of the relevant competent authority. Such a suspension may be renewed for further periods not exceeding six months at a time if the grounds for the suspension continue to be applicable. If the suspension is not renewed after that six-month period, it shall automatically expire.

ESMA shall **within 24 hours after the notification by the relevant competent authority** issue an opinion based on paragraph 4 on any notified suspension or renewal of a suspension. The opinion shall be published on ESMA's web site.

ESMA shall, in particular, take into account the need to preserve liquidity of markets, especially sovereign bond markets and sovereign bond repurchase markets (repo markets).

- Restrictions on uncovered credit default swaps in sovereign debt: since entering into a sovereign credit default swap without underlying exposure to the risk of a decline in the value of the sovereign debt instrument may have an adverse impact on the stability of sovereign debt markets, natural or legal persons **should be prohibited from entering into such uncovered credit default swap position**s. However, at the first initial signals that the sovereign debt market is not functioning properly, the competent authority should be empowered to **suspend temporarily such a restriction**. Such a suspension should be based on the belief of the competent authority based on objective elements consisting of the analysis of certain indicators set out in this Regulation. However, competent authorities should be empowered to use additional indicators.

The suspension shall be valid for an initial period not exceeding twelve months from the date of its publication on the website of the relevant competent authority. Such a suspension may be renewed for further periods not exceeding six months at a time. ESMA shall within 24 hours after the notification by the relevant competent authority issue an opinion on the intended suspension or on the renewal of that suspension. The opinion shall be published on ESMA's web site.

- Buy-in procedure: the new Regulation also imposes requirements on central counterparties relating to buy-in procedures and fines for failed settlement of transactions in those shares.

Notification by lenders in exceptional situations: the new Regulation provides that the competent authority of a Member State may require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify it or to disclose to the public details of the position whenever the position reaches or falls below a notification threshold fixed by the competent authority, where all the following conditions are fulfilled:

(a) there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States;

(b) the measure is necessary to address the threat and will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits.

Power to temporarily restrict short selling of financial instruments in case of a significant fall in price: where the price of a financial instrument on a trading venue has significantly fallen during a single trading day in relation to the closing price on that venue on the previous trading day, the competent authority of the home Member State for that venue shall consider whether it is appropriate to prohibit or restrict natural or legal persons from engaging in short selling of the financial instrument on that trading venue or otherwise limit transactions in that financial instrument on that trading venue in order to prevent a disorderly decline in the price of the financial instrument.

A competent authority shall notify ESMA about any decision of this nature so that ESMA can immediately inform the competent authorities of the home Member States of venues which trade the same financial instrument and, if necessary, assist those authorities in reaching an agreement in accordance with Article 19 of Regulation (EU) No 1095/2010.

ESMA inquiries: ESMA may, on the request of one or more competent authorities, the European Parliament, the Council or the Commission or on its own initiative conduct an inquiry into a particular issue or practice relating to short selling or relating to the use of credit default swaps to assess whether that issue or practice poses any potential threat to financial stability or market confidence in the Union. ESMA shall publish a report setting out its findings and any recommendations relating to the issue or practice within three months as from the end of the inquiry.

Cooperation with third countries: the competent authorities of Member States shall wherever possible conclude cooperation arrangements with competent authorities of third countries concerning the exchange of information with competent authorities in third countries, the enforcement of obligations arising under this Regulation in third countries and the taking of similar measures in third countries by their competent authorities.

Penalties: the measures, sanctions and penalties provided for shall be effective, proportionate and dissuasive. In accordance with Regulation (EU) No 1095/2010, ESMA may adopt guidelines to ensure a consistent approach is taken concerning the measures, sanctions and penalties to be established by Members States. ESMA shall publish on its website and update regularly a list of existing administrative measures, sanctions and penalties per Member State.

Delegated acts: power to adopt acts in accordance with Article 290 TFEU is delegated to the Commission in respect of details concerning calculating short positions, when a natural or legal person has an uncovered position in a credit default swap, and notification or disclosure thresholds. ESMA should play a central role in the drafting of delegated acts by delivering advice to the Commission.

Financial markets: short selling and certain aspects of credit default swaps

2010/0251(COD) - 13/12/2013 - Follow-up document

The Commission presents a report on the evaluation of the Regulation (EU) No 236/2012 on short selling and certain aspects of credit default swaps (CDS).

This Report was prepared in light of discussions with the competent authorities and ESMA. On the basis of this work, ESMA issued its technical advice on the evaluation of the SSR on 3 June 2013.

The Commission is therefore of the view that it is too **early, based on available evidence, to draw firm conclusions on the operation of the SSR framework which would warrant a revision of the legislation at this stage**. The Commission considers that, based on the limited data available so far, it can be said that the SSR has had a positive impact in terms of greater transparency of short sales and reduced settlement failures, and a relatively mixed economic impact.

Overall, the empirical evidence available shows that the SSR has had some **beneficial effects on volatility**, **mixed effects on liquidity** and led to a **slight decrease in price discovery**.

Notification and public disclosure of significant net short positions in shares: the Commission concurs with ESMA's conclusion that the notification and public disclosure thresholds of significant net positions in shares appear to be well-calibrated and appropriate and sees, at this stage, no compelling evidence for the need to change them or the current methodology for calculating the net short positions in shares.

Reporting of significant net short positions in sovereign debt and notification of uncovered positions in sovereign CDS: the Commission takes note of the relatively low level of short selling notifications in sovereign debt compared to the number of notifications received on shares, as well as the pros and cons of both the duration adjusted and nominal methods.

However, given the limited period of time since the application of the SSR and the consequent lack of data, the Commission sees, at this stage, no compelling evidence justifying revisions of the SSR framework in this area.

Impact of individual dosclosure requirements: ESMA reports that 224 holders publicly disclosed 1090 short positions on 427 shares, with the bulk of disclosures from the UK, followed by France and Sweden. Among the 3 508 notifications made public by these 224 holders, 90% were from holders domiciled in the UK or the US, and the ten biggest holders accounted for 37.5% of those published notifications.

Competent authorities considered the individual reporting thresholds to be appropriate, but they received mixed views from market participants. ESMA also comments that market participants may tend to avoid crossing the notification threshold so as to remain under the 0.5% thresholds to avoid disclosing information on short selling activities.

ESMA's Report does not recommend any changes to the disclosure thresholds. The Commission agrees with ESMA that no changes in the individual disclosure requirements are required.

Settlement discipline including buy-in procedures: market participants reported a general improvement in settlement discipline in shares since the entry into application of the SSR, Overall, the number of buy-ins and buy-in attempts across the Union has increased by 35% since the application of the SSR. However this increase could largely be attributed to one particular Member State.

ESMA considers that the settlement discipline requirements, notably the buy-in procedures, could be more appropriately addressed in a single, horizontal piece of legislation. In particular, ESMA is of the view that the forthcoming Regulation on central securities depositories (CSD) provides a more efficient tool to set out a more detailed regime and to ensure a level-playing field in the application of the buy-in and settlement penalties procedures. The Commission shares this opinion.

New evaluation of the Regulation: although ESMA has made some recommendations for adjustments to the SSR, notably concerning the locate rule, market making exemption and the power of competent authorities to impose short term bans, **ESMA has advised the Commission to revisit the assessment of the SSR and its implementing texts at a later stage**, once more data and greater experience will be available. ESMA has also drawn the Commission's attention to the cost implications that changes in the legislative framework so soon after its entry into application might have on investors and on competent authorities.

The Commission will, therefore, continue monitoring the application of the SSR. In order to ensure a smooth functioning of the short selling legal framework, the Commission considers that a new evaluation of the appropriateness and impact of the SSR could be carried out based on more empirical data and evidence and once the competent authorities have accumulated sufficient regulatory experience of applying the SSR. **Such an evaluation could be concluded by 2016**, *i.e.* three years after the entry into application of the SSR. It should be based on the input of ESMA, the analysis of available data and the feedback of competent authorities and market participants.

Financial markets: short selling and certain aspects of credit default swaps

2010/0251(COD) - 14/03/2012 - Final act

PURPOSE: to lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps in order to ensure a high level of consumer and investor protection.

LEGISLATIVE ACT: Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps

CONTENT: following an agreement negotiated in first reading, the European Parliament and Council adopted a Regulation on short selling and certain aspects of credit default swaps which introduces **common EU transparency requirements and harmonises the powers that regulators may use in exceptional situations** where there is a serious threat to financial stability. The United Kingdom delegation abstained.

At the height of the financial crisis in 2008, several Member States adopted emergency measures to restrict or ban short selling in some or all securities in order to counter a downward spiral in the prices of shares that could create systemic risks. "Uncovered" or "naked" short selling is a practice where the seller has not made arrangements to borrow the security.

As the EU lacks a common regulatory framework for dealing with short selling, Member States adopted divergent measures. The current fragmented approach limits the effectiveness of the adopted measures and results in regulatory arbitrage. It may also create confusion in the markets and impose additional costs on market participants. The Regulation is intended to address these issues, whilst acknowledging the role of short selling in ensuring the proper functioning of financial markets, in particular in providing liquidity and contributing to efficient pricing.

The main points of the Regulation are as follows:

Scope: in order to provide for a preventive regulatory framework to be used in exceptional circumstances, the Regulation covers **all types of financial instruments but provides for a response proportionate to the potential risks** posed by the short selling of different instruments. It is only in the case of exceptional circumstances that competent authorities and ESMA are entitled to take measures concerning all types of financial instruments, going beyond the permanent measures that only apply to particular types of instruments where there are clearly identified risks that need to be addressed.

Transparency of significant net short positions: for **shares admitted to trading on a trading venue in the Union,** a **two-tier model** is introduced, that provides for greater transparency of significant net short positions in shares at the appropriate level: (i) at the lower threshold, notification of a position should be made privately to the regulators concerned; (ii) at the higher threshold, positions should be publicly disclosed to the market. A relevant publication threshold is a percentage that equals 0.5 % of the issued share capital of the company concerned and each 0.1 % above that.

A requirement to notify regulators of significant net short positions relating to sovereign debt in the Union should be introduced as such notification would provide important information to assist regulators in monitoring whether such positions are in fact creating systemic risks or being used for abusive purposes. Such a requirement should only include private disclosure to regulators as publication of information to the market for such instruments could have a detrimental effect on sovereign debt markets where liquidity is already impaired.

For **sovereign debt**, on the other hand, significant net short positions relating to issuers in the EU will always require private disclosure to regulators. The proposed regime also provides for notification of significant positions in credit default swaps that relate to EU sovereign debt issuers.

Natural and legal persons that hold significant net short positions shall keep, **for a period of 5 years,** records of the gross positions which make a significant net short position.

The text states that the relevant time for calculation of a net short position shall be at **midnight** at the end of the trading day on which the natural or legal person holds the relevant position.

The notification of information to a relevant competent authority shall **ensure the confidentiality of the information** and incorporate mechanisms for authenticating the source of the notification.

Restrictions on uncovered short selling in shares: to reduce the risks of uncovered short selling of shares, the Regulation provides that a natural or legal person may enter into a short sale of a share admitted to trading on a trading venue only where that person has: (i) **borrowed the share** or has made alternative provisions resulting in a similar legal effect; or (ii) **entered into an agreement to borrow** the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due or (iii) an **arrangement with a third party** under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have a reasonable expectation that settlement can be effected when it is due.

However, these restrictions don't apply to the short selling of sovereign debt if the transaction serves to hedge a long position in debt instruments of an issuer. Moreover, if the liquidity of sovereign debt falls below a specified threshold, the restrictions on uncovered short selling may be temporarily suspended by the competent authority.

Exceptional situations: in exceptional situations that threaten financial stability or market confidence in a Member State or the EU, the Regulation provides that competent authorities should have temporary powers to require greater transparency or to impose restrictions on short selling and credit default swap transactions or to limit individuals from entering into derivative transactions.

In such a situation, the European Securities Market Authority (ESMA) is given a key coordination role, to ensure consistency between competent authorities and to guarantee that such measures are only taken where they are necessary and proportionate. ESMA is also given the power to take measures where the situation has cross-border implications.

ESMA inquiries: ESMA may, on the request of one or more competent authorities, the European Parliament, the Council or the Commission or on its own initiative conduct an inquiry into a particular issue or practice relating to short selling or relating to the use of credit default swaps to assess whether that issue or practice poses any potential threat to financial stability or market confidence in the Union.

Cooperation with third countries: the competent authorities of Member States shall wherever possible conclude cooperation arrangements with competent authorities of third countries concerning the exchange of information with competent authorities in third countries, the enforcement of obligations arising under the Regulation in third countries and the taking of similar measures in third countries by their competent authorities.

Penalties: the measures, sanctions and penalties provided for shall be effective, proportionate and dissuasive. In accordance with Regulation (EU) No 1095/2010, ESMA may adopt guidelines to ensure a consistent approach is taken concerning the measures, sanctions and penalties to be established by Members States. ESMA shall publish on its website and update regularly a list of existing administrative measures, sanctions and penalties per Member State.

Review and report: by 30 June 2013, the Commission shall, in light of discussions with the competent authorities and ESMA, report on:(i) the appropriateness of the notification and disclosure thresholds; (ii) the impact of the individual disclosure, in particular with regard to the efficiency and volatility of financial markets; (iii) the appropriateness of direct, centralised reporting to ESMA; (iv) the operation of the restrictions and requirements in the Regulation (v) the appropriateness of the restrictions on the uncovered sovereign credit default swaps and (vi) the appropriateness of any other restrictions or conditions on short selling or credit default swaps.

ENTRY INTO FORCE: 25/03/2012.

APPLICATION: from 01/11/2012 (certain provisions will apply from 25/03/2012).

DELEGATED ACTS: the Commission is empowered to adopt delegated acts in respect of details concerning calculating short positions, where a natural or legal person has an uncovered position in a credit default swap, notification or disclosure thresholds and further specification of criteria and factors for determining in which cases an adverse event or development creates a serious threat to financial stability or to market confidence in a Member State or the Union.

The power to adopt delegated acts is conferred on the Commission for an indeterminate period of time. A delegated act shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification (which may be extended by two months). If the European Parliament or Council objects, the delegated act shall not enter into force.