esma European Securities and Markets Authority

Final report

Draft technical standards on the Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps

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Acronyms used

BIC	Bank Identifier Code
CSD	Central securities depository
ISIN	International securities identification number
ITS	Implementing technical standards
LEI	Legal entity identifier
RTS	Regulatory technical standards
ESMA	European Securities and Markets Authority
MiFID	Directive on markets in financial instruments (Directive 2004/39/EC of the European Parliament and of the Council of April 2004)
SMSG	Securities and Markets Stakeholder Group

I. Executive Summary

Reasons for publication

Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March on short selling and certain aspects of credit default swaps (the Regulation)[1] requires ESMA to develop draft regulatory (RTS) and implementing technical standards (ITS) in relation to several provisions contained in Articles 9, 11, 12 and 16 of the Regulation.

ESMA has consulted market participants on the proposed draft RTS and ITS through a public consultation launched on 24 January 2012 (Consultation Paper; ESMA/2012/30). The Securities and Markets Stakeholder Group (SMSG) established under the Regulation (EU) No 1095/2010 establishing the European Supervisory Authority (ESMA Regulation) was also requested to provide an opinion in accordance with Articles 10 and 15 of that regulation.

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ESMA has considered the feedback it received to the consultation in drafting these RTS and ITS in accordance with Articles 10 and 15 of the ESMA Regulation. This document sets out a summary of the responses received by ESMA and describes any material changes to the proposed technical standards. It also includes in the Annex II a cost-benefit analysis on which ESMA was not able to consult as explained in the consultation paper (ESMA/2012/30). Finally, it contains the final draft RTS and ITS to be submitted to the European Commission.

Next steps

The draft RTS and ITS will be submitted to the European Commission by 31 March 2012. The Commission has three months to decide whether to endorse ESMAs draft technical standards. A further regulatory technical standard, on the method of calculation of the fall in value of a financial instrument required under Article 24(8) of the Regulation will be submitted together with the technical advice in the course of April 2012.

[1] http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0486&language=EN#BKMD-12

II. Background

1. According to the Regulation, ESMA has to submit its technical standards to the Commission by 31 March 2012. Further to this, ESMA received a letter from the Commission on 24 November 2011 requesting to also provide an advice on all the delegated acts contained in the Regulation by the same deadline – 31 March 2012.

2. Taking into account the amount of work, complexity of the issues and the very tight deadlines, the process of preparing technical standards and drafting the advice on all delegated acts has been significantly compressed compared to normal ESMA practices. The most important differences compared to normal practices were the absence of a previous call for evidence (used normally to gather early views to help shape the legal proposals), the length of the consultation period (reduced to 3 weeks) and the absence of a cost-benefit analysis incorporated in the consultation paper on the draft technical standards. Nevertheless, it was possible to organise a roundtable with European and international associations representing the various stakeholders at the beginning of December in order to collect views on the approach to be taken in the main technical standards and delegated acts foreseen in the Regulation. Although the formal consultation period had closed, there was also a subsequent opportunity for interested parties to make comments on ESMA's proposals for draft technical standards at an open hearing held on 29 February.

3. The Regulation (EU) No 1095/2010 establishing the European Supervisory Authority (ESMA Regulation) empowered ESMA to develop draft regulatory and implementing technical standards where the European Parliament and the Council delegate power to the Commission to adopt regulatory standards by means of delegated acts under Article 290 TFEU or implementing acts under Article 291 TFEU.

4. Articles 10(1) and 15(1) of the ESMA Regulation state that before submitting draft technical standards to the Commission, ESMA shall conduct open public consultations on draft regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft technical standards concerned or in relation to the particular urgency of the matter.

5. The legislative mandate for ESMA to develop draft regulatory and implementing technical standards is provided in Annex I.

6. This document does not include the draft RTS on the method of calculation of the fall in value of a financial instrument required under Article 24(8) of the Regulation. Considering the interdependence with the provisions of a future Commission's delegated act on the definition of what is a significant fall in value of financial instruments other than liquid shares, these draft RTS will be delivered upon finalisation of the ESMA technical advice on delegated acts.

7. The following sections describe the changes made to the final draft RTS and ITS after considering comments received from the different interested parties. The final version of the draft technical standards is set out in Annexes III and IV.

III. Feedback from market participants and changes to the draft technical standards

8. Having considered the responses to the public consultation, ESMA clarifies below certain common issues raised by market participants. In this section ESMA also provides reasons for the changes made to the proposed draft technical standards after considering the comments and proposals and explains why certain market participants' suggestions were not followed.

9. ESMA wishes to clarify that the scope of the legislative mandate for drafting technical standards does not encompass the provisions relating to Buy-in procedures (Article 15 of the Regulation).

10. In addition, some comments or requests for changes received could not have been dealt with by ESMA in these technical standards as they relate directly to the scope of or the wording used in provisions of the Regulation itself. This is notably the case in relation to the scope of application of the reasonable expectation test for sovereign debt under Article 13 of the Regulation.

On the agreements, arrangements and measures that adequately ensure that the share or the sovereign debt will be available for settlement.

11. Many respondents to the consultation questioned ESMA's approach of seeking to draw up exhaustive lists of these types of agreements, arrangements and measures. However, given that the technical standards to be drafted in relation to the restrictions on uncovered short sales in shares or in sovereign debt (Articles 12 and 13 of the Regulation) are implementing (not regulatory) technical standards , ESMA has little flexibility as to the approach to adopt for specifying the types of agreements to borrow or other enforceable claims and the type of arrangements and measures that ensure that settlement can be effected when it is due as well as the third parties to these arrangements. Nevertheless, even though the exhaustive list approach is followed with the objective to specify an appropriate and stable framework through the ITS, ESMA has tried to provide sufficient flexibility to allow for innovation and the development of future arrangements provided that they meet specified conditions or to preclude entities from acting as third parties unless they fulfil specific criteria. This is the purpose of the revised articles 5(1)(f) and 8(1)(f) and (g) of the draft ITS. In addition, it should be noted that ESMA can keep the situation under review and, when needed, propose amendments to the technical standards.

12. There were also comments that securities lending and prime brokerage agreements had been missed out from the list. In fact, ESMA considers that these agreements are certainly contemplated to fall under the permissible borrowing agreements provided they meet the conditions set out in the draft technical standards, notably under letter f) of Article 5 of the draft ITS, which is designed in such a way to be future proof. In any case, it has to be highlighted, for the sake of maximum clarity, that a master lending agreement, typically covering the standard conditions applicable for a long timeframe and a wide range of possible securities, will hardly meet by itself the conditions of Article 5 letter f) unless it is complemented for each short sale with a specific confirmation or term sheet under that master agreement containing a specific number of a specific security and a specific execution or delivery date, meeting the conditions required by Article 5 letter f).

13. ESMA has amended the drafting of Article 6 of the ITS on arrangements and measures in relation to shares so as to clearly and unambiguously indicate the two-step nature of the process. In all cases here a locate confirmation is required before a short sale of shares can be undertaken. For liquid shares and for intra-day short selling, provided that an additional confirmation is obtained that a share is easy to borrow or to purchase; the shares need not be put on hold before the short sale.

However, where this confirmation cannot be provided and for all cases where the short sale concerns an illiquid share and the short selling will be for longer than an intra-day period, the shares must at least be put on hold.

14. With respect to the "Liquid Shares Locate Arrangements and Measures", ESMA remains mindful to provide clarity and certainty across Europe on the scope of the shares concerned, without creating additional complexity for investors through a new definition of liquid shares based on each individual third party assessment. Nevertheless, ESMA takes note that the MiFID definition of liquid shares might be too limited and therefore widens the scope to other shares under certain conditions to be fulfilled (constituent of a main national index and underlying of a derivative contract admitted to trading on a trading venue).

15. As regards the arrangements with third parties to be taken in relation to sovereign debt, various respondents to the consultation questioned whether the correct interpretation of Article 13. 1 (c) of the Regulation was that such an arrangement was necessary in order to provide a reasonable expectation that settlement can be effected when it is due. They considered that the reasonable expectation needed to be on the part of the short seller. However, this is another issue related to the interpretation of the Level 1 text rather than the drafting of the ITS themselves and as such not a matter for ESMA. Nevertheless, ESMA considers that the list of measures which would provide a reasonable expectation of timely settlement provided for in Article 7 of the draft ITS could be usefully complemented with additional situations brought to its attention by some responses to the consultation.

16. Some respondents proposed that the list of third parties provided in Article 8 of the draft ITS should explicitly refer to other types of entities. ESMA considers it is legitimate to refer specifically to investment firms, including retail services providers where relevant, as a specific type of third party with whom arrangements can be made given the activities they carry out. ESMA considers that it is not necessary to make specific references to other entities such as insurances companies, credit institutions or pension funds since their activities are not necessarily primarily related to securities business. However, ESMA emphasises that, even though not mentioned by name, such entities would fall under the category of third party defined under Article 8(1)(f) of the ITS provided they fulfil the criteria specified in that article. In relation to central securities depositories (CSDs) and International CSDs, ESMA confirms that it considers that both types of entities are within the scope of Article 8(1)(c) of the ITS as they are covered by the Settlement Finality Directive for their European activities

17. In relation to entities from third countries, ESMA has amended the draft ITS to clarify the conditions which they need to fulfil to fall under an eligible type of third party listed in the ITS.

18. Finally, many respondents expressed concerns about the fact that third party should be a distinct legal entity from the entity entering into the short sale. They argued that this would run counter to current practices, causing practical problems and entailing additional costs notably for the investors, and even increase the potential risks of settlement fails. However, while ESMA notes these comments, it considers that this issue is a matter of legal interpretation of the provision enshrined in the Regulation itself rather than one which can be resolved through the ITS.

On the details of the information on net short positions and the means for disclosure

19. ESMA notes that the transparency regime for net short positions set out in the Regulation foresees a notification requirement to the relevant competent authority both in relation to issuers of shares and sovereign issuers when the relevant thresholds are reached or exceeded or are crossed downward. The initial and incremental thresholds in relation to the issued share capital are defined in the Regulation whereas the initial and incremental thresholds for sovereign issuers will be defined in a delegated act to be adopted by the Commission and shall be expressed in Euro nominal amounts.

20. The disclosure to the public however applies only to net short positions relating to an issuer of shares. These disclosure thresholds are already defined in the Regulation. The drafting of Article 2 of the ITS has been amended in order to avoid misinterpretation of the net short positions on an issuer posted on the central website operated or supervised by the relevant competent authority that is available when accessing that website. Thus, ESMA has clarified that the information displayed should cover not only net short positions exceeding the publication thresholds but also those that reach them. In addition, ESMA believes it is not necessary to prescribe a specific file format for this information; the machine readable requirement set out in Article 2(d) of the ITS is sufficiently generic to cater for the use of existing and new technologies.

21. Some of the comments raised in the responses relate to topics that are of relevance for the technical advice on delegated acts ESMA should submit to the Commission rather than to these draft technical standards. The treatment of index ETFs with synthetic replication and the issue of currency conversion or whether notifications of net short position in sovereign debt issuers would be required when thresholds are crossed due to movements in exchanges rates are topics to be dealt in the advice on the method of calculation of net short positions. The concerns raised on who shall report and what positions are expected in relation to fund management and investment managers relate to the delegated act regarding specification of the method of calculating positions when different entities in a group have long or short positions or for fund management activities related to separate funds.

22. In relation to the details of the information to be provided in the net short position notification forms, some respondents questioned the need to include the field “date of previous notification”. ESMA considers that this field, that actually refers to the date of the last valid position reported (not a cancelled position), is necessary as it will be of assistance for supervisory purposes as well as for traceability of the reporting. In addition, ESMA considers that under the Regulation the duty to notify or disclose the net short position lies on the position holder. Therefore, all the information required for the notification should be provided by the position holder to the reporting entity when the position holder is not reporting directly to the competent authority.

23. For the information required on the identity of the position holder and, if relevant, of the reporting entity, ESMA recalls that they are not meant for authentication purposes. According to the Regulation, authentication is a matter for national competent authorities which may have their own specific requirements in that respect. The technical standards mandate prescribes only the details of the information to be provided in the notifications. The level of details set out in the draft RTS, including the contact details, notably the fax number, is considered necessary by ESMA for the competent authorities to be able to manage the errors in particular notifications or questions arising for supervisory purposes. When competent authorities have in place secure identification systems (that can be, among others, dedicated IT systems to submit regulated information in a secure

manner to the competent authority) that allow these competent authorities to identify precisely the sender of a notification and the full identity and contact details of the position holder, ESMA considers that it is not necessary to repeat all the information on the identity of the position holder, its contact details and the reporting person in each notification, provided this information can be obtained in full from the authentication systems in place.

24. For the sake of proper transparency to both the competent authorities and the public and in line with the disclosure of major shareholdings under the Transparency Directive[2], ESMA confirms that it is appropriate to use a 2 decimal points format for expressing the size of a net short position as a percentage of the issued share capital.

25. The use of the ISIN code for identifying in the notification form the issuer in relation to which the relevant position is held was widely supported. However, most respondents expressed a preference for the ISIN code of the main class of shares (usually ordinary shares) rather than for the one of the share class first admitted to trading which was argued to be potentially misleading and difficult and onerous to keep track of. ESMA has therefore modified the technical standard accordingly.

26. In relation to the identification of the issuers, responses frequently included a request to ESMA to publish and update regularly, if not daily, the full list of the issuers covered by the short selling regime, including the amount of the issued share capital or the outstanding debt of sovereign issuers and the relevant competent authority for notification purposes. ESMA would like to recall that the Regulation only requires ESMA to publish the list of exempted shares. In addition, the list of sovereign issuers will be made available to the public further to the requirement for ESMA to publish on its website the relevant notification threshold for each sovereign issuer according to Article 7(2) of the Regulation. For shares admitted to trading on a Regulated Market, ESMA notes that the information on the relevant competent authority for the purposes of the Regulation is already available in the MiFID database published on its website as, according to Article 2(1)(j)(v) of the Regulation, the definition of such an authority coincides with the definition of the relevant competent authority for a share under MiFID. Finally, under Article 15 of the Transparency Directive, issuers of shares are required to monthly update the information they disclose on their issued share capital. ESMA would expect that given the increased importance of the disclosure of the issued share capital, particular for the Regulation, national competent authorities will enhance their monitoring of the compliance with the issuers' disclosure requirements.

27. Finally, without questioning the proposed approach to use common formats for notification and cancellation of reported net short positions that has been widely supported by the respondents, the structure of the formats specified in Annex II and III of the RTS have been reorganised to facilitate their usability.

[2] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC

On the determination of the principal trading venue for the exemption pursuant to Article 16 of the Regulation

28. ESMA would like to recall that the turnover calculation for the determination of the principal venue applies on a per trading venue basis for a specific share and not on the overall turnover for that share irrespective of where it is traded.

29. ESMA welcomes the willingness expressed by operators of regulated markets to assist in the performance of the calculations for the determination of the principal venue. However, defining whether an agreement on compensation should be established to cover for the costs of performing such calculations is a matter for individual competent authorities and is not in the scope of these technical standards.

30. Some respondents to the consultation commented that the occurrence of a merger or acquisition could be added as a situation warranting an update of the list of exempted shares within the 2-year period. However, ESMA believes that there is no need to explicitly mention this situation as such scenarios are already covered in points a) and b) of Article 13(1) of the draft ITS.

On the information to be provided to ESMA by competent authorities

31. Further to some comments, the wording of Article 4(2) has been aligned with the one of Article 3(2) of the ITS, as ESMA intends to establish a system that would allow for exchanging the information to be provided by competent authorities both periodically and upon request.

32. Finally, to ensure alignment with the content of Article 4 of the RTS on the details of the information to be provided on a quarterly basis – as specified in the Regulation – to ESMA by competent authorities, Annex II of the ITS describing their format has been amended and now includes the “End of quarter aggregated net short position on other shares”.

Annex I

Legislative mandate to develop technical standards

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 (requires ESMA to develop draft regulatory and implementing technical standards in relation to several provisions.

Article 9(5) requires ESMA to develop draft regulatory technical standards specifying the details of information on net short positions to be notified to competent authorities and disclosed to the public, whereas Article 9(6) requires ESMA to develop draft implementing technical standards specifying the means by which information may be disclosed to the public.

Article 11(3) of the Regulation requires ESMA to develop draft regulatory technical standards specifying the details of the information to be provided to ESMA by competent authorities in a summary form on a quarterly basis on net short positions in shares and sovereign debt and the additional information which ESMA may request at any time from competent authorities.

Article 11(4) of the Regulation requires ESMA to develop draft implementing technical standards defining the format of information to be provided to ESMA by competent authorities.

Article 12(2) of the Regulation requires ESMA to develop draft implementing technical standards to determine the types of agreements, arrangements and measures that adequately ensure that the shares will be available for settlement whereas Article 13(5) of the Regulation relates to draft implementing technical standards on the types of agreements or arrangements that adequately ensure that the sovereign debt will be available for settlement.

Article 16(3) requires ESMA to develop draft regulatory technical standards specifying the method for calculation of the turnover to determine the principal venue for the trading of a share, and Article 16(4) requires ESMA to develop implementing technical standards to determine:

a. the date on which and period in respect of which any calculations determining the principal trading venue for a share is to be made;

b. the date by which the relevant competent authority shall notify ESMA of those shares for which the principal trading venue is outside the Union;

c. the date from which the list is to be effective following publication by ESMA.

Annex II

Cost-benefit analysis on draft technical standards relating to the Regulation on short selling and certain aspects of credit default swaps

Summary of the Analysis

1 This summary describes the main benefits and costs that have been identified.

2 The technical standards (TS) on settlement arrangements — by setting standards on evidencing — should reinforce contractual relationships and enhance confidence in the market. Increased investor confidence could create higher levels of investor participation in the market, improving liquidity and price discovery.

3 The estimated cost of evidence gathering varies significantly depending what part of the activity is covered under market making, what type of systems are used to gather evidence and what proportion of the activity is captured in the future MiFID regime, where custody and related services would become covered by the MiFID record-keeping requirements. We estimate that it could range from €2.2 million in total per annum to as much as €18–€47 million per annum.

4 The TS on the disclosure of net short positions harmonises the rules on information in terms of content and publication. Investors would therefore benefit from not having to familiarise themselves with different disclosure formats: the key benefit of this approach (within the context of what the Regulation is doing) is in not creating additional market frictions — indeed, relative to the current situation it is reducing them — and so maintaining global investor interest in European capital markets. The standard information requirements as set out under the TS will have the effect of harmonising the content of information that position holders will be required to disclose to Competent Authorities as well as their format. Such a "single rulebook" approach should be particularly of benefit to firms operating cross-border and non-EU firms. We did not identify a non-negligible cost driven by the TS *per se* separable from the Regulation.

5 The TS related to calculations of the principal trading venues of equities establishes the conditions for a dynamic list of exempted equity securities. The main benefits here are that the global investment community beyond the EU would avoid being caught unnecessarily by the Regulation and that EU-based broking and investment firms are not at a disadvantage to their competitors outside the EU when trading in the shares of firms where the PTV is outside EU.

6 The costs of data retrieval on non-EU stocks and of data analysis by the Competent Authorities may be non-trivial due to comparability issues and currency translation but should otherwise be capable of some automation. Provided that the information on exempted shares is publicly available in an appropriate machine-readable protocol then this could be incorporated into firms' trading systems in a fairly straightforward manner. However this does not mean that no costs would be incurred: we estimate a one-off cost of €0.2–€1.1 million would be incurred. This spending on adapting systems should mean that the on-going costs of flagging what is on the exempt list are negligible (since compliance would be integrated into the system).

7 The summary tables below provide an overview of our estimates.

Table 1: Potential Costs of the Technical Standards

Provision	Cost driver	Nature of cost	Bearer of cost	Lower bound	Upper bound
Settlement arrangements	The definition of illiquid shares	On-going	Industry	Not quantified	Not quantified
	Evidencing requirements	One-off	Third parties	€0.8 million	€2.5 million
		On-going	Third parties	€18 million	€47 million
Information disclosure	No non-negligible cost (over and above Regulation) identified				
Principal trading venue	Identification of the relevant Competent Authority	One-off and on-going	Competent Authorities	Not quantified (not trivial in one Member State)	Not quantified (not trivial in one Member State)
	Data collection and analysis	One-off and on-going	Competent Authorities and trading venues	Data = not quantified; Analysis = trivial	Data = not quantified; Analysis = trivial
	Notification to ESMA and publication of the list	One-off	Industry	€0.2m	€1.1m
	Notification to ESMA and publication of the list	On-going	Industry	Not quantified (trivial)	Not quantified (trivial)

Table 2: Potential Benefits of the Technical Standards

Provision	Benefit driver	Nature of benefit	Beneficiary	Lower bound	Upper bound
Settlement arrangements	Use of exhaustive lists as opposed to criteria (net of costs of the former approach)	One-off	Industry	€0.4 million	€1.1 million
	Evidencing requirements	On-going	Industry	Not quantified	Not quantified
	Evidencing requirements	On-going	Competent Authorities	Not quantified	Not quantified
Information disclosure	Single Rule book	One-off and on-going	Industry	Not quantified	Not quantified
	Harmonisation of information to be publicly disclosed	On-going	Investors	Not quantified	Not quantified
Principal trading venue	Dynamic list should aid global investment community and level-playing field within EU	On-going	Investors	Not quantified	Not quantified

Estimates of the administrative burden as defined by the Standard Cost Model are at Section 3.

1 Context and the Counterfactual

Introduction

1. The aim of this study is to assess the expected costs and benefits of ESMA's proposed technical standards relating to the Regulation of the European Parliament and of the Council on short selling and certain aspects of credit default swaps (the Regulation). This section sets out the context and baseline scenario for our analysis. The incremental impacts of the proposed technical standards (as set out in the Public Consultation[3]) will be assessed against this baseline.

2. In principle, since the focus of the analysis is the incremental impact of the technical standards (rather than the expected costs and benefits of the Regulation itself[4]) the appropriate baseline scenario would be the least stringent standards possible for the regulation to be implemented. The incremental costs of ESMA's proposed technical standards would then be assessed against these. In practice however, this would be an overly complex task given the lack of available data and the uncertainty surrounding any analysis of what the "least stringent" standards would be. Thus, given the risks that such an approach would give rise to obfuscating the overall results, our description of the baseline scenario as set out here is based on an analysis of the existing status quo (i.e. in the absence of a European regulation on short selling).

3. Further, given the lack of available data, the focus of the analysis that follows is focused mainly on the current nature and scope of market participants and their relevant activities rather than on expected future developments.

Nature and Scale of Short Selling in the EU

4. Short selling is a trading strategy whereby the investor is selling a security that he does not own at the time of entering into the sale, hence betting on the price of an asset to fall. Effectively the investor sells an asset that he/she will buy at some point in the future. If the price of the asset falls below the point at which the investor sells the asset, he/she will benefit from the difference. If the price increases, the short seller will experience a corresponding loss.

5. There are two principal types of short selling:

    a. Covered short selling — whereby the seller has ensured that he/she can actually deliver the assets when necessary to complete the transaction, by borrowing them before the sale occurs; and

    b. Naked short selling — whereby the seller does not borrow the assets in which he/she has taken a short position. Since under a naked strategy the investor has not actually borrowed the required assets in advance there is a greater risk that he/she will be unable to fulfil their obligations. This might result in settlement failure.

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3 Available at: http://www.esma.europa.eu/system/files/2012-30_0.pdf

4 "Commission Staff Working Document Impact Assessment: Accompanying document to the Proposal for a Regulation Of The European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps", COM(2010) 482 final, SEC(2010) 1056, 15th September 2010.

6. There are a variety of tools that can be used to initiate a short position, but effectively a short seller can either borrow the required stock or simply "locate" it. In general terms a locate simply allows the short seller to ascertain whether it will be possible to borrow or purchase the required financial instruments in time to settle the sell transaction[5]. Since borrowing shares ex ante tends to be costly, currently the most common method of initiating a short position involves a locate agreement.

7. When an asset is considered to be liquid the short seller will simply locate the required assets, whilst if the asset is considered illiquid or difficult to borrow it may also be put on hold. Currently, securities lending associations estimate that approximately 2,000 to 2,500 shares[6] could be considered liquid for the purposes of borrowing. According to some estimates, on average, around one to two per cent of the locates will be on illiquid assets which need to be put on hold. Not all locates do necessarily turn into trades, however. Some feedback from industry suggests that only about 5 per cent of locate requests to a particular participant will actually turn into trades. There is, however, a lack of official data on lending and data obtained from lending firms or intermediaries, which hold clear interests in this market, should be just one input in the analysis.

8. The Regulation relates to short selling in shares whose principal trading venue (PTV) is in the EU, not short selling activity in the EU per se, but given the data limitations here we use EU short selling in the EU as a proxy. Whilst this approach has its limitations, e.g. it might over-state short selling activity that would potentially be affected, as it will include trades in assets whose PTV is outside the EU, or it may underestimate by excluding short positions taken by those outside the EU in assets whose PTV is within the EU, it is the most practicable avenue to explore.

9. Publically available data on short selling activity in Europe are limited. As a result data on the value of securities lending as a percentage of market capitalisation are sometimes used as a proxy for short selling stock lending. It is important to state that in some countries this may offer a poor proxy as securities lending statistics may themselves vary in quality from country to country and, of course, not all securities lending is conducted for short selling purposes, a significant part of securities lending may occur to address settlement problems and coupon/dividend washing — the incidence of which may again be highly country-specific. Notwithstanding this, data cited in the European Commission's Impact Assessment report for the UK suggests that securities lending in the UK averaged between one and three per cent of market capitalisation between August 2006 and August 2009. The Commission also cited data from Spain which suggested short selling activity in shares amounted to approximately 1.4 per cent of trades in 2009 which accounted for 6.47 per cent of the value of total trades in the same year.

10. Data from national Competent Authorities on disclosure regimes indicate large differences in the likely scale of net short positions across different markets. The average number of monthly notifications in countries where disclosure regimes are applied to all listed stocks on the main exchange (including Spain, France, Portugal and Greece) differ markedly. For example, since their introduction, there have been an average of 371 notifications made per month in France compared with 192 in Spain and 8-9 in Greece. Such differences are not trivially related to the relative importance of these markets.

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5 To note under the Regulation, locate has a specific meaning; it relates to the fact that the third party considers it can make share or sovereign debt available for settlement when it is due.

6 This range was provided by a number of industry sources and is supported by estimates constructed by ISLA and presented in their joint response to the Consultation. The ISLA methodology, which defines a share as liquid if borrowing availability exceeds 50% of the 30 day average daily traded volume (ADTV), identifies 2183 shares as being liquid at the time of their analysis.

11. As set out in the European Commission's Impact Assessment report, there are a number of reasons for which market participants may engage in the activity, including:

    a. Speculation: Some short positions are taken for the purpose of speculation, i.e. taking a short position in a stock in anticipation that its price will fall and then purchasing the stock back at a lower price.

    b. Hedging: Many investors use short positions as a means of hedging — i.e. protecting long positions with offsetting short positions.

    c. Arbitrage: Some short positions are taken to benefit from market inefficiencies (e.g. from mispricing), e.g. to profit from a price differential by taking both a long and a short position in two different but related shares.

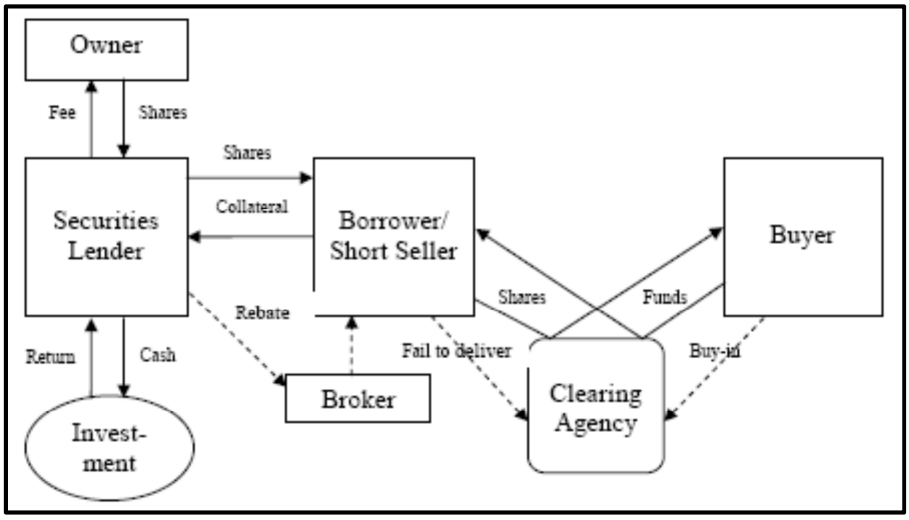
    d. Market making: Some short positions are created (providing therefore liquidity to the market) when securities are not immediately available. Short positions by market makers in equity markets are typically transitory (covered each trading day at the latest) and do not require a locate or pre-borrow. Market makers in derivatives markets use shorts to hedge: for example, if an options market maker buys a call or sells a put, he can offset the position by going short in the equity market.

12. Under the Regulation market making activities are exempt from the main obligations it contains.

Key Stakeholders

13. Given the nature of a short sale there are usually several parties involved in the process, as illustrated in Figure 1.1 below. These include the securities lender, the short seller, the broker who arranges the lending agreement for the short seller with the lender, the buyer and the clearing agency through which the transaction occurs. The short seller could be, for example, a hedge fund, a bank engaging in proprietary trading or a market maker. All stakeholders need to be considered in order to assess the potential impact the technical standards would have on their business.

Figure 1.1: Equity Loan and Short Selling Structure



Source: Gruenewald, S., Wagner, A. F., and Weber, R. H. (2009), "Short Selling Regulation after the Financial Crisis – First Principles Revisited", Swiss Finance Institute, Research Paper Series, No. 09-28, p. 5.

Short sellers

14. We adopted two approaches in considering the total population of short sellers. First, we considered the data available on the number of position holders that had notified Competent Authorities of their positions under existing disclosure regimes. Data from Belgium, France, Germany, Greece, the Netherlands, Portugal, Spain and the UK were available for this analysis. The highest number of position holders in any one country was 245 in France. The total across all eight countries was 585 — there would of course be duplicates in the latter figure. On the other hand, there may be country-specific position takers in locations without a disclosure regime (e.g. Sweden) or where there is such a regime but we lack data. The disclosure limits in the UK are higher than will be in place under the Regulation and apply only to financials (it is possible that, in the UK, Germany and the Netherlands — where disclosure only currently applies to the Financials sector — that some short sellers have switched to other sectors). Some position takers may simply not have held a large position during the recent past. There are therefore a number of imponderables and we sought an alternative sense check to these data.

15. To this end, we note that hedge funds are estimated to account for the vast majority (approximately 80 per cent) of (non-market making) short selling activity[7]. According to Eurohedge there were around 1220 Europe-based hedge funds at the close of 2010. (A large majority — 69 per cent, with another 8 per cent in the Channel Islands — of these European-based hedge funds are based in the UK.)

16. In addition, there are 82 EU-dedicated hedge funds based in North America (Eurekahedge). This gives over 1300 as the minimum number of hedge funds interested in EU capital markets.

17. Globally, long-short and event driven strategies (which we take as the most relevant) account for 42 per cent of assets under management (Eurohedge). If we assume that the number of firms affected is a similar proportion of the total then this gives about 550 as our estimate of the hedge funds affected. If this is indeed 80 per cent of the total number of position holders this implies a total of about 690. On the other hand, if we take into account all hedge funds with a global focus (which obviously might include the EU) the same approach would generate an estimate of about 2000 potential short sellers.

18. Looking at the evidence together we have adopted a range of 300 to 800 as our population estimate. As such it may underestimate the global population. However we believe that our range is a reasonable basis for our analysis.

19. Data from International Financial Services London (IFSL) on the composition of institutional investors by investor type show that fund of funds, public pension funds, endowment plans and private pension funds are the key types of institutional investors accounting for 24 per cent, 17 per cent, 14 per cent and 14 per cent respectively of the total capital sources from institutional investors in 2009.

[7] Estimate based on feedback from market participants and obtained by ESMA from external consultants (i.e. Europe Economics).

Prime Brokers

20. Prime brokers offer professional services to hedge funds and other professional investors and are typically part of investment banks and securities firms. Currently in the EU there are between 15 and 20 prime brokers of which, we estimate, around 12 to 15 are part of global investment banks[8].

21. Recent data from Eurekahedge suggest that the market share of leading prime broker service providers to European hedge funds have been growing at the expense of prime brokers listed as 'others' (i.e. those that are not identified as market leading providers of these services)[9]. Indeed, the market share of 'other' (i.e. outside the top 10) providers in 2010 was approximately eight per cent compared with approximately 32 per cent in 2008. According to Eurekahedge this trend is interpreted as a move towards quality service providers in the wake of the financial crisis. This indicates that it will be the larger providers of prime broker services that are more likely to be affected by the Regulation on short selling. However, the size and cross-country reach of these larger providers may mean that the relative costs and benefits incurred as a result of the implementing standards will differ significantly across smaller and larger providers of prime brokerage services.

Table 1.1: Summary Table of "Third Parties" in the EU according to ITS

	Number of Firms
Investment firms executing trades (IF)	2541
Central counterparties	12
Securities settlement systems	40
Central banks	28
National debt management entity	27
Securities lenders	1000
Prime brokers(PB)	15
Total Third Parties	**3663**

Source: data on the number of investment firms executing trades are taken from a MiFID Review report by Europe Economics, data on central counterparty numbers and securities settlement systems come from the European Central Bank, and the estimated number of securities lenders was provided by ISLA and relates to 2009. We have assumed that each of the 27 EU Member States has a national debt management agency and our figures for prime brokers are based on feedback from industry.

Existing Regulation on Short Selling

22. At present, in the absence of action at the EU level, regulations on short selling, both in terms of short selling bans and disclosure rules on short positions have been implemented in some Member States. However, where rules have been imposed these are far from harmonised – differing both in nature and in scope. Below, we discuss the nature and scope of any disclosure rules and short selling bans in individual Member States.

23. At present, there are a number of disclosure rules on short positions at the national level.

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8 Based on feedback from industry.

9 Eurekahedge (July 2010), "2010 Key Trends in European Hedge Funds".

24. Table 1.2 below provides a summary of the current disclosure rules that apply at the national level, in particular:

    a. whether any disclosure rules on net short positions apply at present;

    b. the scope of financial instruments covered by the disclosure rules;

    c. the thresholds applied;

    d. the number of notifications received; and

    e. the number of position holders from which notifications have been received.

25. The information on national disclosure regimes set out in the table below suggests that short selling disclosure regimes are applied in only a third of EU Member States.

26. Where disclosure regimes have been implemented, while the scope of the regime (i.e. in terms of the number and types of financial instruments included) differs, in most cases the thresholds applied are similar, if not identical. In most cases, net short positions at or in excess of 0.20-0.25 per cent of issued share capital must be disclosed with further disclosure at increments of 0.1 per cent also required. The exception appears to be Greece where the disclosure threshold applied to all stocks is 0.1 per cent.

27. With regard to differences in the scope of disclosure regimes (i.e. in terms of the types of stocks covered), half of the Member States with a disclosure regime for shares covers all shares listed in domestic markets. Where specific stocks are singled out, information received from national competent authorities to date indicates that these are typically stocks in financial institutions.

Table 1.2: Disclosure rules across EU Member States

Member State	Disclosure rules on short positions?	Scope of stocks covered	Thresholds applied	No. of notifications received	No. of position holders from which notifications have been received
Austria					
Belgium	✓	Limited to 4 Belgian financial institutions	A net short position that represents an excess of 0.25% of share capital (and, thereafter, any incremental of 0.01%) must be reported to FSMA	397 (since September 2008)	11 (since September 2008)
Bulgaria					
Cyprus					
Czech Republic					
Denmark					
Estonia					
France	✓	All shares listed in French regulated markets or MTF's	A net short position of 0.2%, 0.3%, 0.4% of the capital of a company Incremental of 0.1% apply	3813 (since February 2011) – equivalent to approximately 371 per month on average	245 (since February 2011)
Finland					
Germany	✓	10 German financial stocks	All net short positions that exceed 0.2% of issues share capital with disclosure at increments of 0.1% required.	468 (since March 2010)	70 (since March 2010)

Greece	✓	All shares listed in the Athens Exchange	All net short positions that exceed 0.1% of issues share capital	335 (since September 2008) – approximately 8/9 per month on average	16 (since September 2008)
Hungary					
Ireland					
Italy	✓				
Luxembourg					
Lithuania					
Latvia					
Malta					
Netherlands	✓	All Dutch financial institutions	Net short positions which exceed 0.25% of share capital with increments of 0.1% applied.	133 (since September 2008) – approximately 3 per month on average	22
Poland					
Portugal	✓	All shares listed in Portuguese regulated markets or MTF's	Short positions representing 0.2% of issued capital are notified to the CMVM, and positions of 0.5% or more are notified to the market. In both cases, the incremental levels are 0.1%.	20 (monthly average since October 2010)	49
Romania					

Spain	✓	All shares listed in regulated markets	A net short position representing 0.2% of share capital must be notified to CNMV. CNMV notifies the public (via website) of short positions of 0.5% or more. Increments of 0.1% over the 0.2% threshold apply	3076 (since Oct 2010) — approximately 192 per month on average	152 (since October 2010)
Slovenia					
Slovakia					
Sweden					
United Kingdom	✓	Financial sector companies as well as those companies conducting rights issues.	For companies conducting rights issues – one-off disclose is required for net short positions at or above 0.25 per cent of the issues share capital of the country. For UK financial sector companies, disclosure is required for net short positions at or above 0.5 per cent of issues share capital. Additional disclosers are necessary at increments of 0.35 %, 0.45% and 0.55% and each 1% after that.	21 (average per month)	20 different position holders making disclosures.

28. Aside from national disclosure regimes in the EU, other regulatory changes have and continue to influence market participants' behaviour. For example Basel 2.5 for the Trading Book, as well as the increased requirements anticipated generally under Basel 3 have led many large firms to start to re-consider the role of proprietary trading. AIFMD has also brought hedge funds more into the light, and is likely to have increased the emphasis on their internal compliance function.

29. Internationally, developments in the USA have also stimulated changes in EU firms. The forthcoming application of the so called Volcker rule (assuming that this is in fact enacted) under the Dodd-Frank Act Financial Reform Bill in the USA, which would prevent FDIC-backed financial institutions from engaging in proprietary trading, has resulted in a number of large financial institutions already separating off their proprietary trading activities.

2 Mechanisms of Economic Effect and Cost-benefit Analysis

Introduction

30. ESMA pursues sound evidence and robust cost-benefit analysis on draft technical standards relating to the Regulation on short selling and certain aspects of credit default swaps (CDS).

31. Broadly speaking the technical standards relate to:

    a. The determination of what agreements, arrangements and measures would be required to ensure a "reasonable expectation of settlement" of shares and adequately ensure sovereigns will be available for settlement.

    b. The notification and disclosure of net short positions.

    c. The method for calculating a turnover indicator to identify principal trading venues (including the associated dates and periods).

32. Below we take each of the themes in turn present our analysis of the mechanisms of economic effect for both the costs and the benefits.

2.1 Agreements, Arrangements and Measures to Ensure Settlement

Potential costs

33. The requirements in relation to agreements, arrangements and measures to ensure settlement (articles 5 to 8 of the ITS) have the potential to create certain costs over and above those implied by the Regulation. The main drivers of these costs, which are discussed in turn below, are:

    a. The lists of appropriate approaches to borrowing, appropriate locate arrangements and measures, and of the types of entities that can act as a third party[10].

[10] Under the Regulation ESMA was not required, and legally is not in a position, to clarify what constitutes a third party beyond what types of entities may be considered. For completeness we note that the requirement for a third party to be a separate legal entity may create significant costs for the industry, although these are not considered in the impact assessment since they arise from the Level 1 text and not from technical standards. For example, if large financial institutions have to separate off their broke

b. The definition of illiquid shares in the provisions on locate agreements.

c. The requirements to save proof that appropriate measures to ensure settlement were taken.

The lists of appropriate approaches to borrowing, locate arrangements and measures, and types of third party

34. The Regulation requires ESMA to develop draft Implementing Technical Standards (ITS) to determine the types of agreements, arrangements and measures that adequately ensure that the required assets will be available for settlement (see Article 12 (2)[11] and Article 13 (5)[12]).

35. An exhaustive list of approaches to borrowing is provided in the ITS as is a detailed description of what is required for a locate arrangement for different types of assets. The ITS also include an exhaustive list of the types of institutions/organisations that would qualify as a third party.

36. Exhaustive lists can create unintended consequences if not carefully constructed. One potential risk of including an exhaustive list in a regulatory context is that is can potentially limit innovation in the market. Since only those tools included are permitted there is little incentive for participants to develop alternative methods. Similarly such an approach could encourage regulatory get-arounds, by creating stronger incentives to develop methods that bypass the locate requirement altogether.

37. Moreover if the list omits viable alternatives this could potentially result in unforeseen costs. For example, if any borrowing approaches were missing from Article 5 of the ITS that are currently used by the market (and were not intentionally excluded to alter market behaviour) there may be unintended costs to investors from being forced to switch away from their preferred methods of borrowing/covering a short position. Forcing investors to adopt alternative methods of covering a short sale would adversely affect the efficiency of the market.

38. In terms of the list of borrowing approaches, the inclusion of provision (f) in Article 5 the ITS, which specifies other claims or agreements leading to physical exchanges or delivery of the shares or sovereign debt, should capture most unspecified situations and, as such, minimise the risk outlined above. The inclusion of Article 8 (f) and (g), which covers any other person subject to authorisation or registration requirements in accordance with Union Law or and, in case of persons established in a third country is, among others, subject to supervision by an authority in that third country, should allow any new institutional structures to be covered by the regulation and ensure that the rules remain future-proof.

39. The exact cost at a firm level will come from two sources: 1) the need to clarify if the agreements and measures they use comply with the requirements in the regulation and 2) the need to ensure that any subsequent changes to those agreements and measures continue to be compliant with the

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age activities some estimates on the cost to industry are between €24 million and €45 million. If locate arrangements are instead to be handled by another third party, such as a securities lender, the on-going per annum cost to industry could be in the range of €6.6 million to €22 million.

[11] "ESMA shall develop draft implementing technical standards to determine the types of agreements, arrangements and measures that adequately ensure that the share will be available for settlement"

[12] "ESMA may develop draft implementing technical standards to determine the types of agreements or arrangements that adequately ensure that the sovereign debt will be available for settlement"

regulation. This will depend on the size of the firm, the specific measures or arrangements used and the relevance of the possible changes: we would not expect all firms to invest the same amount of resources in clarifying what is included under the provisions. In any case, although some approaches to these estimates have been obtained by ESMA from external consultants, we are not in a position to estimate these with enough accuracy.

The definition of illiquid shares

40. Short sellers, such as hedge funds, will tend to contact a number of brokers to locate assets that they may wish to go short on. Obviously, the number of locates far exceeds the number of trades that actually occur. Views from industry participants indicate that, while actual conversion rates vary by company type, on average only around five per cent of locates actually turn into trades. This is based on feedback from industry participants interviewed as part of the research for the analysis and is not supported by evidence, so it should be taken with care, as a mere estimate. Based on the ITS a locate would not be sufficient for illiquid shares — in the case of illiquid shares they must also be put on hold.

41. As described earlier in the event that a share is hard to find or considered to be relatively illiquid, a broker will often put the stock on hold. As such the locate requirements on illiquid shares set out in the ITS themselves would not necessarily alter behaviour dramatically. What is potentially an issue is the definition of an illiquid share.

42. According to the ITS the MiFID list of liquid shares would be used to determine whether a share needs to be put on hold or not prior to a short position being taken. The number of liquid shares according to the MiFID list is 785. Feedback from some stakeholders would suggest that for the purposes of short selling covered through borrowing agreements this figure should be somewhere around 2,000-2,500. It is not possible to ascertain this estimate since there are no official statistics or data gathering on securities lending across the EU. The use of the MiFID list, according to some industry participants, would result in 60 to 70 per cent of locates requiring the shares to be put on hold, in contrast to the one to two per cent of locates currently requiring holds to be placed on them (same estimates, not based on official data). Whilst an imperfect proxy, this is supported by the fact that only 40 per cent of cash transactions in value terms are in the liquid shares as defined by the MiFID list. Use of the MiFID list to define the liquidity of equities for the short selling regulation would, obviously, change market practice (though probably most options arising from the Regulation's requirement would) and it could have an effect on liquidity of the lending market and, eventually, on increased transaction costs.

43. In the absence of any clear idea of how the costs of the additional holds might be passed through to short sellers it is difficult to estimate the costs of this provision. However, they are likely to be significant.

44. Industry participants have suggested that one response might be for agent lenders and owners to either hold a daily auction or force the third party who has reserved the stock into physically borrowing the shares. If auctions are used the cost of a narrow list of liquid shares would equate to the cost of engaging a hold on shares that would currently be considered liquid.

45. When agent lenders and owners force the third party to borrow the shares the process is called a "fill or kill", i.e. the borrower has to either trade the shares or let the hold lapse. The third party will at this stage not know whether or not their client will in fact decide to go short, and so if they err on the side of caution they will have to convert the hold into a physical borrow. This will lead to

an increase in borrowed shares, pushing up banks' balance sheet and capital usage as the lack of a sale on the other side means that they need to collateralise the borrow. These costs should in turn be passed on to the short sellers[13].

Evidencing arrangements

46. The ITS requirements on the retention of proof that arrangements have been put in place to ensure settlement, also create potential costs for investors.

47. Data on the ways in which investors cover their short positions currently are not available. However, based on feedback from industry, locate arrangements seem to be the most commonly used approach[14]. Securities lenders provide daily information on availability to brokers. Brokers then provide locates to their clients on those shares they deem to be sufficiently liquid. If the share is considered illiquid or difficult to get the broker would then approach securities lenders to identify if the assets are available. Once located the assets will be put on hold and eventually borrowed if the trade goes ahead. Covering a short position via borrowing approaches is substantially more expensive than using locate agreements.

48. A key driver of these costs would be the need to install systems to allow appropriate records of these locates to be made. The ITS does not impose a specific record keeping obligation nor does it prescribe a way to achieve the ultimate requirement of being able to obtain evidence that the locate confirmation was received on time (as the Regulation requires). Neither do they require records to be kept on a specific format or media as long as it is a durable one. Several ways of obtaining that type of evidence (fax, email, phone recording, electronic messages, etc.) could be used and the provisions are quite flexible on this aspect. This would work in the direction of allowing each firm to use the most efficient system for this end and not having to adapt any pre-existing systems to any new standards, since telephone recording is not mandated if other systems allow for a durable record of the confirmations received.

49. While some of the large financial institutions appear to have already installed the necessary systems, in general, it is not currently common practice for prime brokers and securities lenders to provide formal confirmation of a locate. In many cases contractual agreements between parties act as evidence that their word is good.

50. In many large financial institutions, fixed line telephony recording exists to support certain activities (e.g. MiFID instruments trading). Recording of other media is more ad hoc. However, there could be costs associated with extending telephony recording systems for this purpose. These would represent one-off set up costs. This could also create a need for further staff training, both one-off and on-going. Such costs could be more significant for third parties such as securities lenders where record keeping more generally is less ingrained.

51. Aside from this, we might expect various IT costs and training costs associated with the establishment of a mechanism for storing the records. This would not necessarily require the installation of a new centralised system, but as a minimum would need to ensure that the records could all be accessed from one point. One-off and on-going legal advice would also be required to ensure that the

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[13] As a general rule, in a competitive market, increases in operating costs will be passed through to customers.

[14] This is based on the feedback from stakeholder interviews conducted by Europe Economics with industry participants and trade bodies and the responses to ESMA's consultation.

investor has fulfilled their responsibilities in all potential jurisdictions of interest, as well as one-off and on-going staff training would ensure that staff is up to date with the relevant requirements.

52. These all represent incremental compliance and administrative costs. The scale would depend on the firms' existing compliance function. To this end smaller third parties might be proportionately more affected by such costs.

53. Prime brokers are likely to have substantial reporting systems already in place (or at least the infrastructure to create the necessary systems relatively costlessly) — particularly if, as most prime brokers are, they are part of a large financial institution. The incremental costs (both one-off and on-going) of having to save evidence of a locate to provide to the short seller are likely to be negligible. Moreover, the vast majority of large financial institutions have already spun off their proprietary trading business and short selling activity by proprietary traders appears to be limited anyway. As such, the demands in terms of the reporting requirements on non-prime broker third parties, such as securities lenders, who may be used by financial institutions instead of their own prime brokerage desk, would be likely to be modest.

54. At the very most we estimate this would cost all non-prime broker third parties[15] across the EU27 around €2.2 million in total per annum. This is based on the assumption that no new IT systems are required but simply some additional man-power to handle the position reporting.

55. If, however, we assume that all prime broker activity within large financial institutions falls under the regulation, the implications of the reporting requirements for the industry are likely to be more pronounced. Such a situation could lead to large financial institutions separating off their prime brokerage activities. If they do not, and prime brokers must rely more heavily on external third parties, such as securities lenders, to provide locates to their clients there could be significant cost implications for these external third parties.

56. We estimate that the total one-off cost of installing the necessary systems to meet the reporting requirements in this instance could range from €0.8 million to €2.5 million for all non-prime broker third parties in the EU27. In the extreme assumption that the all firms had to implement brand new telephone recording systems (which are significantly more expensive than systems based on electronic messages or email), on-going costs for all non-prime brokers in the EU27 could range from €18 million per annum at the lower end, potentially rising as high as €47 million per annum at the upper bound. Clearly the cost could be even higher since non-EU domiciled companies would also be affected. In any case, when analysing these costs, we should consider that the proposals on the MIFID review that are currently being negotiated by the EU legislators already foresee that custodianship and related services will be considered (for the first time) investment services. If this is finally implemented, securities lending processes may well fall under the MIFID requirements for record keeping, that currently affect to all "MiFID-instruments" transactions. If this is the case, any cost related to saving confirmations will be subsumed in the general MiFID record keeping requirements and should probably not be considered as an on-going cost beyond that point.

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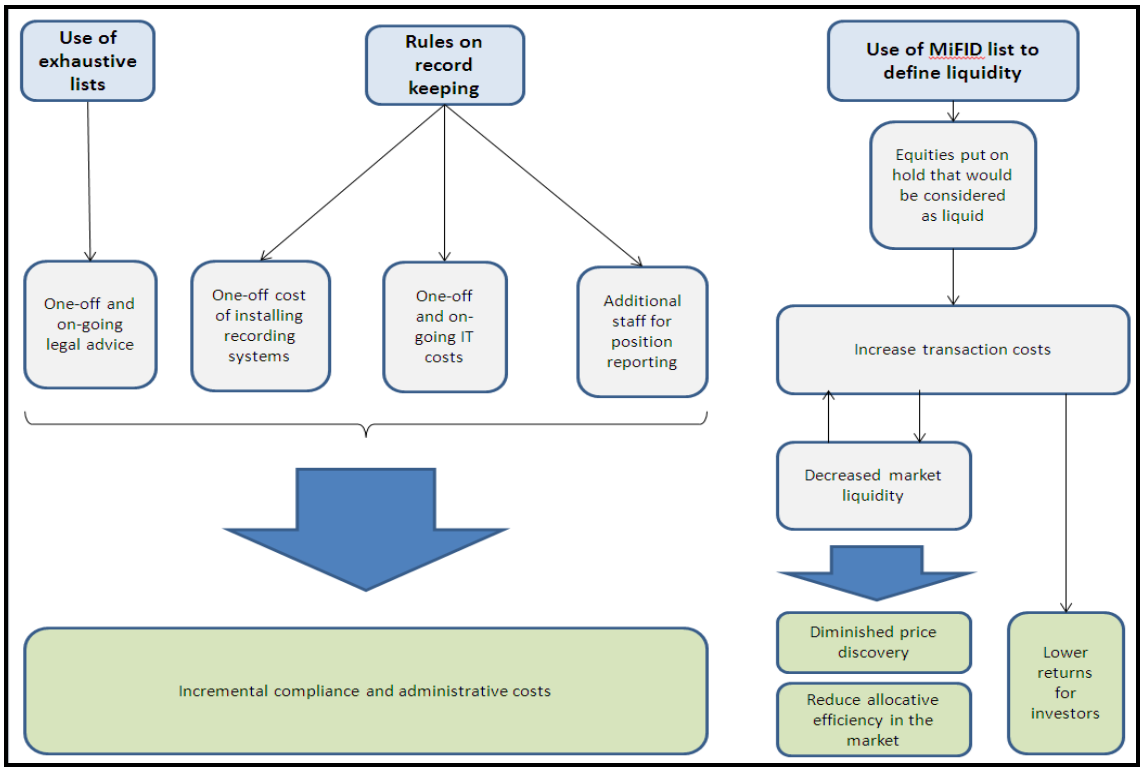
[15] Non-prime broker third parties have been defined here as: trading venues (MTF and regulated markets), central counterparties, securities settlement systems, central banks, national debt management entity and securities lenders, as presented in the ITS. We have excluded from our calculations investment firms, because aside from those with prime broker facilities we feel that they are not relevant in this context of short selling. We obviously do not preclude the possibility that such investment firms may engage in third party activities in short sales in the future, however, this would imply that the costs of entering the market, i.e. installing the necessary reporting systems, would be outweighed by the potential profits they would earn, and as such are not relevant here.

57. These potential costs and their economic impacts are illustrated in the diagram below.

Figure 2.1.1: Potential Costs of the Settlement Rules



Potential benefits

58. The overarching benefit of restricting naked short selling is the reduction in the risk of settlement failure, reduction of volatility in extreme market conditions, avoidance of self-fulfilling phenomena and a more reliable picture of the supply side of the order book. According to the EC Impact Assessment report settlement failures linked to naked short selling are believed to be small[16]. That said, evidence from the USA suggests that requirements on covering short sales can have a substantial effect on reducing settlement failures[17]. A reduction in the settlement risk should reduce transaction costs.

59. The benefits of banning naked short selling (at least of non-market makers) can be attributed to the Regulation itself. On the other hand, a key benefit of the ITS derives from the use of exhaustive lists to define the approved approaches to borrowing and types of third parties. As opposed to providing criteria, exhaustive lists offer clarity to stakeholders and reduce the potential costs associated with clarifying what approaches can be used for covering short positions.

60. The main benefit on evidencing arrangements is to allow the investors to show evidence that they followed the Regulation's requirements and ensure legal certainty for them when conducting short

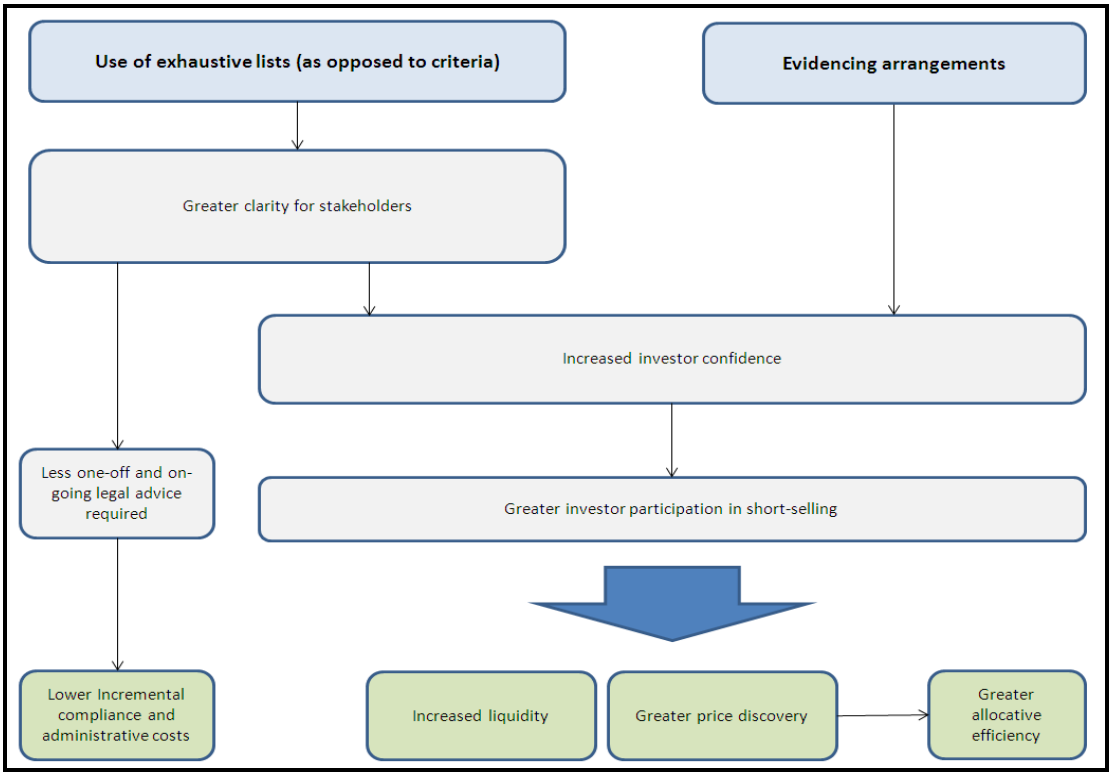
16 See EC IA, p. 26 and p.33.
17 See EC IA p. 27

selling activity, so that they are able to demonstrate, on request, that they acted in the framework allowed by the regulation.

61. The standards on evidencing the arrangements also improve transparency and would be likely to increase investor confidence in the market. Requiring third parties to save proof of a covered position reinforces contractual relationships and enhances confidence in the market between participants. Increased investor confidence could create higher levels of investor participation in the market, improving liquidity and price discovery.

62. These potential benefits and their economic impacts are illustrated in the diagram below.

Figure 2.1.2: Potential Benefits of the Settlement Rules



2.2 Information Provision

Potential costs

63. A central contribution of the technical standard is to increase the level of harmonisation of disclosure by defining: the detail of what is to be provided to Competent Authorities; the means by which information is to be disclosed to the public and the content and format of submissions by Competent Authorities to ESMA. The incremental costs of the disclosure regime are likely to be minimised where rules on the information, i.e. in terms of content and format and notification, are fully harmonised. In addition, the technical standard identifies additional information to be disclosed.

64. The harmonised approach should reduce compliance costs relative to a non-harmonised approach. According to the feedback provided by market participants, the majority of the time ("about 90 per

cent") is spent in monitoring their short selling activity with only the balance dedicated to actually preparing and submitting the notifications themselves[18].

65. In terms of the notification fields relating to Articles 2 and 3 of the technical standard, many, but not all, of the consultation respondents preferred the use of the ISIN of the main class of share only — stating that this reflects current market practice. The alternative — the use of the ISIN of the first class of shares admitted to trading — would require look-up, or the creation of a database making these connections which would involve expense on infrastructure and headcount. ESMA's proposed approach of requiring the use of the ISIN of the main class based upon ordinary shares (using the first admitted where several classes of ordinary shares exist, or applying similar rules to preference shares in the absence of ordinary shares) are therefore broadly aligned with current practice and hence existing systems. The implication is that the cost consequences should be minimal.

66. Similarly, in terms of the additional information required by ESMA concerns was raised about requiring the date of the previous notification. This was on two levels: that the date might not be clear (e.g. where a notification was cancelled) and where the notification was not made by the position holder but by (say) the prime broker, who might need to access this date from the position holder, who may have used another broker or brokers previously.

67. Our analysis of the current rate of disclosure is that it varies from a negligible level in Greece up to about 36 notifications per issuer per annum in the Netherlands (where only the shares of large financial firms are in scope). We do not consider that at such a rate of notification that these concerns about the previous notification date are substantial or likely to result in cost in the vast majority of cases[19]. Provided that the likely disclosure rates on other instruments are similar we would view non-negligible added cost as unlikely here as well.

Potential Benefits

68. Again, the market-functioning benefits of the disclosure regime are likely to be maximised where the rules on information in terms of content and publication are fully harmonised. Investors would therefore benefit from not having to familiarise themselves with different disclosure formats: the key benefit of this approach (within the context of what the Regulation is doing) is in not creating additional market fractions — indeed, relative to the current situation it is reducing them — and so maintaining global investor interest in European capital markets (and, indeed, potentially even broadening the geographic scope of such interest).

69. The standard information requirements as set out under the RTS will have the effect of harmonising the content of information that position holders will be required to disclose to Competent Authorities as well as their format. Such single European rulebook approaches should be particularly of benefit to firms operating cross-border and non-EU firms.

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[18] The time spent monitoring is heavily influenced by the definitions of what counts towards the issued share capital and so on: ESMA has not been asked to address this as part of the preparation of the technical standards — we have therefore excluded the effect of this from our cost estimates.

[19] Possibly prime brokerage contracts may be re-written such that position holders are obliged to provide previous notifications where notice is made by someone other than the position holder himself.

70. Notwithstanding some of the possible practical difficulties alluded to by some consultation respondents the inclusion of the previous notification date within the additional information set was considered likely to be of use to Competent Authorities in their work.

2.3 Determination of Principal Trading Venue

Potential costs

71. Responsibility for the establishment of the PTV rests with Competent Authorities (although it can be delegated to markets).

Identification of the relevant Competent Authority

72. The relevant Competent Authority is to be established by reference to the Member State where the share was first admitted to trade. Where this is not clear (e.g. due to simultaneous listing in multiple jurisdictions) then with reference to liquidity as set out in EC1287/2006, i.e. in MiFID.

73. Since this approach copies what is done already for MiFID, it should not result in incremental costs being incurred by the Competent Authorities with respect to equities first admitted to a Regulated Market.

74. The Regulation also applies to those equities admitted to trading only on an MTF. There are about 25 MTFs for equity-trading, of which about 20 facilitate primary issuance (mostly for small and medium-sized companies). These vary in size from London's Alternative Investment Market down to the Cyprus' Emerging Companies Market. We estimate that at the close of 2011 there were about 10,000 companies whose shares were only admitted to trading on these equity-focused MTFs[20]. A number of the issuers were non-EU headquartered: however, in large part due to their relatively small market capitalisations, these firms do not tend to be cross-listed. The Member State where the share was first admitted to trade will remain in the vast majority of cases the relevant reference point. We do not believe that the costs of establishing this would be anything but trivial for the Competent Authorities[21].

Data collection and analysis

75. Data collection by Competent Authorities on trading turnover from within the EU should be a reasonably straight-forward process.

76. Accessing data from non-EU markets (particularly non-European markets) may be harder, at least in terms of ensuring comparability (e.g. whether the default is to present information in volume or transaction value terms). There may be an additional cost associated with acquiring data from outside the EU. This is particularly true in a small number of EU Member States where it is usual practice to admit for trading in regulated markets or in MTFs a large number of foreign shares that are mainly traded actively outside the EU. In some of these countries, like Germany, the cost for the competent authority of getting or calculating data on the trading that is taking place in the

[20] This was based upon examination of publicly available data as at end December 2011 (or the closest available date) and on data relating to the shares admitted to trading on German MTFs.

[21] Even in the event of a dual listing — which are anyway relatively rare — a suitable protocol could be established between the relevant authorities.

principal EU trading venue versus the non-EU trading venues can be quite significant, since the number of shares involved is in the thousands.

77. On the other hand volume data for most equities can be accessed from relevant data providers—on a global basis. We assume that all of the Competent Authorities will have access to at least one such terminal. In some (we believe rare) occasions this information may need to be requested from the market directly.

78. Data analysis by the Competent Authorities may be non-trivial due to comparability issues, as above, and currency translation but should otherwise be capable of some automation. The main cost will be the initial establishment of the exempt list.

79. The on-going cost for the Competent Authorities of maintaining the exempt list should be low on average, but with some relevant exceptions as pointed out above, depending on the yearly number of admissions to trading of non-EU shares.

Notification to ESMA

80. Notification to ESMA and publication of the list on ESMA's website should only lead to relatively trivial costs, provided that this is done electronically.

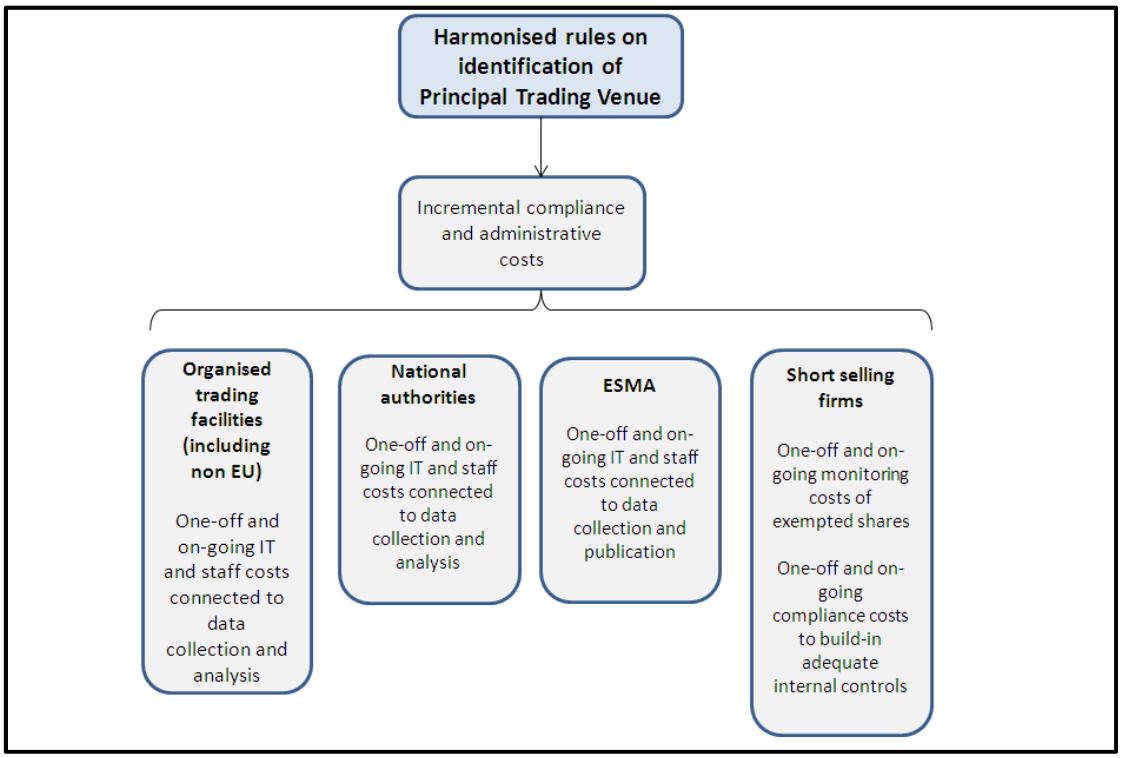
81. The costs associated with market participants implementing the exempt list on a two year basis are part of the costs driven by the Regulation. On the other hand, we view adapting to changes to the exempt list within the two year frame as associated with the technical standard (which sets out the basis for such adjustments to the list).

82. It is ESMA's intention to make the information on exempted shares publicly available on ESMA's website in an appropriate machine-readable protocol. Therefore, the scraping of the exempt shares could be automated by firms in a fairly straightforward manner. However this does not mean that no costs would be incurred. Taking the population of position holders and prime brokers as the appropriate population and assuming, based upon interviews with market participants, that no more than 2–3 days only of new coding would be required then a one-off cost of €0.2–€1.1 million would be incurred. Respondents to ESMA's consultation on the technical standards concurred that provision of the list in machine readable format would significantly reduce those costs.

83. This spending on adapting systems should mean that the on-going costs of flagging what is on the exempt list are negligible (since compliance would be integrated into the system). If the information is not provided in a machine-readable way then headcount would increase in order to monitor manually so that compliance can be maintained. At a basic level someone would need to access ESMA's website on a daily basis and then update trading systems — this would need to take place at each affected market participant. Even if this is simply a five minute exercise, in aggregate this could amount to a recurring cost of up to €0.7 million, but this is not the central scenario, since machine-readable formats are envisaged.

84. These cost drivers are summarised in the chart below.

Figure 2.3.3: Mechanisms Driving Costs of Determination of PTV



Potential benefits

85. The main incremental benefits arising from the technical standard are likely to relate to the notifications within the two year period. For example, if the equity was previously traded principally on a non-EU venue, and then this permanently ceased to be the case, a revision to the exemption listing would be necessary to ensure that the security was then captured within the short selling regime. This would then have the same benefits as the regime has.

86. Some respondents to ESMA's consultation identified additional situations (beyond those already identified by ESMA) that might merit an update of the list of exempted shares (or at least a review of the status of individual shares) within the two year effectiveness period:

    a. Where a non-EU trading venue for the shares of a company has either been launched, or grown rapidly during the 24 month period, supplanting a European trading venue, to become the PTV.

    b. When there has been a merger or acquisition (of trading venues cross border either inside the EU or between EU and non-EU venues, or between issuers).

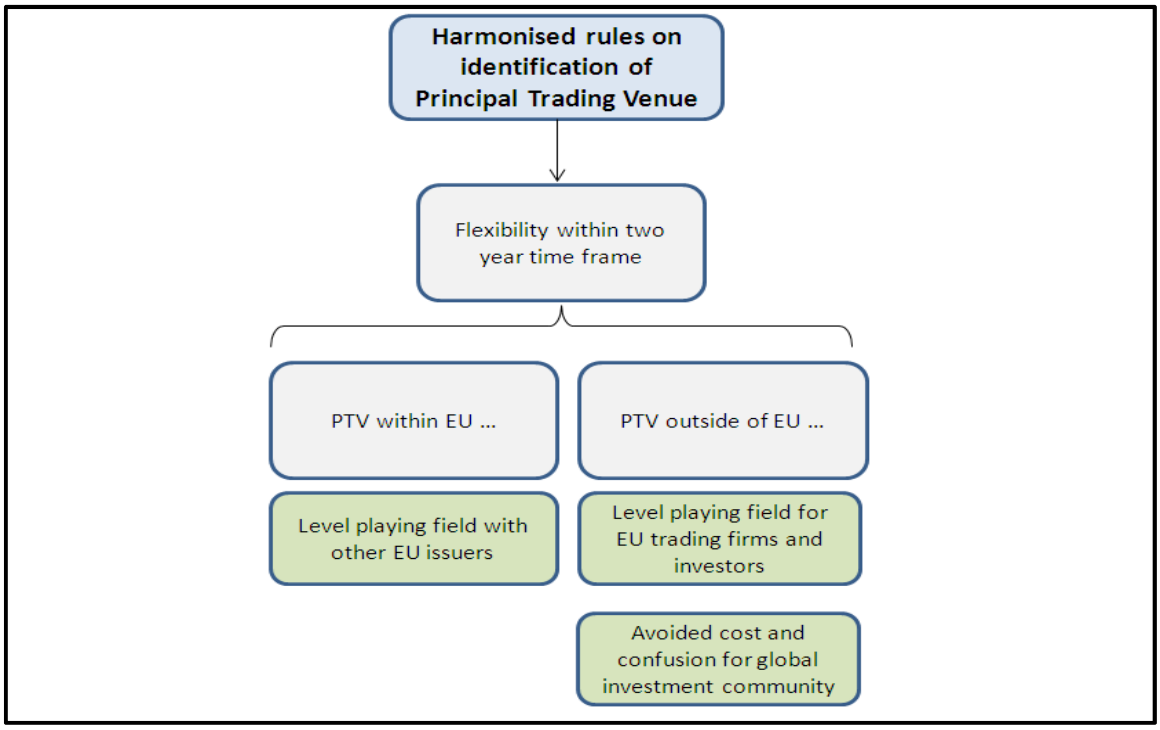
    c. When there has been a delisting, closing of a non-EU exchange or entry or exit of countries to or from EU.

87. ESMA considers these cases are already covered by its proposals. Nevertheless the desire of market participants to ensure that the list covers all eventualities implies a belief in benefits arising from such flexibility. The intra-two year notifications could lower cost by avoiding some of the compliance cost associated with the entire Regulation (as opposed to the technical standards

alone). Whilst the vast majority of these costs are likely to be automated and are unlikely to be significantly influenced by whether an individual share is in or out of scope, the aggregation of the exemption over a few hundred stocks may have a cost reducing affect.

88. More broadly, the investment community inside and beyond the EU would avoid being caught unnecessarily by the Regulation. If no dynamic updates were foreseen, as soon as a share where the PTV is outside the EU is admitted in a EU trading venue, it would be captured: a short seller anywhere in the world, including European investors, would be subject to the disclosure requirements in the absence of a dynamic exempt list, without necessarily being aware of that fact. The result would be a mess of confusion, non-compliance and added cost affecting a much larger community of investors. Indeed there are an estimated 9500 hedge funds globally — if this is taken as 80 per cent of short sellers then almost 12,000 investors could be affected — an order of magnitude higher than the assumptions we have used in this report. This does not imply that without amending the exempt list all cost impacts would increase ten-fold, but rather highlights the potential significant benefit of having a dynamic list.

Figure 2.3.4: Mechanisms Driving Main Benefits of Determination of PTV



3 Standard Cost Model

Description of the Model

89. The EU Standard Cost Model (SCM) is a model presented in the Annex 10 to the EU Impact Assessment Guidelines[22] as the preferred method of assessing the net costs of information obligations or administrative costs imposed by EU legislation. Administrative cost is defined as:

> "the costs incurred by enterprises, the voluntary sector, public authorities and citizens in meeting legal obligations to provide information on their action or production, either to public authorities or to private parties"

90. On the basis of this definition of administrative costs only the compliance cost aspects of certain of the technical standards described in this report are relevant in constructing the SCM estimate. The measures classified as giving rise to information obligations are as follows:

- Evidence gathering aspects of the TS relating to the agreements, arrangements and measures to ensure settlement.

- All aspects of the TS on Information disclosure — however we have not identified incremental costs arising as a result of these.

91. There are two important distinctions to be made in considering costs:

a. Recurring/on-going versus one-off — one-off costs are costs incurred only once, while on-going costs reflect the recurring costs associated with running the business.

b. Business-as-usual costs versus administrative burdens — this distinguishes between costs that result from collecting and processing information that would be incurred in the absence of the legislation and the administrative burdens associated with the additional costs that result from processes undertaken solely due to the legislation. In each case costs can be divided into one-off and on-going costs.

92. In terms of estimating the SCM both the one-off costs and on-going costs must be considered, but only in so far as they are incremental to business-as-usual costs. It is therefore clear that the SCM can draw directly upon the results of the cost-benefit analysis that we have conducted. We have only considered the incremental cost impacts in our work and we have also identified where these are one-off in nature or else recurring impacts.

93. The core concept of the SCM is that costs should be calculated as the average cost of the administrative activity (price) times the total number of activities performed per year (quantity). The price is calculated by multiplying the time required for performing that action with the average tariff rate for workers that perform that action, and the quantity is calculated by multiplying the number of actions required by their frequency.

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[22] European Commission, *Part III: Annexes to Impact Assessment Guidelines ('The Annexes')* (2009) <http://ec.europa.eu/governance/impact/commission_guidelines/commission_guidelines_en.htm>

Estimating the SCM

94. The standard step by step procedure set out in the guidance is described in brief below:

- Step 1 — identify the information obligations and classify them according to a typology[23] published in Annex 10.
- Step 2 — for each type of information required, identify the type of action required based on the typology[24] published in Annex 10.
- Step 3 — obtain a picture of the target groups, which may be classified by size, type and location.
- Step 4 — identify of the frequency of the required actions, i.e. on average the number of times per year an action is required to be taken.
- Step 5 — identify the relevant cost parameters, i.e. the time spent performing the action and the hourly pay of those performing the action. In addition, there could be costs of *equipment and supplies* where the parameters would be (i) acquisition cost and (ii) depreciation period. Lastly, there could be *outsourcing costs*, where the parameter is what the service provider charges on average per information obligation per entity per year.
- Step 6 — estimate the average time spent on a task and the average hourly wage of those performing the task, based on information for all entities after removing any outliers.
- Step 7 — estimate of the number of entities in each target group.
- Step 8 — extrapolate data to EU level.

95. The results of this exercise are presented in the standard summary format[25].

Assumptions Made to Reflect Nature of the Technical Standards

96. In constructing out estimate we have made a number of assumptions. These are described below.

Step one

97. We categorise the information obligations as set out below.

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[23] See 'Box 1: Types of obligation', The Annexes 49-50.
[24] See 'Box 3: Types of required action', The Annexes 51.
[25] Downloaded from http://ec.europa.eu/governance/impact/docs/eu_cost_model_report_sheet_v2.xls.

Policy option giving rise to an information obligation	Type of obligation
Evidence gathering aspects of the TS relating to the agreements, arrangements and measures to ensure settlement	Cooperation with audit and inspection by public authorities, including maintenance of appropriate records
TS on Information disclosure to Competent Authorities	Cooperation with audit and inspection by public authorities, including maintenance of appropriate records
TS on Information disclosure to public	Non-labelling information for third parties

Step two

98. In terms of the administrative actions required to fulfil the information obligations set out above the most relevant for both one-off costs and on-going costs are as follows: Training members and employees about the information obligations; "Buying (IT) equipment & supplies"; "Designing information material"; and "Inspecting and checking (including assistance to inspection by public authorities)". These are more fully detailed in the completed templates, attached as an Annex to this report.

Step three

99. We have discretely identified the target groups (hedge funds; prime brokers; MTFs and Regulated Markets, etc) in the previous section and do not repeat that analysis here.

Steps four to six

100. For one-off costs we have assumed that the actions would only have to be undertaken once (i.e. once per year and for one year only). For on-going costs we have used the same assumptions in terms of the frequency of the actions per year as identified previously.

101. For wages (or "tariff per hour" as set out in the template), we have used the hourly labour costs derived from the annual cost estimates identified in the previous section.

102. Since the only asset acquisition identified for the purposes of our estimates relate to IT systems we have not included a depreciation period. We have assumed that the system would continue until the company updated their IT as a natural part of their future development (i.e. unrelated to the introduction of the proposed rules). The one-off cost of the initial acquisition has, therefore, not been adjusted for depreciation. Using this information we have estimated an average cost per type of company for each action.

Step seven

103. The number of entities in the EU as a whole for each of the target groups has, in the main part, been estimated as part of our analysis specific to each aspect of the technical standards.

Step eight

104. As we have noted already, the SCM estimates have been derived from the cost estimates used in this report. Our cost estimates are based upon a number of more or less detailed (typically "bottom-up") assumptions which are not practical to summarise here. These cost estimates have then

been applied to a "whole of EU" population for the purposes of establishing the cost impact of specific policy options. It follows that further extrapolation for the purposes of the SCM would be inappropriate.

105. To note again, the administrative burden estimates are on an incremental basis, i.e. excluding any costs that would be incurred in the absence of the regulation. As such we do not need to include any estimate of the Business as Usual costs.

Results

106. We present below summary tables. We provide low and high estimates for both on-going and one-off costs.

Table 3.1: Summary of SCM Estimates

	One-off		On-going	
	Low	**High**	**Low**	**High**
	€m	**€m**	**€m**	**€m**
Agreements, Arrangements and Measures to Ensure Settlement	€ 1,4	€ 5,5	€ 17,6	€ 47,4
PTV	€ 0,2	€ 1,1	€ 0,0	€ 0,0
	€ 1,6	€ 6,6	€ 17,6	€ 47,4

Annex III

Draft Regulatory Technical Standards

COMMISSION DELEGATED REGULATION (EU) No …/..

supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council with regard to regulatory technical standards on notification and disclosure requirements relating to net short positions, the details of the information to be provided to the European Securities and Markets Authority in relation to net short positions and the method for calculating turnover to determine exempted shares.

of XXX

THE EUROPEAN COMMISSION,
Having regard to the Treaty on the Functioning of the European Union,
Having regard to Regulation (EU) No 236/2012 of 14 March 2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps[1], and in particular Articles 9(5), 11(3) and 16(3) thereof.

Whereas:

(1) The provisions in this Regulation are closely linked, since they deal with the submission of notifications and information, by investors to national competent authorities or by those competent authorities to ESMA. The turnover calculation to determine exempted shares is also closely linked to the giving of information concerning shares where their principal trading venue is in the Union. To ensure coherence between those provisions, which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations it is desirable to include all the regulatory technical standards required by Regulation (EU) No 236/2012 in a single Regulation.

[1] OJ L 86, 24.3.2012, p. 1

(2) In relation to the notifications of net short positions on shares, sovereign debt and uncovered sovereign credit default swaps and to the public disclosure of significant net short positions on shares, uniform rules regarding the details of the information including the common standard to be used in the notification are appropriate to ensure consistency in the application of the notification requirements across the Union, to foster efficiency in the reporting process and to provide comparable information to the public.

(3) To ensure the proper identification of the position holders, notification should, where available, include a code that can complement the name of the position holder. Until a single, robust and publicly recognized global legal entity identifier is available, it is necessary to rely on existing codes that some position holders may have, such as the Bank Identifier Code.

(4) For the purpose of carrying out its duties under this Regulation and under Regulation (EU) No 1095/2010 of the European Parliament and of the Council[2], the European Securities Markets Authority (hereinafter "ESMA") must be provided with information by competent authorities on a quarterly basis in relation to notification of net short positions on shares, sovereign debt and uncovered sovereign credit default swaps, as well as with additional information on net short positions upon its request.

(5) In order to efficiently use this information, in particular, with respect to the objective of ensuring the orderly functioning and integrity of the financial markets and the stability of the financial system in the Union, the quarterly information should be standardised, stable over time and of sufficient granularity, in the form of some daily aggregated data, to allow ESMA to process it and to conduct research and analyses.

(6) ESMA cannot determine beforehand the specific information it may require from a competent authority as that information can only be determined on a case by case basis and may include information as diverse as individual or aggregated data on the net short positions or uncovered positions in credit default swaps. Nonetheless, this Regulation should establish the general information to be provided in this respect.

(7) For the purposes of calculating turnover, both in the Union and in trading venues outside the Union, to determine the principal trading venue of a share, each relevant competent authority needs to determine the relevant sources of information to identify and measure the trading on a specific share. There are currently neither harmonized transaction reporting requirements in the Union for shares admitted only on multilateral trading facilities nor international standards with regard to trading statistics on individual shares on trading venues, which may show relevant variations. Thus, it is necessary to allow some flexibility to competent authorities to carry out this calculation.

(8) In order to allow sufficient time for natural and legal persons to process the list of shares exempted pursuant to Article 16 of Regulation (EU) No 236/2012, the preparation of this list and its subsequent publication on the ESMA website should take place sufficiently in advance before the application date of Regulation (EU) No 236/2012. Therefore, Article 6 of this Regulation needs to apply from the day this Regulation enters into force.

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[2] OJ L 331, 15.12.2010, p.84

(9) This Regulation is based on the draft regulatory technical standards submitted by ESMA to the Commission.

(10) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.

HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL

Article 1
Subject-matter

This Regulation lays down regulatory technical standards specifying the following:

a. the details of the information on net short positions to be provided to the competent authorities and disclosed to the public by a natural or legal person pursuant to Articles 9(5) of Regulation (EU) No 236/2012;

b. the details of the information to be provided to ESMA by the competent authority pursuant to Article 11(3) of Regulation (EU) No 236/2012;

c. the method for calculation of turnover to determine the principal venue for the trading of a share pursuant to Article 16(3) of Regulation (EU) No 236/2012.

CHAPTER II
DETAILS OF THE INFORMATION ON NET SHORT POSITIONS TO BE NOTIFIED AND DISCLOSED PURSUANT TO ARTICLE 9 OF REGULATION (EU) 236/2012

Article 2
Notification of net short positions in shares, sovereign debt and uncovered sovereign credit default swaps to competent authorities

1) Subject to paragraph 2) and 3), a notification made under Article 5(1), Article 7(1) or Article 8 of Regulation (EU) No 236/2012 shall contain the information specified in Table 1 of Annex I to this Regulation using a form issued by the relevant competent authority which shall take the format set out in Annex II.

2) When the competent authority has secure systems in place that allow it to fully identify the person filing the notification and the position holder, including all the information contained in fields 1 to 7 of Table 1 of Annex I to this Regulation, those fields can be left unpopulated in the notification form.

3) A natural or legal person who has submitted a notification referred to in paragraph 1 which contains an error shall send, on becoming aware of the error, a cancellation to the relevant competent authority in a form issued by that authority which shall take the format specified in Annex III and submit a new notification in accordance with this Article if necessary.

Article 3
Public disclosure of information on net short positions in shares

Any public disclosure of a net short position in shares that reaches, or upon having reached, subsequently falls below, a relevant publication threshold in accordance with Article 6(1) of Regulation (EU) No 236/2012 shall contain the information specified in Table 2 of Annex I.

CHAPTER III
DETAILS OF THE INFORMATION TO BE PROVIDED TO ESMA IN RELATION TO NET SHORT POSITIONS PURSUANT TO ARTICLE 11 OF REGULATION (EU) 236/2012

Article 4
Periodic information

Pursuant to Article 11(1) of Regulation (EU) No 236/2012, competent authorities shall provide ESMA with the following information on a quarterly basis:

a. the daily aggregated net short position on each individual share in the main national equity index as identified by the relevant competent authority;

b. the end of quarter aggregated net short position for each individual share which is not in the index referred to in paragraph (a);

c. the daily aggregated net short position on each individual sovereign issuer;

d. where applicable, daily aggregated uncovered positions on credit default swaps of a sovereign issuer.

Article 5
Information upon request

Information to be provided by a relevant competent authority on an ad hoc basis pursuant to Article 11(2) of Regulation (EU) No 236/2012 shall include all requested information specified by ESMA that has not previously been submitted by the competent authority in accordance with Article 4 of this Regulation.

CHAPTER IV
METHOD OF CALCULATION OF TURNOVER TO DETERMINE THE PRINCIPAL TRADING VENUE FOR A SHARE PURSUANT TO ARTICLE 16 OF REGULATION (EU) No 236/2012

Article 6

Turnover calculation to determine the principal venue for the trading of a share

1) When calculating turnover pursuant to Article 16 of Regulation (EU) No 236/2012, a relevant competent authority shall use the best available information, which may include:
    a. publicly available information;
    b. transaction data obtained under Article 25(3) of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments[3];
    c. information from trading venues where the relevant share is traded;
    d. information provided by another competent authority, including a competent authority of a third country;
    e. information provided by the issuer of the relevant share;
    f. information from other third parties, including data providers.
2) In determining what constitutes the best available information, a relevant competent authority shall ensure so far as reasonably possible that :
    a. it uses publicly available information in preference to other sources of information;
    b. the information covers all trading sessions during the relevant period, irrespective of whether the share traded during all of the sessions;
    c. transactions received and included in the calculations are counted only once;
    d. transactions reported through a trading venue but executed outside it are not counted.
3) The turnover of a share on a trading venue shall be deemed to be zero where the share is no longer admitted to trading on that trading venue even if the share was admitted to trading on the trading venue during the relevant calculation period.

CHAPTER V
FINAL PROVISIONS

Article 7

Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 November 2012, except for Article 6 which shall apply from the day this Regulation shall enter into force.

[3] OJ L 145, 30.4.2004, p. 1

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]

ANNEX I

Table 1

List of fields for notification purpose (Article 2)

Field identifier		Description
1.	Position holder	For natural persons: the first name and the last name For legal persons: full name including legal form as provided for in the register where it is incorporated, if applicable
2.	Legal person identification code	Bank Identifier Code, if available
3.	Address of the position holder	Full address (e.g. street, street number, postal code, city, state/province) and country
4.	Contact details of the position holder	Telephone number, fax number (if available), email address
5.	Reporting person	For natural persons: the first name and the last name For legal persons: full name including legal form as provided for in the register where it is incorporated, if applicable
6.	Address of the reporting person	Full address (e.g. street, street number, postal code, city, state/province) and country, when different from the position holder
7.	Contact details of the reporting person	Telephone number, fax number (if available), email address, when different from the position holder
8.	Reporting date	Date on which the notification is submitted in accordance with ISO 8601:2004 standard (yyyy-mm-dd)
9.	Issuer identification	For shares: full name of the company that has shares admitted to trading on a trading venue For sovereign debt: full name of the issuer For uncovered sovereign credit default swaps: full name of the underlying sovereign issuer
10.	ISIN	For shares only: ISIN of the main class of ordinary shares of the issuer. If there are no ordinary shares admitted to trading, the ISIN of the class of preference shares (or of the main class of preference shares admitted to trading if there are several classes of such shares)
11.	Country code	Two letter code for the sovereign issuer country in accordance with ISO 3166-1 standard
12.	Position date	Date on which the position was created, changed or ceased to be held. Format in accordance with ISO 8601:2004 standard (yyyy-mm-dd)
13.	Net short position size in percentage	For shares only: percentage (rounded to 2 decimal places) of the issued share capital, expressed in absolute terms, with no “+” or “-" signs
14.	Net short position equivalent amount	For shares: total number of equivalent shares For sovereign debt: equivalent nominal amount in Euros For uncovered sovereign credit default swaps: equivalent nominal amount in Euros Figures expressed in absolute terms, with no “+” or “-" signs and the currency expressed in accordance with ISO 4217 standard
15.	Date of the previous notification	Date on which the last position reported by the position holder in relation to the same issuer was notified. Format in accordance with ISO 8601:2004 standard (yyyy-mm-dd)
16.	Cancellation date	Date on which a cancellation form is submitted to cancel an erroneous notification previously submitted. Format in accord-

		ance with ISO 8601:2004 standard (yyyy-mm-dd)
17.	Comments	Free text – optional

Table 2

List of fields for public disclosure purpose (Article 3)

	Field identifier	Description
1.	Position holder	For natural persons: the first name and the last name For legal persons: full name including legal form as provided for in the register where it is incorporated, if applicable
2.	Name of the issuer	Full name of the company that has shares admitted to trading on a trading venue
3.	ISIN	ISIN of the main class of ordinary shares of the issuer. If there are no ordinary shares admitted to trading, the ISIN of the class of preference shares (or of the main class of preference shares admitted to trading if there are several classes of such shares)
4.	Net short position size in percentage	Percentage (rounded to 2 decimal places) of the issued share capital
5.	Position date	Date on which position was created, changed or ceased to be held in accordance with ISO 8601:2004 standard (yyyy-mm-dd)

ANNEX II

NOTIFICATION FORM FOR NET SHORT POSITIONS (Article 2)

POSITION HOLDER	First name LAST NAME Full company name		
	BIC code (if the holder has one)		
	Country		
	Address		
	Contact person	First name Last name	
		Phone number	
		Fax number	
		E-mail address	

REPORTING PERSON (if different)	First name LAST NAME Full company name		
	Country		
	Address		
	Contact person	First name Last name	
		Phone number	
		Fax number	
		E-mail address	

NET SHORT POSITION IN SHARES	
1. Reporting date (yyyy-mm-dd)	
2. Name of the issuer	
2.1 ISIN code	
2.2 Full name	
3. Position date (yyyy-mm-dd)	
4. Net short position after threshold crossing	
4.1 Number of equivalent shares	
4.2 % of issued share capital	
5. Date of previous notification (yyyy-mm-dd)	
6. Comment	

NET SHORT POSITION IN SOVEREIGN DEBT	
1. Reporting date (yyyy-mm-dd)	
2. Name of the issuer	
2.1 Country code	
2.2 Full name	
3. Position date (yyyy-mm-dd)	
4. Net short position after threshold crossing Equivalent nominal amount	
5. Date of previous notification (yyyy-mm-dd)	
6. Comment	

POSITION IN UNCOVERED SOVEREIGN CREDIT DEFAULT SWAPS	
1. Reporting date (yyyy-mm-dd)	
2. Name of the issuer	
2.1 Country code	
2.2 Full name	
3. Position date (yyyy-mm-dd)	
4. Net short position after threshold crossing Equivalent nominal amount	
5. Date of previous notification (yyyy-mm-dd)	
6. Comment	

ANNEX III

CANCELLATION FORM FOR ERRONEOUS NOTIFICATIONS (Article 2)

POSITION HOLDER	First name LAST NAME Full company name		
	BIC code (if the holder has one)		
	Country		
	Address		
	Contact person	First name Last name	
		Phone number	
		Fax number	
		E-mail address	

REPORTING PERSON (if different)	First name LAST NAME Full company name		
	Country		
	Address		
	Contact person	First name Last name	
		Phone number	
		Fax number	
		E-mail address	

CANCELLED NET SHORT POSITION IN SHARES	
1. Cancellation date (yyyy-mm-dd)	
2. Name of the issuer	
2.3 ISIN code	
2.4 Full name	
3. Position date of the notification being cancelled (yyyy-mm-dd)	
4. Net short position after threshold crossing contained at the notification being cancelled	
4.1 Number of equivalent shares	
4.2 % of issued share capital	
5. Reporting date of the notification being cancelled (yyyy-mm-dd)	
6. Comment	

CANCELLED NET SHORT POSITION IN SOVEREIGN DEBT	
1. Cancellation date (yyyy-mm-dd)	
2. Name of the issuer	
2.1 Country code	
2.2 Full name	
3. Position date of the notification being cancelled (yyyy-mm-dd)	
4. Net short position after threshold crossing contained at the notification being cancelled Equivalent nominal amount	
5. Reporting date of the notification being cancelled (yyyy-mm-dd)	
6. Comment	

CANCELLED POSITION IN UNCOVERED SOVEREIGN CREDIT DEFAULT SWAPS	
1. Cancellation date (yyyy-mm-dd)	
2. Name of the issuer	
2.1 Country code	
2.2 Full name	
3. Position date of the notification being cancelled (yyyy-mm-dd)	
4. Net short position after threshold crossing contained at the notification being cancelled Equivalent nominal amount	
5. Reporting date of the notification being cancelled (yyyy-mm-dd)	
6. Comment	

Annex IV

Draft Implementing Technical Standards

COMMISSION IMPLEMENTING REGULATION (EU) No …/..

COMMISSION IMPLEMENTING REGULATION (EU) No …/… laying down implementing technical standards with regard to the means for public disclosure of net position in shares, the format of the information to be provided to the European Sepervisory Authority (European Securities and Markets Auhtority) in relation to net short positions, the types of agreements, arrangements and measures to adequately ensure that shares or sovereign debt instruments are available for settlement and the dates and period for the determination of the principal venue for a share according to Regulation (EU) No 236/2012 of the European Parliament and Council on short selling and certain aspects of credit default swaps

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,
Having regard to Regulation (EU) No 236/2012 of 14 March 2012 of the European Parliament and of the Council on short selling and certain aspect of credit default swaps[1] and in particular Articles 9(6), 11(4), 12(2), 13(5) and 16(4) thereof,
Whereas:

(1) The provisions in this Regulation are closely linked, aiming to determine the list of exempted shares as a necessary step for the disclosure to the public of short positions in all non-exempted shares and then for that information to be sent to ESMA. In order to accomplish this, it is essential that rules also be laid down regarding arrangements and measures to be adopted with respect to those non-exempted shares. To ensure coherence between those provisions on short selling which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations it is desirable to include all the implementing technical standards required by Regulation (EU) No 236/2012 in a single Regulation.

(2) To ensure the uniform application of Regulation (EU) No 236/2012 in relation to the information to be provided to the European Securities Markets Authority (hereinafter "ESMA") by competent authorities and to achieve efficient processing of this information, information should be exchanged electronically in a secure way using a standard template.

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[1] OJ L 86, 24.3.2012, p. 1

(3) It is desirable to allow easy access to and re-use of the data on net short positions that is disclosed to the market through central websites operated or supervised by a competent authority. To this end, these data should be provided in a format that allows for flexible use of data and that does not offer only the possibility of static, facsimile documents. Wherever technically possible, machine-readable formats should be used to enable users to process the information in a structured and cost-efficient way.

(4) In addition to disclosure on the central website operated or supervised by a competent authority, the details of a net short position may be made available to the public in other supplementary ways.

(5) It is essential for users to have two basic outputs when making public individual net short positions in shares above the relevant publication threshold. These should comprise a compact list or table of the net short positions above the publication threshold that are outstanding at the time of consultation of the central website and a list or table with historical data on all individual net short positions published.

(6) When a net short position in shares falls below a relevant disclosure threshold, the details, including the actual size of the position, should be published. In order to avoid confusion for users consulting the central websites, disclosures of positions that have fallen below 0.5% of the issued share capital of the company concerned should not remain indefinitely alongside the live positions but should be available as historical data after one day.

(7) In order to provide for a consistent and clear framework which is nevertheless flexible, this Regulation lists types of agreement to borrow and other enforceable claims having similar effect and the types of arrangement with a third party that adequately ensure that shares or sovereign debt instruments will be available for settlement, and specifies the criteria such agreements and arrangements must fulfil.

(8) The use of rights to subscribe for new shares in relation to a short sale may adequately ensure availability for settlement only where the arrangement is such that settlement of the short sale is ensured when it is due.

(9) When defining time limited confirmation arrangements, it is necessary to define the timeframe for covering a short sale through purchases in a way compatible with different settlement cycles in different jurisdictions.

(10) In order to adequately ensure that instruments are available for settlement where a natural or legal person entering into a short sale has an arrangement with a third party under which that third party has confirmed that the instrument has been located, it is essential that there is confidence that the third party is, when established in a third country, subject to appropriate supervision and that there are appropriate arrangements for exchange of information between supervisors. Such appropriate arrangements could include being a signatory of the International Organisation of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding.

(11) To ensure proper implementation of the requirement to determine whether the principal trading venue of a share is located outside the Union, transitional arrangements should be put in place for determining for the first time the list of exempted shares under Article 16 of Regulation (EU) No 236/2012. In addition, although the list of exempted shares is ef-

fective for a 2 year period, it is necessary to provide some flexibility as there are cases where a review of that list might be necessary during the two-year period.

(12) In order to allow sufficient time for natural and legal persons to process the list of shares exempted pursuant to Article 16 of Regulation (EU) No 236/2012, the preparation of this list and its subsequent publication on the ESMA website should take place sufficiently in advance before the application date of Regulation (EU) No 236/2012. Therefore, Articles 9, 10 and 11 of this Regulation need to apply from the day this Regulation enters into force.

(13) This Regulation is based on the draft implementing technical standards submitted by ESMA to the Commission.

(14) ESMA has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010.

HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL

Article 1
Subject Matter

This Regulation lays down implementing technical standards specifying the following:

a. the means by which information on net short positions may be disclosed to the public by natural or legal person as well as the format of information to be provided to ESMA by competent authority pursuant to Article 9(6) and Article 11(4) of Regulation (EU) No 236/2012;

b. the types of agreements, arrangements and measures that adequately ensure that the shares will be available for settlement and the types of agreements or arrangements that adequately ensure that the sovereign debt will be available for settlement pursuant to Article 12(2) and 13(5) of Regulation (EU) No 236/2012;

c. the date and period for principal trading venue calculations, notification to ESMA and the effectiveness of the relevant list pursuant to 16(4) of Regulation (EU) No 236/2012.

CHAPTER II
MEANS FOR PUBLIC DISCLOSURE OF SIGNIFICANT NET SHORT POSITIONS IN SHARES PURSUANT TO ARTICLE 9 OF REGULATION (EU) 236/2012

Article 2
Means by which information may be disclosed to the public

This article specifies how the information on net short positions in shares should be disclosed to the public by posting it on a central website operated or supervised by the relevant competent authority pursuant to Article 9(4) of Regulation (EU) No 236/2012. The information shall be disclosed to the public through means which:

a. publish it in the format specified in Annex I in such a way as to allow the public consulting the website to access one or more tables offering all the relevant information on positions per share issuer;

b. allow users to identify and filter on whether the net short positions in a share issuer at the time of accessing the website has reached or exceeded the relevant publication threshold;

c. provide for historical data on the published net short positions in a share issuer;

d. include, whenever technically possible, downloadable files with the published and historical net short positions in a machine-readable format, meaning that the files are sufficiently structured for software applications to identify reliably individual statements of fact and their internal structure;

e. show for one day, together with the information specified in paragraph b), the net short positions that are published because they have fallen below the publication threshold of 0.5% of the issued share capital, before removing and transferring the information to a historical data section.

CHAPTER III
FORMAT OF THE INFORMATION TO BE PROVIDED TO ESMA BY COMPETENT AUTHORITIES IN RELATION TO NET SHORT POSITIONS PURSUANT TO ARTICLE 11 OF REGULATION 236/2012

Article 3
Format of the periodic information

1) The information to be provided on a quarterly basis to ESMA on net short positions in shares, sovereign debt and credit default swaps pursuant to Article 11(1) of Regulation (EU) No 236/2012 shall be provided by relevant competent authorities in the format specified in Annex II.

2) The information referred to in paragraph 1 shall be sent to ESMA electronically through a system established by ESMA that ensures that the completeness, integrity and confidentiality of the information are maintained during its transmission.

Article 4
Format of the information to be provided upon request

1) A relevant competent authority shall provide the information on net short positions in shares and sovereign debt or on uncovered positions relating to sovereign credit default swaps pursuant to Articles 11(2) of Regulation (EU) No 236/2012 in the format specified by ESMA in its request.

2) When the information requested relates to information contained in the notification received by the competent authority pursuant to Articles 5, 7 and 8 of Regulation (EU) No 236/2012, the information shall be provided in accordance with the requirements established in Article [2] of Commission Delegated Regulation (EU) No .../.... [Cross Reference to Regulation adopting Regulatory Technical Standards].

3) The information requested shall be sent by the competent authority in electronic format, using a system established by ESMA for exchanging information that ensures that the completeness, integrity and confidentiality of the information are maintained during its transmission.

CHAPTER IV
AGREEMENTS, ARRANGEMENTS AND MEASURES TO ADEQUATELY ENSURE AVAILABILITY FOR SETTLEMENT PURSUANT TO ARTICLES 12 AND 13 OF REGULATION 236/2012

Article 5
Agreements to borrow and other enforceable claims having similar effect

1) An agreement to borrow or other enforceable claim referred to in Article 12(1)(b) and Article 13(1)(b) of Regulation (EU) No 236/2012 shall be made by means of the following types of agreement, contract or claim which are legally binding for the duration of the short sale:

   a. Futures and swaps: futures and swap contracts leading to a physical settlement of the relevant shares or sovereign debt and covering at least the number of shares or amount of sovereign debt proposed to be sold short by the natural or legal person, entered into prior to or at the same time as the short sale and specifying a delivery or expiration date that ensures settlement of the short sale can be effected when due.

   b. Options: options contracts leading to a physical settlement of the relevant shares or sovereign debt and covering at least the number of shares or amount of sovereign debt proposed to be sold short by the natural or legal person, entered into prior to or at the same time as the short sale and specifying an expiration date that ensures settlement of the short sale can be effected when due.

   c. Repurchase agreements: repurchase agreements covering at least the number of shares or amount of sovereign debt proposed to be sold short by the natural or legal person, entered into prior to or at the same time as the short sale and specifying a repurchase date that ensures settlement of the short sale can be effected when due.

   d. Standing agreements or rolling facilities: an agreement or facility which is entered into prior to or at the same time as the short sale, of a predefined amount of specifically identified shares or sovereign debt, which for the duration of the short sale, covers at least the number of shares or amount of sovereign debt proposed to be sold short by the natural or legal person and specifies a delivery or execution date that ensures settlement of the short sale can be effected when due.

   e. Agreements relating to subscription rights: agreements relating to subscription rights where the natural or legal person is in possession of rights to subscribe for new shares of the same issuer and of the same class and covering at least the

number of shares proposed to be sold short provided that the natural or legal person is entitled to receive the shares on or before settlement of the short sale.

f. Other claims or agreements leading to delivery of the shares or sovereign debt: agreements or claims which cover at least the number of shares or amount of sovereign debt proposed to be sold short by the natural or legal person, entered into prior to or at the same time as the short sale, and specifying a delivery or an execution date that ensures settlement can be effected when due.

2) The agreement, contract or claim shall be provided in a durable medium by the counterparty to the natural or legal person as evidence of the existence of the agreement to borrow or other enforceable claim.

Article 6

Arrangements and measures to be taken in relation to short sales of a share admitted to trading on a trading venue for the purposes of Article 12(1)(c) of Regulation (EU) No 236/2012

1) Standard locate arrangements and measures: arrangements, confirmations and measures that include each of the following elements:

a. Locate confirmation: a confirmation provided by the third party, prior to the short sale being entered into by a natural or legal person, that it considers that it can make the shares available for settlement in due time taking into account the amount of the possible sale and market conditions and which indicates the period for which the share is located; and

b. Put on hold confirmation: a confirmation by the third party, provided prior to the short sale being entered into, that it has at least put on hold the requested number of shares for that person.

2) Standard Same Day Locate Arrangement and Measures: arrangements, confirmations and measures that include each of the following elements:

a. Request for confirmation: a request for confirmation from the natural or legal person to the third party which states that the short sale will be covered by purchases during the day on which the short sale takes place;

b. Locate confirmation: a confirmation provided by the third party prior to the short sale being entered into that it considers that it can make the shares available for settlement in due time taking into account the amount of the possible sale and market conditions, and which indicates the period for which the shares are located;

c. Easy to borrow or purchase confirmation: a confirmation by the third party, provided prior to the short sale being entered into, that the share is easy to borrow or purchase in the relevant quantity taking into account the market conditions and other information available to that third party on the supply of the shares or, in the absence of this confirmation by the third party, that it has at least put on hold the requested number of shares for the natural or legal person;

d. Monitoring: an undertaking by the natural or legal person to monitor the amount of the short sale not covered by purchases;

e. Instruction in the event of failure to cover: an undertaking from the natural or legal person that in the event that executed short sales are not covered by purchases in the same day, the natural or legal person will promptly send an instruction to

the third party to procure the shares to cover the short sale to ensure settlement in due time.

3) Easy to Borrow or Purchase Arrangements and Measures: arrangements, confirmations and measures when the natural or legal person enters into a short sale of shares that meet the liquidity requirements defined in Article 22 of Regulation (EU) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council[2], or other shares that are included in the main national equity index as identified by the relevant competent authority of each Member State and are the underlying financial instrument for a derivative contract admitted to trading on a trading venue, that include the following elements:

   a. Locate confirmation: a confirmation provided by the third party prior to the short sale being entered into that it considers that it can make the shares available for settlement in due time taking into account the amount of the possible sale and market conditions and indicating the period for which the share is located;

   b. Easy to borrow or purchase confirmation: a confirmation by the third party, provided prior to the short sale being entered into, that the share is easy to borrow or purchase in the relevant quantity taking into account the market conditions and other information available to that third party on the supply of the shares, or in the absence of this confirmation by the third party, that it has at least put on hold the requested number of shares for the natural or legal person; and

   c. Instruction to cover: when executed short sales will not be covered by purchases or borrowing, a undertaking that a prompt instruction will be sent by the natural or legal person instructing the third party to procure the shares to cover the short sale to ensure settlement in due time.

4) The arrangements, confirmations and instructions referred to in paragraphs 1, 2 and 3 shall be provided in a durable medium by the third party to the natural or legal person as evidence of the existence of the arrangements.

Article 7

Arrangements with third parties to be taken in relation to sovereign debt for the purposes of Article 13(1)(c) of Regulation (EU) No 236/2012

1) Standard sovereign debt locate arrangement: a confirmation from the third party, prior to the short sale being entered into, that it considers that it can make the sovereign debt available for settlement in due time, in the amount requested by the natural or legal person, taking into account market conditions and indicating the period for which the sovereign debt is located.

2) Time limited confirmation arrangement: an arrangement where the natural or legal person states to the third party that the short sale will be covered by purchases during the same day of the short sale and the third party confirms, prior to the short sale being entered into, that it has a reasonable expectation that the sovereign debt can be purchased in the relevant quantity taking into account the market conditions and other information available to that third party on the supply of the sovereign debt instruments on the day of entering into the short sale.

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[2] OJ L 241, 2.9.2006, p. 1.

3) Unconditional repo confirmation: a confirmation where the third party confirms, prior to the short sale being entered into, that it has a reasonable expectation that settlement can be effected when due as a result of its participation in a structural based arrangement, organised or operated by a central bank, a debt management office or a securities settlement system, that provides unconditional access to the sovereign debt in question for a size consistent with the size of the short sale.

4) Easy to purchase sovereign debt confirmation: a confirmation by the third party, provided prior to the short sale being entered into, that it has a reasonable expectation that settlement can be effected when due on the basis that the sovereign debt in question is easy to borrow or purchase in the relevant quantity taking into account the market conditions and any other information available to that third party on the supply of the sovereign debt.

5) The arrangements, confirmations and instructions shall be provided in a durable medium by the third party to the natural or legal person as evidence of the existence of the arrangements.

Article 8
Third parties with whom arrangements are made

1) Where an arrangement referred to in Articles 6 and 7 is made with a third party, the third party shall be one of the following types:

   a. an investment firm: an investment firm which meets the requirement in paragraph 2);

   b. a central counterparty: a central counterparty which clears the relevant shares or sovereign debt;

   c. a securities settlement system: a securities settlement system as defined under Directive 98/26/EC which settles payments in respect of the relevant shares or sovereign debt;

   d. a central bank: a central bank that accepts the relevant shares or sovereign debt as collateral or conducts open market or repo transactions in relation to the relevant shares or sovereign debt;

   e. a national debt management entity: the national debt management entity of the relevant sovereign debt issuer;

   f. any other person who is subject to authorisation or registration requirements in accordance with Union law by a member of the European System of Financial Supervision and meets the requirement in paragraph 2);

   g. a person established in a third country who is authorised or registered, and is subject to supervision by an authority in that third country and who meets the requirement in paragraph 2), provided that the third country authority is a party to an appropriate cooperation arrangement concerning exchange of information with the relevant competent authority.

2) The requirement referred to in paragraphs 1(a), 1(f) and 1(g) is that the third party:

   a. participates in the management of borrowing or purchasing of relevant shares or sovereign debt;

   b. provides evidence of such participation; and

c. can, on request, provide evidence of its ability to deliver or process the delivery of shares or sovereign debt on the dates it commits to do so to its counterparties including statistical evidence.

CHAPTER V
DETERMINATION OF THE PRINCIPAL TRADING VENUE FOR THE EXEMPTION PURPOSE PURSUANT TO ARTICLE 16 OF REGULATION 236/2012

Article 9
Date and period for principal trading venue calculations

1) Relevant competent authorities shall make any calculations determining the principal trading venue for a share by at least 35 calendar days before the date of application of Regulation (EU) No 236/2012 in respect of the period between 1 January 2010 and 31 December 2011.

2) Subsequent calculations shall be made before 22 February 2014 in respect of the period between 1 January 2012 and 31 December 2013, and every two years thereafter in respect of the subsequent two year period.

3) Where the share concerned was not admitted to trading during the whole two-year period on the trading venue in the Union and the third country trading venue, the period for calculation shall be the period during which the share was admitted to trading on both venues concurrently.

Article 10
Date of notification to ESMA

Relevant competent authorities shall notify ESMA of those shares for which the principal trading venue is outside the Union at least 35 calendar days before the date of application of the Regulation (EU) No 236/2012 and thereafter on the day before the first trading day in March every second year commencing from March 2014.

Article 11
Effectiveness of the list of exempted shares

The list of shares for which the principal trading venue is located outside the Union shall be effective as of the first day of April following its publication by ESMA, except that the first list published by ESMA shall be effective from the date of entry into application of Regulation (EU) No 236/2012.

Article 12
Specific cases of review of exempted shares

1) This Article applies where:

   a. the shares of a company are removed from trading on a permanent basis on the principal venue located outside the Union;

   b. the shares of a company are removed from trading on a permanent basis on a trading venue in the Union; or

c. the shares of a company that was previously admitted to trading in a trading venue outside the Union are admitted to trading on a trading venue in the Union.

2) Where a relevant competent authority determines whether the principal trading venue for a share is located outside the Union following one of the circumstances set out in paragraph 1):

a. any calculations determining the principal trading venue shall be made as soon as possible after the relevant circumstances arise and in respect of the two year period preceding the date of calculation;

b. the relevant competent authority shall notify ESMA of its determination as soon as possible and, where relevant, before the date of admission to trading on a trading venue in the Union; and

c. any revised list shall be effective from the day after publication by ESMA.

CHAPTER VI
FINAL PROVISIONS

Article 13
Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 November 2012, except for Articles 9, 10 and 11 which shall apply from the day this Regulation enters into force.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

On behalf of the President

[Position]

ANNEX I

PUBLIC DISCLOSURE OF SIGNIFICANT NET SHORT POSITIONS (Article 2)

Position holder	Name of the issuer	ISIN	Net short position (%)	Date position was created, changed or ceased to be held (yyyy-mm-dd)

ANNEX II

Format of the information to be provided to ESMA on quarterly basis (Article 3)

Information		Format
1.	Issuer identification	For shares: full name of the company that has shares admitted to trading on a trading venue For sovereign debt: full name of the issuer For uncovered sovereign credit default swaps: full name of the underlying sovereign issuer
2.	ISIN	For shares only: ISIN of the main class of ordinary shares of the issuer. If there are no ordinary shares admitted to trading, the ISIN of the class of preference shares (or of the main class of preference shares admitted to trading if there are several classes of such shares)
3.	Country code	Two letter code for the sovereign issuer country in accordance with ISO 3166-1 standard
4.	Position date	Date for which the position is reported. Format in accordance with ISO 8601:2004 standard (yyyy-mm-dd)
5.	Daily aggregated net short position on main national index shares	Percentage figure rounded to 2 decimal places
6.	End of quarter aggregated net short position on other shares	Percentage figure rounded to 2 decimal places
7.	Daily aggregated net short positions in sovereign debt	Figure of equivalent nominal amount in Euros
8.	Daily aggregated uncovered positions on credit default swaps of a sovereign issuer	Figure of equivalent nominal amount in Euros