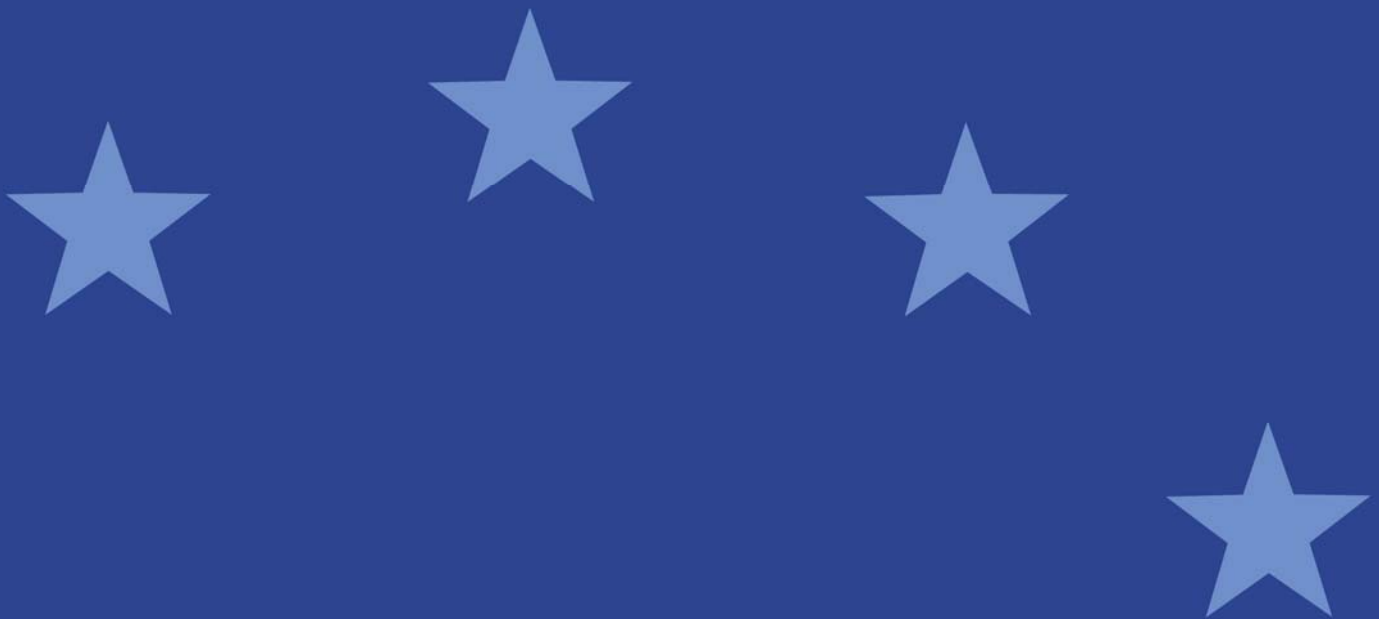




European Securities and
Markets Authority

Consultation Paper

**Draft technical standards on the Regulation (EU) xxxx/2012 of the European Parliament
and of the Council on short selling and certain aspects of credit default swaps**





Date: 24 January 2012
ESMA/2012/30

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- indicate the specific question to which the comment relates and respond to the question stated;
- contain a clear rationale, clearly stating the costs and benefits; and
- describe any alternatives ESMA should consider.

Comments should reach us by **13 February 2012**. Considering the extremely tight deadline of 31 March 2012 for ESMA to deliver the technical standards, any delay in the response would jeopardise the possibility to take into account your comments.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Legal Notice'.

Who should read this paper

This paper may be specifically of interest to investors that take short positions, hedge funds, investment firms whose clients hold short positions or engage in CDS activity, securities lending firms, prime brokers, custodians, settlement systems, national debt management agencies and issuers whose shares are actively traded outside the EU.

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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 Market Authority
MiFID	Market in financial instruments Directive (Directive 2004/39/EC of the European Parliament and of the Council of April 2004)

I. Executive Summary

Background

In November 2011 the Council and the Parliament voted on a Regulation on short selling and certain aspects of credit default swaps (the Regulation)¹. This is about to be published and should be applicable from 1 November 2012.

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.

Taking into account the amount of work, complexity of the issues and the very tight deadlines, the process of preparing technical standards and elaborating the advice on all delegated acts is being significantly compressed compared to normal ESMA practice. The most important differences compared to normal practice will be 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. 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.

This consultation paper on the draft technical standards is published without prejudice to another consultation paper on technical advice to the Commission on delegated acts to be issued by ESMA shortly. The consultation paper on technical advice will also include the corresponding consultation on one regulatory technical standard on the method of calculation of the fall in value of a financial instrument, since it is dependent on 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.

Reasons for publication

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.

Articles 10(1) and 15(1) of 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.

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

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

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.

Contents

In each of the following sections, the background and reasons for the proposals are explained. Section II sets out ESMA proposals on agreements, arrangements and/or measures that adequately ensure that the shares or the sovereign debt instruments will be available for settlement. Section III sets out the proposal for details of information to be notified to competent authorities and disclosed to the public. Section IV clarifies the proposal regarding means by which information may be disclosed to the public. Section V defines the information to be provided to ESMA by competent authorities. Section VI provides for the proposal on application of exemption where the principal trading venue is located outside the Union. Annex III contains the full text of the draft regulatory technical standards and Annex IV contains the full text of the draft implementing technical standards.

Next steps

ESMA will consider the feedback it received to this consultation in February/March 2012 and expects to publish a final report and submission of the draft technical standards to the European Commission by 31 March 2012 for endorsement.

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

II.I. Background

1. Article 12(1) of the Regulation provides

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

- (a) the natural or legal person has borrowed the share; or has made alternative provisions resulting in a similar legal effect;*
- (b) the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;*
- (c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have reasonable expectation that settlement can be effected when it is due.*

2. Article 13(1) of the Regulation provides

A natural or legal person may only enter into a short sale of sovereign debt where one of the following conditions is fulfilled:

- (a) the natural or legal person has borrowed the sovereign debt or has made alternative provisions resulting in a similar legal effect;*
- (b) the natural or legal person has entered into an agreement to borrow the sovereign debt or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;*
- (c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the sovereign debt has been located or has otherwise reasonable expectation that settlement can be effected when it is due.*

3. In accordance with Article 17 of the Regulation, transactions performed due to market making activities or, in respect of sovereign debt, primary market operations are exempted from these requirements.

4. Recital 18 provides indication on the arrangements currently used for covered short selling that should be taken into account. The following examples are provided but there is no specification as to whether they apply to shares, sovereign debt or both:

- a separate repurchase agreement on the basis of which the person short selling a security buys back an equivalent security in due time to allow settlement of the short sale transaction,
 - collateral arrangements if the collateral taker can use the security for settling the short sale transaction,
 - rights issues (offerings) of companies to existing shareholders,
 - lending pools provided, for instance, by trading venues, clearing systems or central banks, and,
 - repo facilities provided, for instance, by trading venues, clearing systems or central banks.
5. In relation to uncovered short selling in shares, Recital 19 provides examples of measures to be taken vis-à-vis third parties for the legal or natural person to have a reasonable expectation that settlement can be effected when it is due (in the case of an arrangement with a third party under which that third party has confirmed that the shares have been located) like:
- third party having allocated the shares for borrowing or purchase,
 - confirmation by a third party that it considers the share as easy to borrow or purchase in case of short sales to be covered by purchase of the share during the same day.
6. In relation to uncovered short selling in sovereign debt, Recital 20 specifies that the covering of a short sale by a purchase in the same day is sufficient to consider that there is reasonable expectation that settlement can be effected when due.
7. As specified in the Regulation, one of the conditions set out in Article 12(1) for shares and Article 13(1) for sovereign debt must be fulfilled prior to entering into any short sale.

II.II. Approach

8. ESMA is asked to develop implementing technical standard (ITS) to determine the type of agreements to borrow or arrangements with a third party that adequately ensure that the shares or sovereign debt instruments will be available for settlement.
9. The Recitals provide examples of types of such agreements or arrangements.
10. ESMA considers that an approach which provides an exhaustive list of types of agreements or arrangements and the criteria which these must fulfil will provide certainty and clarity while it is also necessary to leave flexibility to cope with market evolutions.
- Q1: Do you agree with the approach of providing an exhaustive list of types of agreement, arrangement and measure that adequately ensure shares or sovereign debt instruments will be available for settlement and setting out the criteria these should fulfil?**

II.III. Agreements to borrow or other enforceable claim having similar effect

11. ESMA considers that the following exhaustive list of types of agreement or enforceable claim having a similar effect should be set out in the implementing technical standard along with the criteria these should meet:
 - a. Futures;
 - b. Options;
 - c. Repurchase agreements;
 - d. Standing agreements or rolling facilities;
 - e. Subscription rights;
 - f. Other claims or agreements leading to physical exchanges of the shares or sovereign debt.
12. These agreements or enforceable claims should meet the following criteria:
 - ensure that the amount of shares or sovereign debt subject to the short sale will be made available to the investor (a natural or legal person) for the settlement of that short sale,
 - be entered into prior or concomitantly to the investor entering into the short sale,
 - be legally binding for at least the duration of the contract,
 - cover at least the exact quantity to be sold short by the investor,
 - specify an execution date consistent with ensuring that the settlement date of the short sale in question is met,
 - be recorded in a durable medium so the third party can provide evidence to e.g. the short seller or the competent authority.
13. The final criterion above is intended for supervisory purposes and for the investor to be able to demonstrate that the provisions of the Regulation have been complied with. This could be achieved through any record, whatever the media used (taped phone line, email, electronic confirmation, etc), allowing the identification of the concerned shares or sovereign debt instruments and their amount, the date and time on which they entered into and the period of validity of the agreement or claim
14. Recital 18 mentions rights issues (offerings) of companies to existing shareholders as an example of an arrangement for covering short selling that should be considered. However it is doubtful that the issued rights (including nil-paid rights), that can be converted into new shares only after the theoretical settlement date relating to a short sale of that share, will allow the timely delivery for settlement of that transaction. On the contrary, it would only be considered as an arrangement for covering short selling when the rights received by existing shareholders or bought would allow obtaining the new shares on time to deliver them when settling the short sale in the intended settlement date. Therefore, only the rights issued that can be converted into new shares before or at the settlement date of the concerned short sale transactions shall meet the criterion of this type of arrangement to cover short selling.

Q2: Do you agree with the proposed list of agreements and enforceable claims and the criteria they should meet? Are there any other types of agreement or enforceable claims or criteria which should be added?

Q3: Do you consider that these criteria will entail additional costs as compared to current practices on the market? If so, could you specify the drivers for those additional costs and any indication of their amount?

II.IV. Third party arrangements

15. Articles 12(1) and 13(1) as well as Recital 19 of the Regulation refer to third party confirmations but the Regulation does not define “third party”. This poses the risk of relying on confirmations that come from parties that are not reliable or knowledgeable enough which, in turn, would make the whole process ineffective. In addition, the objectives of the provisions i.e. improving customer and investor protection and reducing the risk of settlement failures would not be achieved.

16. ESMA considers that for the proposed arrangements and measures to be meaningful and reliable ensuring that the investor has reasonable expectation of timely settlement, these should be concluded only with one of the following third parties which meet certain criteria:

- An investment firm,
- A trading venue,
- A central counterparty,
- A securities settlement system,
- A central bank,
- A national debt management entity,
- Any other person subject to authorisation or registration in accordance with EU law and who is an active participant in the securities market and can provide data on its ability to deliver in time for settlement.

17. The final category sets out criteria which new types of participants, services or business models would need to meet to be included in the list. ESMA considers that confirmations should come from parties that will have some kind of involvement in the process for the location, borrowing or purchasing of the shares or sovereign debt instruments and not from disinterested third parties who do not put any skin in the game. Thus, providers of data on securities lending markets, actors and activity are not included in the list of third parties for the purpose of the location of the shares or sovereign debt instruments or for providing a reasonable expectation to an investor. However, such data providers can have a role in the measures necessary for the third party to ensure the investor’s reasonable expectation that the instruments intended to be sold short can be settled in due time. Additionally, to allow the investor to monitor the extent to which the confirmations he is relying on are conducive to the intended effect of timely settlement, the third party should be able to show some evidence about the effectiveness of its arrangements and measures.

18. ESMA is aware of the current practice within regulated firms whereby proprietary trading desks undertaking short selling have arrangements with another internal desk in charge of lending/borrowing shares/debts or repo desk.
 19. However, any arrangement under the provisions of Articles 12(1)(c) and 13(1)(c) must be made with a third party. If this is to be understood from a pure legal point of view, that third party would be a legal entity that is different from the legal entity that has or will enter into the short sale. ESMA acknowledges that this will affect the current practice as a trading desk entering into a short sale could not make an arrangement with a lending desk within the same legal entity as this would not fulfil the conditions in Articles 12(1)(c) and 13(1)(c).
- Q4: Do you agree with the proposed list of third parties which may be parties to the arrangements or measures and the criteria proposed by ESMA that they should fulfil?**
- Q5: Are there further criteria which should be added?**
- Q6: Does the fact that a third party should be a distinct legal entity from the entity entering into the short sale entail costs? If so please provide estimates of those costs.**

II.V. Locate confirmation arrangements and measures in relation to shares

20. The condition specified under Art 12(1)(c) of the Regulation describes a two-step process whereby the investor intending to execute a short sale should first obtain a location confirmation under the third party arrangement and, second, should take additional measures. However, in practice nothing precludes these two steps being taken simultaneously.
21. On the location confirmation, Recital 19 specifies that the third party confirmation essentially relates to the assessment by the third party of its ability to make the shares available for settlement; it does not necessarily imply that the shares are already available to that third party at the time of the location confirmation. Therefore, ESMA considers that the shares to be sold short by the investor would be located upon reception of the confirmation from the third party that it could lend, or otherwise make available, the shares in the amount requested by the investor, so as to allow settlement in due time.
22. With respect to the measures to be taken by the investors, according to Article 12(2), there are two main factors that should be taken into account: intraday trading; and liquidity of the shares. The types of locate confirmation arrangements and measures listed in the technical standard should in ESMA's view reflect these criteria. Therefore in addition to a standard locate confirmation arrangement or measure, the technical standard should provide for a standard same-day locate confirmation arrangement and measure and a liquid shares locate confirmation and measure which meet certain criteria.
23. In order to ascertain that the investor has reasonable expectations that the settlement can be effected when it is due, ESMA considers that the standard locate confirmation arrangement and measure should include as a criterion on obtaining the confirmation of the effective allocation of the shares. Such an allocation by the third party could take several forms providing various levels of certainty in terms of effective availability of the shares, among others: effective purchase or borrowing of the shares, reservation to the investor of shares already owned by the third party or putting on hold ("icing") of the shares by the third party. ESMA considers that to meet the test, the shares should at least be identified and put on hold by the third party. This approach will in prac-

tice concern mainly illiquid shares in cases of intraday short selling or liquid shares when the specific “reasonable expectation” test described below for intraday short selling or short selling of liquid shares is not met.

24. The standard locate confirmation arrangement and measure should also entail the third party’s confirmation that they are able to make the securities available for settlement when it is due and be based on proper assessment of the amount of the possible sale and the market conditions. This is without prejudice of the respective responsibilities of the firms being members of trading, clearing or settlement systems.
25. For the specific case of intraday short selling (understood as short sales to be covered by purchase of the shares during the same day) recital 19 indicates that obtaining a confirmation that the shares are easy to borrow or purchase from the third party from which the location confirmation was sought is sufficient to meet the reasonable expectation test. However, with a view to ensuring transparency in the process and a proper assessment of the risks taken by a third party, standard same day locate confirmation arrangement and measure should include the criterion of a statement by the investor that it is meant for intraday trading and specification of the maximum number of shares to be sold short. It should also include the criterion of continuous monitoring by the investor of the uncovered position and, where necessary, of instructions to the third party to procure any remaining shares that were not covered by purchases in the same day.
26. Similarly, for liquid shares as defined under Markets in Financial Instruments Directive 2004/39/EC (MiFID), the standard liquid shares locate confirmation arrangement and measure should include as criterion the confirmation by the third party that the shares, for the requested amount, are easy to borrow or purchase in the prevailing market conditions.
27. For supervisory purposes and to be able to demonstrate that the provisions of the Regulation were complied with, the process should be properly evidenced. This could be achieved through any record, whatever the media used, of the confirmation, measures and instructions, including the identification of the shares concerned and their amount as well as the date and time of such confirmation.

Q7 Do you agree with the approach proposed by ESMA on the standard/same day/liquid shares locate confirmation arrangements and measures and the criteria that they must fulfil?

Q8 In circumstances other than intraday short selling or short selling on liquid shares, can you suggest any additions to the methods for effective allocation set out in this consultation paper which would provide the necessary comfort that shares can be delivered for settlement in due time?

Q9 In relation to the approach suggested for liquid shares, do you consider it appropriate to use the MiFID definition of liquid shares? Do you think ESMA should consider different approaches to determine the reasonable expectation test for liquid and illiquid shares? If not, can you provide indications as to the criteria to consider to define liquid shares or to take into account the liquidity of the shares in these circumstances? Is securities lending activity an additional factor to consider when determining liquidity of a share?

II.VI. Locate confirmations or reasonable expectation arrangements in relation to sovereign debt

28. In relation to third party arrangements under which that third party has confirmed that the sovereign debt has been located, Article 13(1)(c) does not require further measures to be taken by the investor.
29. When reading Recital 20 in conjunction with Article 13(1)(c), ESMA considers that the types of arrangements which fulfil the criteria of Article 13(1) are:
- a standard sovereign debt locate confirmation, whereby a third party confirms that it considers it can make the sovereign debt available for settlement when it is due, in the amount requested taking into account market conditions and specifying the period of validity of that location confirmation;
 - a same day sovereign debt locate confirmation arrangement whereby the investor clearly indicates to that third party that the amount of sovereign debt to be sold short will be repurchased during the same day and the third party confirms to the investor that given the liquidity of the sovereign debt instrument, there is a reasonable expectation that the investor would be able to cover his short sales by buying back the same amount of sovereign debt by the end of the day.
30. As with other arrangements this process should be properly evidenced. Evidence of such confirmation is kept as part of the third party arrangement.
31. Both situations described above would allow for relying on structural based arrangements such as repo facilities organised or operated for instance by central banks or debt management offices, where they exist.

Q10: Do you agree with the approach proposed by ESMA on the location confirmation and reasonable expectation arrangement in relation to sovereign debt and that the reasonable expectation test should only apply in the case of intraday short selling of sovereign debt?

III. Details of the information on net short positions to be notified to competent authorities and disclosed to the public

III.I. Background

32. Article 5(1) of the Regulation provides that

A natural or legal person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue shall notify the relevant competent authority whenever the position reaches or falls below a relevant notification threshold referred to in paragraph 2.

33. Article 6(1) of the regulation provides that

A natural or legal person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue shall disclose details of that position to the public whenever the position reaches or falls below a relevant publication threshold referred to in paragraph 2, in accordance with Article 9.

34. Article 7(1) of the Regulation provides that

A natural or legal person who has a net short position relating to the issued sovereign debt of a sovereign issuer shall notify the relevant competent authority whenever such position reaches or falls below the relevant notification thresholds for the Member State concerned or the Union

35. Article 8 of the Regulation provides that

Where a competent authority suspends in accordance with Article 14(2) the restrictions referred to in Article 14(1), a natural or legal person who has an uncovered position in a sovereign credit default swap shall notify the relevant competent authority whenever such a position reaches or falls below the relevant notification thresholds for the Member State concerned or the Union, specified in accordance with Article 7.

36. Article 9(1) of the Regulation provides that

Any notification or disclosure under Articles 5, 6, 7, or 8 shall set out details of the identity of the natural or legal person who has the relevant position, the size of the relevant position, the issuer in relation to which the relevant position is held and the date on which the relevant position was created, changed or ceased to be held.

37. Article 9(4) of the Regulation provides that

The public disclosure of the information set out in Article 6 shall be made in a manner ensuring fast access to information on a non-discriminatory basis. This information shall be posted on a central website operated or supervised by the relevant competent authority. The competent authority shall communicate the address of this website to ESMA, which, in turn, shall put a link to all such central websites on its own website.

38. Explanations of requirements in Article 5, 6, 7 and 8 and further details on them are provided in Recitals 7, 8 and 9 of the Regulation.

III.II. Approach

39. According to Article 9(5) of the Regulation, ESMA is required to specify the details of the information to be notified to the relevant competent authority and, afterwards, disclosed to the public.
40. It should be noted that provisions of Article 9(3) require a relevant competent authority to ensure the confidentiality of information and to incorporate mechanisms for authenticating the source of the notifications. There are no requirements in the Regulation to determine through technical standards either the means or the set of information to be used by the relevant competent authority for the purpose of authenticating the net short position holder submitting the notification. These arrangements are left to the discretion of the relevant competent authorities.
41. It is logical to assume that, from the notifying investors' perspective, full harmonisation of the details and format of the information required to be submitted to the competent authorities is preferred. It is likely that they will hold net short positions in relation to several issuers and that they will have to notify more than one competent authority. Therefore, it would be neither satisfactory nor efficient to require providing different sets of information according to national different formats. Hence, introducing a common standard notification form for each type of financial instrument (i.e. shares, sovereign bonds, uncovered CDS) is envisaged. A common standard form is also foreseen for the purpose of cancelling previously submitted erroneous notifications. To correct any previous notification containing an error, a cancellation of the erroneous notification has to be submitted, and if applicable followed by the new correct notification form.
42. In the same vein, ESMA also proposes a common standard form for the purpose of public disclosure of information on net short positions in shares on central websites operated or supervised by the relevant competent authorities.

Q11: Do you agree that there should be one standard format for notifying relevant competent authority for each type of instrument?

Q12: Do you agree that there should be one standard form for public disclosure of information on significant net short position in shares?

III.III. Identity of the natural or legal person

43. Article 9(1) of the Regulation provides for the identity of the natural or legal person to be notified to the competent authority and, when applicable, to the public.
44. ESMA believes that for this purpose the full name of the natural person should be required.
45. For the legal entity, identity will mean its full legal name as recorded in the relevant official register in its place of incorporation. Furthermore, ESMA also considers it necessary to include an identification number of the legal entity. In order to ensure robustness of the identification number, the standard for the identification of legal entities currently under discussion at the Financial Stability Board (e.g. LEI code) should be used in the long run if and once agreed and operational. In the meantime, those legal entities which hold a Bank Identifier Code (BIC) should use this as their identification number.

46. The information provided in the notification form should also contain contact information: address, country, city, area code, telephone, fax and email. Based on the experience of those competent authorities that already have national net short positions notification and disclosure regimes, this information is extremely useful for possible inquiries in case of erroneous or incomplete data. This information will also allow the holder of the net short position to be contacted regarding any supervisory task related to the Regulation.

47. ESMA notes that the contact information provided would not be made public.

Q13: Do you agree with the proposed way to identify natural and legal persons, including the contact information details?

III.IV. Size of the relevant position

48. Article 5(2) of the Regulation states that

A relevant notification threshold is a percentage that equals 0.2% of the issued share capital of the company concerned and each 0.1% above that.

49. Article 6(2) of the Regulation states that

A relevant publication threshold is a percentage that equals 0.5% of the issued share capital of the company concerned and each 0.1% above that.

50. For the purposes of a notification in relation to the issued share capital of a company, the net short position should be presented both as a percentage (rounded to 2 decimal places) of the issued share capital and as an equivalent number of shares. The figures should be expressed in absolute value terms, i.e. without “+” or “-” signs.

51. Including in the notification the net short position expressed also in equivalent number of shares would allow the notified competent authority to conduct simple checks on the accuracy of the calculation of the position, in particular on the denominator, i.e. the issued share capital figures used by the investor for the calculation. The experience of some competent authorities currently running a notification regime shows that it is not infrequent to receive notifications with evident errors. The ability to perform a simple check by comparing the percentage and number of shares figures would help avoid public disclosure of erroneous data or would make it possible to publish corrections when appropriate.

52. For public disclosure purposes, only the percentage figure (rounded to 2 decimal places) is required. The provisions of the Article 6(2) of the Regulation require that net short positions in shares equal to or above 0.5% and at each further 0.1% above this initial threshold (i.e. 0.6%, 0.7%, etc.) should be publicly disclosed. Article 6(1) requires disclosure of details of the positions in shares to the public whenever the position reaches or falls below a relevant publication threshold. Hence, disclosure of the position in percentage terms also needs to be made when a position falls below the initial threshold of 0.5% it had previously crossed.

53. For the purpose of notification of significant net short positions in sovereign debt, the net short position should be presented as an equivalent nominal amount (expressed in the same currency of the outstanding issued debt). These figures should be expressed in absolute value terms, i.e. without “+” or “-” signs.

54. For the purpose of notification of uncovered position in sovereign CDS, the uncovered position in CDS should be presented as an equivalent nominal amount (expressed in the same currency of the outstanding issued debt). This figure should be expressed in absolute value terms, i.e. without “+” or “-“ signs.

Q14: Do you agree with the proposed way to notify and disclose the size of the relevant position?

III.V. Issuer in relation to which the relevant position is held

55. For the purpose of the net short position notification and disclosure in shares and pursuant to Articles 5(1) and 16(1), an issuer is a company that has shares admitted to trading on a trading venue (regulated market or a multilateral trading facility in the Union) except where the principal venue for the trading of the shares is located in a country outside the Union.
56. The information for notification and disclosure should, therefore, include the full name of the company in which the net short position is held. In addition, a unique identification code should be specified to avoid any mistakes in spelling the name of the issuer or to avoid confusion between entities with similar names. A possible way of assigning a code to the issuer for this purpose would be to use the ISIN code of the shares but, since ISIN codes are assigned to financial instruments and not to companies, some situations could require clarification. The most common one (although not very frequent in European markets) is for issuers to have more than one class of shares admitted to trading at a certain point in time. This typically includes different classes of shares in terms of voting rights or shares with different economic rights. In cases where the issuer has several classes of shares with different ISINs, a single ISIN code should be used to identify the issuer. The option favoured by ESMA would be to use the ISIN of the shares class first admitted to trading. An alternative would be to use a concept like “main class” of shares, typically referring to the ordinary shares (one-share-one-vote and normal dividend rights), although ESMA considers this would provide less clarity.
57. For the purpose of notification of net short positions in sovereign debt and uncovered sovereign CDS and pursuant to Articles 2(1)(i) and 7(1) of the Regulation, an issuer is a sovereign issuer that can be (i) the Union, (ii) a Member State including any ministry, agency or special purpose vehicle of the Member State, (iii) in the case of a Member State that is a federal state, one of the members making up the federation, (iv) a special purpose vehicle for several Member States, or (v) the European Investment Bank.
58. Notification should, therefore include the full name of the issuer for net short positions in sovereign debt and the full name of the referenced sovereign issuer for uncovered positions in sovereign CDS. In addition, the two letter code in accordance with ISO 3166-1 standard for country name should be specified.

Q15: Do you have any comments on the proposed way to identify the issuer in relation to which the relevant net short position is held, including how to use the ISIN code in this matter?

III.VI. Date on which relevant position was created, changed or ceased to be held

59. In order to avoid inconsistencies due to various date conventions or settings of electronic systems and to ensure the use of a standard date format, ESMA considers that a fixed standard for the date

format should be used. ESMA therefore proposes that the ISO 8601 2004 standard (yyyy-mm-dd) should be the only one admissible for notification and publication purposes.

60. The ISO 8601 standard should be used for notification of net short positions in relation to issued share capital or sovereign debt, or to uncovered position in sovereign CDS.

Q16: Do you agree with the use of the ISO 8601 2004 standard for specifying the date on which the relevant position was created, changed or ceased to be held?

III.VII. Additional information

61. Experience of several competent authorities that have already implemented national net short position notification and disclosure regimes shows that requiring a particular set of additional information proves to be useful.
62. Based on this experience, ESMA considers it necessary to require the following additional information:
- a. the identity and contact details of a third party submitting the notification on position holder's behalf (when applicable);
 - b. date of the previous notification of the net short position in shares or sovereign debt or position in uncovered sovereign CDS;
 - c. comment information (optional).

This information would only be notified to the relevant competent authority and would not be required to be disclosed to the public.

63. A third party (whether natural or legal person) might be submitting the notification on behalf of the net short position holder. This might be particularly the case with non-EU funds and investors. The identification of this third party should therefore be provided. Details of the identity of the third party would be analogous to those required for the short position holder specified in paragraphs 44 and 45. Following the same rationale as with the identification of the net short position holder in paragraph 46, contact information of a third party should also be submitted.
64. To ensure efficient processing by the competent authority of the notification data received, the date of the previous notification in relation to the same issuer should be submitted. This allows the competent authority to check that there are no missing communications since the last one and to check if the evolution of any short position follows the notification rules. ESMA considers that this information should in any case be easily available to the net short position holder, and is consistent with the provisions of the second paragraph of Article 9(1) that require records of the gross positions which make a significant net short position to be kept for a period of five years.
65. Based on the experience by national competent authorities currently operating a disclosure regime, ESMA believes that the net short position holder should have a possibility to provide additional information (in a free text format) to the relevant competent authority. This could be used to explain the reasons for changes in a particular net short position or to explain incidents of late notification. It would not be mandatory in any case to populate this field and ESMA considers it



would only be used when a specific circumstance requires clarification, not as an ordinary procedure.

Q17: Do you agree that the additional information described above should be provided?

IV. Means by which information on net short positions in shares may be disclosed to the public

66. According to Article 9(6) of the Regulation, ESMA is required to specify the means by which information on net short positions in shares may be disclosed to the public. In ESMA's view, this includes the mechanisms that net short position holders should use to make disclosures to the public and the characteristics of those mechanisms.
67. Article 9(4) of the Regulation specifies requirements for the public disclosure of the net short positions in shares: fast access to information and non-discriminatory basis. This article specifies that the disclosed information shall be posted on a central website operated or supervised by the relevant competent authority. ESMA is required to put web links to all these central websites on its own website. However, Article 9(4) of the Regulation does not prevent net short position holders using additional ways of reaching the public when disclosing their positions. These could include a wide range of mechanisms that are currently used to disclose other types of regulated information, such as regulatory information services, data vendors, news agencies, media and the like. ESMA considers that it would not be proportionate to impose on such a different range of information providers common specific standards on how to present, sort or complement the information they disseminate.
68. In ESMA's view, disclosure and publication through the regulator's website or a website supervised by the competent authority is considered enough to ensure non-discriminatory and fast access to information, without prejudice to the use of other additional mechanisms if the investor so decides.
69. The central websites will ensure that the public can access this information in a centralised way and on a non-discriminatory basis. ESMA considers that in order to make the means of disclosure as comparable and accessible as possible it is advisable to establish minimum specifications for the way the information can be consulted by the users of those websites. This should include at least the possibility of accessing electronically readable data that can be easily understood and, eventually, processed. This will require that the information is stored in databases that allow it to be sorted and downloaded in layouts and formats that are user-friendly to ensure fast access to them and that they are accessible in a way that is broadly similar across the different websites, allowing thus a user to access different websites without finding too different outputs.
70. ESMA considers it necessary that central websites present the information to the public in a way that is easily accessible and workable. For the information to be accessed and used easily, ESMA considers that, without prejudice to other additional features, information should not be available only in facsimile (e.g. pdf) formats. Therefore, the data should be available in a format that would allow electronic reading, including the ability to download them for further processing, analysis or comparison.
71. This would at least include a data table including information on the identity of the position holder, the date when the notification threshold was reached or crossed and the percentage of the issued share capital for all positions published on a particular share at that point in time. The websites should include also a way to identify or filter information on all disclosed positions that, at the moment of accessing the website, exceed the relevant publication threshold. Whenever possible, this information should also be downloadable or exportable.



Q18: Do you agree that information on the central website should be provided at least in a machine-readable format?

Q19: Do you agree that information on the central websites should at least include data as provided in Annex 1 of the draft implementing standard presented in appendix to this consultation paper?

V. Information to be provided to ESMA by competent authorities

V.I. Background

72. Article 11 of the Regulation contemplates two types of information relating to net short positions in shares, sovereign debt and uncovered sovereign CDS that competent authorities should provide to ESMA:

- a. periodic information in summary form on quarterly basis, extracted from the notifications received by each Competent Authority;
- b. additional information that ESMA can request at any time

73. Precisely, Article 11 of the Regulation specifies:

(1) Competent authorities shall provide information in summary form to ESMA on a quarterly basis on net short positions relating to the issued share capital of companies and to the issued sovereign debt of Member States and of the Union, and on uncovered positions relating to credit default swaps, for which it is the relevant competent authority and receives notifications under Articles 5 to 8.

(2) ESMA may request at any time, in order to carry out its duties under this Regulation, additional information from a relevant competent authority of a Member State on net short positions relating to the issued share capital of companies and to the issued sovereign debt of Member States and of the Union, or on uncovered positions relating to credit default swaps.

The competent authority shall provide the requested information to ESMA at the latest within seven calendar days. Where there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in another Member State, the competent authority shall provide ESMA with any available information based on the notification requirements under Articles 5, 7 and 8 within 24 hours.

74. The legislative mandate for the draft Regulatory and Implementing Technical Standards proposed in this Consultation Paper is to be found in Articles 11(3) and 11(4) of the Regulation. They require ESMA to submit for endorsement to the Commission respectively RTS specifying the details of the information to be provided in accordance with paragraphs 1 and 2 of Article 11, and, ITS defining the format of that information.

V.II. ESMA missions, tasks and interest in the information

75. Under Article 30 of the Regulation, ESMA may at its own initiative conduct an inquiry into a particular issue or practice relating to short selling or relating to the use of CDS to assess whether that issue or practice poses a threat to financial stability or market confidence in the Union. The periodic information can therefore be one of the useful sources of information for the identification and analysis of such a situation. As to the information to be provided upon ad hoc request, ESMA may need it in deciding whether to conduct such an inquiry or in the course of the inquiry itself.

76. Furthermore, the Regulation entrusts ESMA with a facilitation and coordination role when a competent authority intends to introduce or renew one of the temporary measures in exceptional circumstances. According to Article 27, upon reception of a notification from a competent authori-

ty, ESMA shall within 24 hours issue an opinion on the measure to be imposed or renewed, assessing in particular its necessity, appropriateness and proportionality as well as whether any measure should also be taken by other competent authorities. In such situations and considering the time constraint, any information already available to ESMA would be of assistance and of crucial importance. So would be the quarterly summary information received by ESMA provided however a sufficient level of granularity is ensured to assist in the analysis. It would be particularly useful for the review of the measures that ESMA should conduct at least every 3 months or the assessment of the renewal of an emergency measure already imposed (Article 27(4)).

77. A similar reasoning applies in relation to the direct intervention powers of ESMA in exceptional situations under article 28 and 29. Periodic information (if granular enough) and upon request information can be of assistance for determining whether a measure against natural or legal persons (including the renewal of a measure after a maximum period of 3 months) is required as well as for determining whether the conditions to take such a measure are fulfilled (addressing a threat of functioning and integrity of financial market or the financial stability, cross border implications). The information, if relevant, could also be used by ESMA as evidence to support its views when consulting with ESRB under article 28(4) and to motivate its decision to be notified to competent authorities and publish. With respect to emergency measures in relation to sovereign debt and sovereign CDS (Article 29), the periodic and upon request information can prove useful for supporting the ESMA confidential recommendation to the Council to declare an emergency situation and the related assessment of the situation, prior to any emergency measures being taken².
78. More globally, ESMA is entrusted under the ESMA Regulation³ with the specific tasks to cooperate closely with the ESRB, to monitor and assess market developments in the area of its competence, to undertake economic analyses of the markets and to contribute to the monitoring, assessment and measuring of systemic risk.

V.III. Periodic information to be provided to ESMA by Competent Authorities

On the details of the information

79. Information to be provided on a periodic basis relates directly to information received by Competent Authorities through all notifications they receive under articles 5, 7 and 8. The summary information should then be derived from these notifications.
80. Recitals 7 and 8 indicates that the purposes of the transparency regime to the Competent Authorities are to enable them to monitor short selling and net short positions on financial instruments that may create systemic risks, be abusive or, in the case of shares, even create disorderly markets. Thus, the Competent Authorities will obtain a global view of the net short positions for the issuers under their scope of competence. However, at European level, only ESMA could get a global picture through the periodic information to be provided.

² For the specific case of sovereign debt and sovereign CDS, the emergency procedure to follow is the one specified in the ESMA Regulation (Regulation (EU) No 1095/2010 of the European Parliament and of the Council).

³ Article 8 of the Regulation (EU) No 1095/2010 of the European Parliament and of the Council

81. It is assumed that ESMA should use this information to carry out its duties as enshrined in the ESMA Regulation⁴, 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 as well as its duties under the short selling Regulation (taking emergency measures, conducting inquiries).
82. In particular, under Article 32 of the ESMA Regulation, ESMA shall monitor and assess market developments and where necessary inform other ESAs, the European institutions and the ESRB of relevant micro-prudential trends, potential risks and vulnerabilities. Economic analyses should therefore be conducted. For instance, ESMA already publishes a half-yearly report on trends, risks and vulnerabilities in financial market.
83. Therefore, in order for ESMA to be in a position to integrate the short selling dimension in the scope of the regular economic analyses, to either conduct descriptive analyses in order to detect trends or more fundamental research and analysis on whether short selling may have an impact in the markets, the data needed should be sufficiently detailed. In addition, such analyses (based on historical data) could also be of use when trying to determine whether advanced indicators of future risks on financial markets could be identified. In doing so, ESMA would not only rely on quarterly information on net short positions but also on other types of market data available.
84. As there are 3 types of positions to consider – on shares, on sovereign debt and on uncovered CDS, there will be potentially 3 types of forms/templates to be used by Competent Authorities to provide information to ESMA, each of them containing different information. To provide the required information, Competent Authorities should use the information they receive through notifications pursuant to Articles 5, 7 and 8 of the Regulation.
85. With respect to uncovered positions in CDS, the provision of information is required from the beginning of the temporary period during which the Competent Authority has decided to opt out of the prohibition on entering into uncovered transactions in CDS, for a maximum period of 12 months (subject to possible renewal).
86. Information required from Competent Authorities under Article 11 of the Regulation shall include:
- a. daily aggregated net short position on each individual share in the main national equity index as identified by the national competent authorities,
 - b. end of quarter aggregated short position (i.e. on the last day of the quarter) for each individual share which is not in the main national index,
 - c. daily aggregated net short positions on each individual sovereign issuer;
 - d. where relevant, daily aggregated uncovered positions on CDS of a sovereign issuer.

On the format

87. To enable ESMA to process and make efficient use of the quarterly information received from Competent Authorities, a unique electronic standard format (e.g. Excel, CSV, XML) should be used

⁴ Regulation (EU) No 1095/2010 of the European Parliament and of the Council

by all Competent Authorities for each form/template they provide (as mentioned before, potentially 3 different forms/templates to cater for the differences between the types of position contemplated).

88. In relation to the means for transmitting the required information, the level of security should be high enough in particular if the data exchanged is to be used for risk assessment, even though no names (e.g. names of notifying investors or reporting entities acting on behalf of investors) are to be included. The transmission mechanism must therefore provide a very high end-to-end security level and notably ensure that the completeness, integrity and confidentiality of the information is maintained during its transmission to ESMA.
89. In addition, the quarterly frequency implies that each of the 30 Competent Authorities (as the Regulation has EEA relevance) will send to ESMA 4 notifications every year, each of them including a maximum of 3 forms/templates. Therefore, the maximum number of forms to be received by ESMA every year is estimated to 360.

V.IV. Information to be provided upon request from ESMA

90. According to Art. 11(2), ESMA may request additional information from a Competent Authority in relation to net short positions on shares and sovereign debt or on uncovered positions relating to CDS.
91. Such additional information can include information that is not already received by ESMA as part of the quarterly information and that is based on the notification requirements. For instance, this may include, without limitation, information on the net short positions or uncovered positions in CDS that one or several investors, clearly identified, hold in relation to a specific issuer or categories of issuers. This could take the form of aggregated data as well as individual notifications received by the Competent Authority.
92. It seems difficult to establish ex ante a standard template containing each and every type of information that could be requested on an ad hoc basis. However, with the objective to obtain as specific and precise information as possible, ESMA will specify in its request to a competent authority the details of the information requested, indicating, among other things and where relevant, whether it concerns one or several specific issuer(s), one or several investors and a specific period of time, and, whether the information should be provided in a particular format. For instance, ESMA may provide a specific template according to which the information relating to data in notifications should be collected and presented. In other circumstances, the information to be provided may be of more qualitative nature and be presented in text format.
93. For the purpose of traceability and efficiency of the exchange of information, requests for information shall be made in writing, through a secured electronic means, and addressed to the relevant contact person within the requested Competent Authority.
94. In order to facilitate any processing of the information received, the requested Competent Authority should send the information in electronic format, in accordance with the proposed templates if any, using a secure network to be set up by ESMA for exchanging information.
95. In case of urgency and depending on its complexity, ESMA's request can be transmitted orally provided that it is confirmed in writing.



96. Considering the sensitive nature and the confidentiality level of the information (e.g. potentially nominative information) to be exchanged between ESMA and Competent Authorities, the transmission mechanism must again provide a very high level of end-to-end security and notably ensure that the completeness, integrity and confidentiality of the information is maintained during its transmission.

VI. Exemption where the principal venue is located outside the Union

VI.I. Background

97. Article 16(1) of the Regulation provides that

Articles 5, 6, 12 and 15 shall not apply to shares of a company admitted to trading on a trading venue in the Union where the principal venue for the trading of the shares is located in a country outside the Union.

98. Article 16(2) of the Regulation provides that

The relevant competent authority for shares of a company that are traded on a trading venue in the Union and a venue located outside the Union shall determine, at least every two years, whether the principal venue for the trading of those shares is located outside the Union.

99. Article 16(3) of the Regulation provides that

The relevant competent authority shall notify ESMA of any such shares identified as having their principal trading venue outside the Union.

Every two years ESMA shall publish the list of shares for which the principal trading venue is located outside the Union. The list shall be effective for a two year period.

100. According to Article 2(1)(o)

"principal venue" in relation to a share means the venue for the trading of that share with the highest turnover.

101. According to Article 2(1)(u)

"turnover" of a share means the turnover as defined in Article 2(9) of Regulation (EC) No 1287/2006 i.e. "the sum of the results of multiplying the number of units of that instrument exchanged between buyers and sellers in a defined period of time, pursuant to transactions taking place on a trading venue or otherwise, by the unit price applicable to each such transaction."

102. According to Article 2(1)(r)

"trading venue" means a regulated market or a multilateral trading facility (i.e. a multilateral system within the meaning of Article 4(1)(15) of Directive 2004/39/EC) in the Union.

103. It should be noted that the scope of exemption in Article 16 is limited to shares and no other financial instruments are concerned by these provisions. The net short position notification and disclosure requirements, the locate rule requirements and the buy-in procedures would not apply to exempted shares.

104. In accordance with Articles 16(3) and 16(4), the calculation methods and implementation details are to be defined through RTS and ITS by ESMA.

105. More specifically, ESMA is required to draft:

- RTS to specify the method for calculation of the turnover to determine the principal trading venue.
- ITS to determine the date on which and period in respect of which any calculation is to be made, the date by which Competent Authorities shall notify ESMA with a list of the relevant shares and the date from which the list is effective following publication by ESMA.

VI.II. Approach

106. The anticipated stages in the process granting an exemption are as follow:

- a. identifying those shares that are traded both on European trading venue(s) and non EU trading venue(s);
- b. collecting publicly available data from non-EU trading venues and calculation of turnover and, if necessary, calculating the turnover by Competent Authorities on a trading venue basis;
- c. comparing the results by the Competent Authority to reach a conclusion on the principal trading venue for a particular share. Cases where the share of a company is traded on several EU trading venues (RM and/or MTF) as well as on non EU venues should be taken into account.
- d. notifying ESMA of the shares having their principal trading venue located outside the Union.
- e. publishing the consolidated list of shares for which the principal venue is located outside the Union on ESMA website.

107. From the wording of Article 16, ESMA understands that venues to consider in third countries shall be the ones equivalent to European trading venues, i.e. equivalent to regulated markets and MTFs.

VI.III. Determination of the relevant competent authority, responsible for the calculation and effect on the schedule

108. In relation to shares admitted to trading on a regulated market, Article 2(1)(q)(v) of the Regulation specifies that the relevant competent authority for that financial instrument means the competent authority as defined in Article 2(7) of Commission Regulation (EC) No 1287/2006⁵, i.e. the competent authority of the most relevant market in terms of liquidity. Article 9 of the same Regulation further specifies that in the case of a share, the most relevant market in terms of liquidity shall be the Member State where the relevant share was first admitted to trading on a regulated market. As to shares admitted to trading on trading venues other than regulated markets, the relevant competent authority is the one of the Member State where the share was first admitted as stated in Article 2(1)(q)(vi) of the Regulation.

⁵ Commission Regulation No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive (OJ L 241, 2.9.2006, p.1)

109. If the share was admitted for the first time simultaneously on more than one trading venue in Europe, the most relevant market in terms of liquidity is determined according to Article 9(8) of the Commission Regulation (EC) No 1287/2006.
110. In cases of contestation of the earlier determination by a competent authority as considered under Article 10 of the Commission Regulation (EC) No 1287/2006, the procedure set up in section 4.2 of the Protocol on the Operation of CESR MiFID Database (Ref: CESR/09-172d)⁶ shall apply (notification of contestation in January, 4 weeks to proceed with the calculations, and if necessary, ESMA to facilitate a solution in case of disagreement).
111. As a consequence, the starting point of the whole process of determining the principal venue located outside the EU for the purpose of the Regulation is closely linked to and dependent on this calendar, both as concerns the date of notification to ESMA and the date of effectiveness of the exemptions.

VI.IV. Carrying out the calculations

112. To calculate the turnover of the relevant shares, ESMA proposes to align the process as much as possible, and where appropriate, with the Commission Regulation (EC) No 1287/2006 requirements in terms of market transparency calculations and take advantage of the experience gained while implementing them. Thus, duplication of work may be limited and processes set up by competent authorities for these calculations could be used for the purposes of the Regulation.
113. These calculation requirements are defined in Article 33 and 34 of the Commission Regulation (EC) No 1287/2006.
114. According to the definition of “principal venue” in Article 2(1)(o), of the Regulation, the calculation of the turnover should be conducted on a per venue basis. Therefore, the steps are the following:
 - a. the relevant competent authority identifies the main trading venue in Europe;
 - b. the relevant competent authority identifies the venues where the shares of a company are trading in countries outside Europe, and selects the one where the turnover is the highest;
 - c. the relevant competent authority then compares the respective turnovers on these 2 venues.
115. For the purpose of the turnover calculations, ESMA proposes to use the following process:
 - a. Relevant competent authorities compare the information published by the identified trading venues where the concerned shares are traded on the basis of the information made public by these venues. Where there are no reasonable doubts about which trading venue has the highest turnover, i.e. the difference is sufficiently significant, the competent authority will make its determination without having to enter into more detailed calculations.

⁶ The “Manual for the use of the MiFID Database 2011 final” (ESMA/2011/SMSC/0003) could also be of assistance.

- b. In case of doubt, the relevant competent authority shall consider all the transactions on each of the identified trading venues over the calculation period, on the basis of the official trading calendar of each venue. Therefore, unlike for the transparency calculations requiring daily average information, there is no need to exclude any specific trading days, for instance when the trading of a share has been suspended.
 - c. Only the transactions executed in the system of the trading venue shall be considered i.e. transactions reported through the venue but executed outside it should not be included.
 - d. In Europe, based on transaction data received from local transaction reporting and data exchanged through transaction reporting exchange mechanism (TREM), the relevant competent authority collects the turnover relating to the trading on the main European venue. Unlike for transparency calculation under Commission Regulation (EC) No 1287/2006, negotiated transactions within the meaning of Article 19 of the same Regulation shall not be excluded from the calculations. As defined in Article 5 of the Commission Regulation (EC) No 1287/2006, a transaction should include a purchase and a sale of a share (i.e. the figures should be single counted). However, if information is only available about either the purchase or the sale (e.g. due to trading with a non-EU firm or a non-MiFID firm), the data about that side of the transaction should be regarded as the single counted transaction.
 - e. The national competent authorities are responsible for ensuring that the calculations are made, but may delegate the actual calculations to a third party (e.g. to a regulated market).
 - f. As regards third country data, the relevant competent authority may rely on turnover information provided by the trading venue in that country as long as the definition of turnover corresponds to that in the Regulation and the proposed RTS, i.e. no exclusion of negotiated trades, single counted. It may also request transaction data information on one or several specific shares through cooperation with the regulator of the concerned trading venue.
116. The method above takes into account the fact that there are no official consolidated statistics on trading volumes of individual shares across different international markets. The potential difficulties this means for identifying all trading venues (including the smallest one) where a particular share might be admitted to trading requires providing some flexibility for the competent authorities and avoiding systematic gathering of data in situations where it is not obviously needed.

VI.V. Period for calculation

117. Under the Regulation, determination of whether the principal trading venue is outside the Union has to be done at least every two years. Publication by ESMA is meant to be done every two years.
118. In normal circumstances, ESMA proposes that the calculation should be based on trading between 1 January and 31 December of the two preceding years. However, in cases where the share in question has not been traded for the whole two-year period on either the European trading venue or venue outside the Union or both, using the common period of trading on both venues for calculating and comparing the turnovers should be considered.

VI.VI. Transitional arrangements for determining for the first time the list of exempted shares and dates for subsequent calculations

119. The list of exempted shares should be determined for the first time according to a procedure that differs from the one presented above.
120. The relevant competent authority for the share of a company would be the one identified as of 1 April 2012.
121. The period to consider for this first calculation shall be 2010 and 2011.
122. Competent authorities shall notify ESMA of their list of exempted shares at least 35 calendar days in advance of the date of application of the Regulation and ESMA shall publish the list of exempted shares on its web site at least 1 month before that date.
123. The list of exempted shares would be effective from the date of application of the Regulation till 31 March 2014.
124. Starting in 2014, the list will be updated on 1 April every second year.

VI.VII. Review and recalculation

125. The purpose of this section is to try to identify a procedure for reviewing the list of exempted shares during the 24 months of its effectiveness and cases where a review would be needed.
126. There are clear cases where the list needs to be specifically reviewed. In particular these include instances when the shares of a company have:
 - i. ceased (on a permanent basis) to be traded on the principal venue located in a country outside the Union;
 - ii. ceased (on a permanent basis) to be traded on a European trading venue; or
 - iii. been admitted to trading on a European trading venue and are already traded on a non-EU trading venue.

In all these cases, the relevant Competent Authority shall notify ESMA as soon as possible.

127. For i, the list should be amended as soon as practicable on the basis of the information to be provided by the relevant competent authority when it becomes aware of the situation.
128. For ii, there are several situations to consider:
 - a. if the share in question was already exempted, there is no need to amend the list though ESMA should be notified of the end of trading on the European trading venue;
 - b. If the shares in question were not exempted:

- if there is no other European venue where these shares are traded, then there is no need to update the list of exempted shares as they are no longer within the scope of the Regulation;
- if there is at least one other European trading venue where the shares in question are traded, the calculation of turnover should be conducted to determine whether exemption should apply under the new circumstances.

129. For iii, if the list is not updated by ESMA immediately, the exemption would not apply to the share in question on its first day of trading on the European trading venue. Since it appears necessary to avoid capturing in the regime shares that are admitted to trading on a EU trading venue but whose principal trading venue was already outside the EU before that admission to trading, ESMA considers that in these cases the competent authority of the EU trading venue should determine whether the share should be exempted and communicate this to ESMA before the date of the admission to trading so that ESMA can add this share to the exempted list.

Q20: Do you foresee any other situation that might merit an update of the list of exempted shares within the two-year effectiveness period?

Annex I

Summary of questions

- Q1: Do you agree with the approach of providing an exhaustive list of types of agreement, arrangement and measure that adequately ensure shares or sovereign debt instruments will be available for settlement and setting out the criteria these should fulfil? ?**
- Q2: Do you agree with the proposed list of agreements and enforceable claims and the criteria they should meet? Are there any other types of agreement or enforceable claims or criteria which should be added?**
- Q3: Do you consider that these criteria will entail additional costs as compared to current practices on the market? If so, could you specify the drivers for those additional costs and any indication of their amount?**
- Q4: Do you agree with the proposed list of third parties which may be parties to the arrangements or measures and the criteria proposed by ESMA that they should fulfil?**
- Q5: Are there further criteria which should be added?**
- Q6: Does the fact that a third party should be a distinct legal entity from the entity entering into the short sale entail costs? If so please provide estimates of those costs.**
- Q7: Do you agree with the approach proposed by ESMA on the standard/same day/liquid shares locate confirmation arrangements and measures and the criteria that they must fulfil?**
- Q8: In circumstances other than intraday short selling or short selling on liquid shares, can you suggest any additions to the methods for effective allocation set out in this consultation paper which would provide the necessary comfort that shares can be delivered for settlement in due time?**
- Q9: In relation to the approach suggested for liquid shares, do you consider it appropriate to use the MiFID definition of liquid shares? Do you think ESMA should consider different approaches to determine the reasonable expectation test for liquid and illiquid shares? If not, can you provide indications as to the criteria to consider to define liquid shares or to take into account the liquidity of the shares in these circumstances? Is securities lending activity an additional factor to consider when determining liquidity of a share?**
- Q10: Do you agree with the approach proposed by ESMA on the location confirmation and reasonable expectation arrangement in relation to sovereign debt and that the reasonable expectation test should only apply in the case of intraday short selling of sovereign debt?**
- Q11: Do you agree that there should be one standard format for notifying relevant competent authority for each type of instrument?**

- Q12: Do you agree that there should be one standard form for public disclosure of information on significant net short position in shares?**
- Q13: Do you agree with the proposed way to identify natural and legal persons, including the contact information details?**
- Q14: Do you agree with the proposed way to notify and disclose the size of the relevant position?**
- Q15: Do you have any comments on the proposed way to identify the issuer in relation to which the relevant net short position is held, including how to use the ISIN code in this matter?**
- Q16: Do you agree with the ISO 8601 2004 standard use to notify and publicly disclose the date on which relevant position was created, changed or ceased to be held?**
- Q17: Do you agree that the additional information as described above should be provided?**
- Q18: Do you agree that information on the central website should be provided at least in a machine-readable format?**
- Q19: Do you agree that information on the central websites should at least include data as provided in Annex 1 of the draft implementing standard presented in appendix to this consultation paper?**
- Q20: Do you foresee any other situation that might merit an update of the list of exempted shares within the two-year effectiveness period?**



Annex II

Cost-benefit analysis

Articles 10(1) and 15(1) of the 1095/2010 ESMA Regulation states 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.

Normal ESMA practice includes the requirement to include elements of cost-benefit analysis in the consultation documents, to allow the public to identify the main cost drivers and the main sources of benefits and be able to input into them or provide evidence that could help in finalizing the analysis.

However, the fact that the text of the Regulation was only agreed and approved in November 2011 and the delivery of the draft Technical Standards by ESMA is required by the end of March 2012 has prevented ESMA from elaborating a draft cost-benefit analysis ahead of the public consultation.

ESMA does not intend to use the exemption foreseen in the Regulation for reasons of urgency or disproportion and, therefore, intends to present and publish an analysis of costs and benefits before submitting the Standards to the European Commission. This is currently under preparation and will be carried out during and after the public consultation and will incorporate the evidence gathered through it. However, ESMA would welcome any evidence of costs and benefits of the proposals presented from the respondents to this consultation paper.



Annex III

Draft Regulatory Technical Standards

COMMISSION DELEGATED REGULATION (EU) No .../..

supplementing Regulation (EU) No xxxx/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 Supervisory Authority (European Securities and Markets Authority) in relation to net short positions and the method for calculating the turnover to determine exempted shares.

of

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No xxxx/2012 of dd mmmm yyyy of the European Parliament and of the Council on short selling and certain aspects of credit default swaps⁷, and in particular Articles 9(5), 11(3) and 16(3) thereof.

Whereas:

- (1) 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.
- (2) 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

⁷ OJ.....

necessary to rely on existing codes that some position holders may have, such as the Bank Identifier Code.

- (3) 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, the European Supervisory Authority (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.
- (4) 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 to allow ESMA to process it and to conduct research and analyses.
- (5) 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, though, it may include, 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.
- (6) 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.
- (7) This Regulation is based on the draft regulatory technical standards submitted by ESMA to the Commission.
- (8) 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 on details of the information on net short positions to be provided to the competent authorities and disclosed to the public, details of the information to be provided to ESMA and method for calculation of the turnover to determine the principal venue for the trading of a share referred to in Articles 9(5), 11(3) and 16(3) of Regulation (EU) xxxx/2012.

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

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

- 1) A notification made under Article 5(1), Article 7(1) or Article 8 of Regulation (EU) No xxxx/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) A natural or legal person who has submitted a notification referred to in paragraph 1 which contains a error shall send, on becoming aware of the error, a cancelation to the relevant competent authority in a form issued by this authority according to 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

A 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) xxxx/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) xxxx/2012

Article 4
Periodic information

Pursuant to Article 11(1) of Regulation (EU) xxxx/2012 competent authorities shall provide ESMA the following information on a quarterly basis:

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

- b. end of quarter aggregated net short position for each individual share which is not in the main national index;
- c. daily aggregated net short positions on each individual sovereign issuer;
- d. where relevant, daily aggregated uncovered positions on CDS of a sovereign issuer.

Article 5
Information upon request

Information to be provided by a relevant competent authority on ad hoc basis pursuant to Article 11(2) of Regulation (EU) xxxx/2012 shall include all requested information as specified by ESMA that has not been previously submitted by the competent authority in accordance with Article 4.

CHAPTER IV
METHOD OF CALCULATION OF TURNOVER TO DETERMINE THE PRINCIPAL
TRADING VENUE FOR A SHARE PURSUANT TO ARTICLE 16 OF REGULATION (EU)
xxxx/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) xxxx/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 of 21 April 2004 on markets in financial instruments;
 - 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; and
 - f. information from other third parties.

- 2) In determining what constitutes the best available information, a relevant competent authority shall ensure to the extent possible:
 - a. 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; and

- 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.

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, when available
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, when available.
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 class of shares of the issuer first admitted to trading
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
15. Date of the previous notification	Date on which the previous notification by the position holder in relation to the same issuer was submitted. Format in accordance with ISO 8601:2004 standard (yyyy-mm-dd)
16. 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, when available
2. Name of the issuer	Full name of the company that has shares admitted to trading on a trading venue
4. ISIN	ISIN of the class of shares of the issuer first admitted to trading
5. Net short position size in percentage	Percentage (rounded to 2 decimal places) of the issued share capital
6. 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							
Reporting date (yyyy-mm-dd)	Name of the issuer		Position date (yyyy-mm-dd)	Net short position after threshold crossing		Date of previous notification (yyyy-mm-dd)	Comment
	ISIN code	Full name		Number of equivalent shares	% of issued share capital		

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

POSITION IN UNCOVERED SOVEREIGN CREDIT DEFAULT SWAPS							
Reporting date (yyyy-mm-dd)	Name of the issuer		Position date (yyyy-mm-dd)	Position after threshold crossing		Date of previous notification (yyyy-mm-dd)	Comment
	Country code	Full name		Equivalent nominal amount			

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							
Cancellation date (yyyy-mm-dd)	Name of the issuer		Position date of the notification being cancelled (yyyy-mm-dd)	Net short position after threshold crossing contained at the notification being cancelled		Reporting date of the notification being cancelled (yyyy-mm-dd)	Comment
	ISIN code	Issuer's name		Number of equivalent shares	% of issued share capital		

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

CANCELLED POSITION IN UNOCEVERED SOVEREIGN CREDIT DEFAULT SWAPS							
Cancellation date (yyyy-mm-dd)	Name of the issuer		Position date of the notification being cancelled (yyyy-mm-dd)	Position after threshold crossing contained at the notification being cancelled		Reporting date of the notification being cancelled (yyyy-mm-dd)	Comment
	Country code	Full name		Equivalent nominal amount			



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 ESMA 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 xxxx/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 xxxx/2012 of dd mm yyyy of the European Parliament and of the Council on short selling and certain aspect of credit default swaps and in particular Articles 9(6), 11(4), 12(2), 13(5) and 16(4) thereof.

Whereas:

- (1) To ensure the uniform application of Regulation (EU) No xxxx/2012 in relation to the information to be provided to the European Supervisory Authority (European Securities Markets Authority, hereinafter “ESMA”) by competent authorities and to achieve an efficient processing of this information, information should be exchanged in an electronically secure way and should also be transmitted using a standard template.
- (2) It is necessary to allow easy access to and re-use of the data on net short positions that is disclosed to the market through central websites. 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 documents or pages should be used to enable users to process the information in a structured and cost-efficient way.
- (3) In addition to disclosure to the central website operated or supervised by a competent authority, the details of a net short position may be made available to the public by other supplementary ways.
- (4) It is considered 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 live at the time of consultation of the central website and a list or table with historical data on all individual net short positions published.

- (5) When a net short position on shares falls below a relevant disclosure threshold, the details, including the actual size of this 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.
- (6) In order to provide for a consistent and clear though flexible framework, the types of the agreements to borrow and other enforceable claims having similar effect or the types of arrangements with a third party that adequately ensure that the shares or sovereign debt instruments will be available for settlement are listed and the criteria they must fulfil are specified.
- (7) The enforceable claims having a similar effect as an agreement to borrow need to be understood as any agreement, contract, transaction or operation entered into by a natural or legal person which ensure that the amount of shares or sovereign debt subject to the short sale will be made available to the natural or legal person for the settlement of that short sale, and can take the form, among others, of a transaction on futures or options leading to a physical settlement of the concerned shares or sovereign debt instruments, a physical exchange or a repurchase agreement.
- (8) In order to avoid confusion, the circumstances in which the use of rights to subscribe new shares in relation to a short sale is adequate are those that ensure settlement when it is due.
- (9) To ensure a proper implementation of the provision for determining whether the principal trading venue of a share is located outside the Union for the purpose of the exemption, the transitional arrangements for determining for the first time the list of exempted shares are specified in relation to the entry into application of Regulation (EU) xxxx/2012. In addition, even though the list of exempted shares is effective for a 2 year period, it is appropriate to provide some flexibility as there are cases where a review of that list might be necessary during the two-year period.
- (10) This Regulation is based on the draft implementing technical standards submitted by ESMA to the Commission.
- (11) 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 means by which information on net short positions may be disclosed to the public, defining the format of information to be provided to ESMA, specifying 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, determining date and period for principal trading venue calculations and notification to ESMA referred to in Articles 9(6), 11(4), 12(2), 13(5) and 16(4) of Regulation (EU) xxxx/2012

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

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

This article sets out how the information on net short positions in shares should be disclosed to the public and posted on a central website operated or supervised by the relevant competent authority for the purpose of Article 9(4) of Regulation (EU) xx/2012. The information shall be disclosed to the public by means of :

- a. publishing 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;
- b. allowing users to identify and sort out the net short positions in a share published on the web site that, at the time of accessing the web site, exceed the relevant publication threshold;
- c. providing for historical data on the published net short positions in a share;
- d. including, 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. showing together with the information under b) the net short positions that are published because they cross downwards the publication threshold of 0.5% of the issued share capital during one day before removing and transferring them to the historical data

CHAPTER III
FORMAT OF THE INFORMATION TO BE PROVIDED TO ESMA BY COMPETENT AU-
THORITIES IN RELATION TO NET SHORT POSITIONS PURSUANT TO ARTICLE 11 OF
REGULATION xxxx/2012

Article 3

Format of the periodic information

- 1) The information to be provided on a quarterly basis to the European Supervisory Authority (European Securities Markets Authority, hereinafter “ESMA”) on net short positions in shares, sovereign debt and credit default swaps pursuant to Article 11(1) of Regulation (EU) xxxx/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) This Article applies for the purpose of Article 11(2) of Regulation (EU) xxxx/2012.
- 2) 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) xxxx/2012 in the format specified by ESMA in its request.
- 3) 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) xxxx/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].
- 4) The information requested shall normally be sent by the competent authority in electronic format, using a secure network 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 xxxx/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) xxxx/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: futures contracts leading to a physical settlement of the relevant securities and covering at least the number of securities proposed to be sold short by the investor, entered into prior to or at the same time as the short sale and specifying

respectively 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 securities and covering at least the number of securities proposed to be sold short by the investor, entered into prior to or at the same time as the short sale and with 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 securities proposed to be sold short by the investor, entered into prior to or at the same time as the short sale and with 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 securities, which for the duration of the short sale, covers at least the number of securities proposed to be sold short by the investor and providing for a delivery or execution date that ensures settlement of the short sale can be effected when due.
 - e. Agreements relating to subscriptions rights; where an investor is in possession of rights to subscribe new shares of the same issuer provided that the investor is entitled to receive the shares on or before settlement of the short sale.
 - f. Other Claims or Agreements leading to physical exchanges or delivery of the shares or sovereign debt: agreements or claims which are covering at least the number of securities proposed to be sold short by the investor, entered into prior to or at the same time as the short sale, and specifying an execution date that ensures settlement can be effected when due.
- 2) The agreement, contract or claim will be provided on a durable medium that can be saved and so provided by the third party to the investor to confirm that the agreement to borrow or other enforceable claim has taken place and used as evidence in the future.
 - 3) Where an agreement to borrow or other enforceable claim which has been entered into is revoked or can no longer be fulfilled, the person is no longer deemed to comply with the conditions of Article 12(1)(b) of Regulation (EU) xxxx/2012 for short sale on shares or Article 13(1)(b) of Regulation (EU) xxxx/2012 for short sales on sovereign debt.

Article 6

Arrangements and measures to be taken in relation to shares

- 1) This article sets out the following types of measures and arrangements [for the purpose of Article 12(1)(c) of Regulation (EU) xxxx/2012]:
 - a. Standard Locate Arrangement and Measures: a locate confirmation, provided prior to the short sale being entered into, including a statement by the third party 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 where the third party has confirmed that it has at least put on hold the requested number of shares for that person.
 - b. Standard Same Day Locate Arrangement and Measures: arrangements, confirmations and measures that include the following elements:

- i. Request for Confirmation: a statement by the investor that the short sale will be covered by purchases during the same day of the short sale should be included in the request for confirmation;
 - ii. 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;
 - iii. Monitoring: the investor continuously monitoring the amount of the short sale not covered by purchases; and
 - iv. Instructions in the event of failure to cover: when executed short sales are not covered by purchases in the same day, a prompt instruction is sent by the investor to the third party to procure the shares to cover the short sale to ensure settlement in due time.
 - c. Liquid Shares Locate Arrangements and Measures: where an investor enters into a short sale of liquid shares, as defined under Article 22 of Regulation (EU) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council⁸, arrangements, confirmations and measures that include the following elements:
 - i. 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; and;
 - ii. Instruction in the event of failure to cover: a prompt instruction by the investor instructing the third party to procure the shares to cover the short sale to ensure settlement in due time.
- 2) The arrangements, confirmations and instructions will typically be provided in the form of letters, emails, recorded telephone conversations and other durable media that can be saved and so provided by the third party to the investor to confirm that the arrangements have been made and used as evidence in the future.

Article 7

Arrangements with third parties to be taken in relation to sovereign debt

- 1) This article sets out the following types of arrangements with third parties [for the purpose of Article 13(1)(c) of Regulation (EU) xxxx/2012]:
 - a. Standard sovereign debt locate arrangement: a confirmation where a third party has confirmed, prior to the short sale being entered into, that it considers that it can make the sovereign debt available for settlement, when settlement is due, in the amount requested by that person, taking into account market conditions.

⁸ OJ L 241, 2.9.2006, p. 1.

- b. Same day sovereign debt locate arrangement: a confirmation where the investor states to the third party that the short sale will be covered by purchases during the same day of the short sale and third party confirms, prior to the short sale being entered into, 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.
- 2) The arrangements and confirmations will typically be provided in the form of letters, emails, recorded telephone conversations and other durable media that can be saved and so provided by the third party to the investor to confirm that the arrangements have taken place and used as evidence in the future.

Article 8

Third parties with whom arrangements are made

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

- a. an investment firm: an investment firm which participates in the management of the borrowing or purchasing of the relevant securities and can provide, on request, statistical evidence for the preceding quarter on the percentage of sales of shares or sovereign debt, including data on short sales, that it processed or covered that were delivered on the intended settlement date;
- b. a trading venue: on which the relevant securities are traded;
- c. a central counterparty: a central counterparty which clears the relevant securities;
- d. a securities settlement system: a securities settlement system as defined under Directive 98/26/EC which settles payments in respect of the relevant securities;
- e. a central bank: a central bank that accepts the relevant securities as collateral or conducts open market or repo transactions in relation to the relevant securities;
- f. a national debt management entity; the national debt management entity that issues the relevant sovereign debt;
- g. any other person subject to authorisation or registration requirements in accordance with Union Law by a member of the European system of the European Financial Supervision or equivalent third country authority which participates in the management of the borrowing or purchasing of the relevant securities and can provide, on request, statistical evidence for the preceding quarter on the percentage of sales of shares or sovereign debt, including data on short sales, that it processed or covered that were delivered on the intended settlement date.

CHAPTER V

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

Article 9

This Chapter applies for the purposes of Article 16(2) of Regulation (EU) xxxx/2012

Article 10

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 the Regulation (EU) xxxx/2012 in respect of the period between 1 January 2010 and 31 December 2011.
- 2) Subsequent calculations shall be made at least 7 calendar days before 1 March 2014 in respect of the period between 1 January 2012 and 31 December 2013, and every second year thereto in respect of the subsequent two year periods.
- 3) Where, for the calculations referred to in paragraphs 1 and 2, the share concerned has not been admitted to trading during the whole two-year period on both 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.

Article 11

Date of notification to ESMA

Relevant competent authorities shall notify ESMA of their list of 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) xxxx/2012 and thereafter on the day before the first trading day in March every second year commencing from March 2014.

Article 12

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) xxxx/2012.

Article 13

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 in the principal venue located outside the Union;
 - b. the shares of a company are removed from trading on a permanent basis in 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 in a trading venue in the Union.
- 2) Where a relevant competent authority considers 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 date of publication by ESMA.

CHAPTER VI FINAL PROVISIONS

Article 14 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 10, 11 and 12 that, for the purpose of the preparation and notification of the first list of exempted shares, shall apply from the day this Regulation shall enter 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 class of shares of the issuer first admitted to trading
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 shares	Percentage figure rounded to 2 decimal places
6. Daily aggregated net short positions in sovereign debt	Figure of equivalent nominal amount in Euros
7. Daily aggregated uncovered positions on CDS of a sovereign issuer	Figure of equivalent nominal amount in Euros