European Securities and Markets Authority

Date: 12/09/2017
ESMA70-146-15

**OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY**

**of 12 September 2017**

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

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

## I. Legal basis

1. According to Article 27(2) of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps[1] (the Short Selling Regulation), the European Securities and Markets Authority (ESMA) shall within 24 hours of the notification made by a competent authority under Article 26 of that Regulation, issue an opinion on whether it considers the measure or proposed measure to be necessary for addressing exceptional circumstances.

2. ESMA's competence to deliver an opinion is based on Article 29(1) (a) of Regulation (EC) No 1095/2010 (ESMA Regulation). In accordance with Article 44(1) of the ESMA Regulation, the Board of Supervisors has adopted this opinion.

## II. Previous measures adopted by Comision Nacional del Mercado de Valores (CNMV)

3. On 12 June 2017, ESMA issued an opinion on the emergency measure introduced by CNMV under Article 20(2)(a) and (b) of Regulation (EU) No 236/2012.

4. The emergency measure consisted of a ban on net short positions on shares issued by Liberbank, S.A. (ISIN ES0168675090, hereinafter "Liberbank"), either directly or through related instruments relevant for the calculation of the net short position determined in Annex I, part 1, Articles 5 and 6 of Commission Delegated Regulation EU Nº 918/2012,

[1] OJ L 86, 24.3.2012, p. 1–24.

and irrespectively of the trading venue or market in which the transactions leading to those positions are conducted.

5. The measure did not apply to trading in index-related instruments or baskets of financial instruments. Furthermore, the CNMV exempted from the measure the following activities:

   a. market making activities, in accordance with the Short Selling Regulation;

   b. the creation of, or increase in, net short positions when the investor that acquires a convertible bond has a delta-neutral position between the equity component of the convertible bond and the short position taken to cover that component; and

   c. the creation of, or increase in, net short positions where the creation of, or increase in, the short position in shares is hedged by a purchase that is equivalent in terms of proportion on subscription rights.

6. The measure entered into force on 12 June 2017 at 08:15 (CET) and was applicable until 23:59 (CET) of 12 July 2017.

7. The CNMV justified the original measure by the existence of specific adverse situations or circumstances that constituted a serious threat to market confidence in the Spanish banking sector. The original measure aimed at preventing this threat from materializing as it could have further implications in terms of financial stability in Spain.

8. That ban was introduced after the resolution of Banco Popular Español S.A., adopted by the Single Resolution Board, and its sale to Banco Santander S.A. That event had increased significantly the sensitivity of the Spanish financial market to possible similar cases that could arise in the future. Market confidence had deteriorated accordingly, especially regarding small financial institutions.

9. CNMV highlighted that in the three weeks before the ban was adopted, Liberbank had already experienced a severe share price fall that resulted in losing 45% of its market capitalisation.

10. Since the ban was imposed, the price of the shares of Liberbank stabilised. Nevertheless, CNMV reported that the share price had shown high volatility, compared to similar shares and did not recover reaching the price levels of the weeks previous to the resolution of Banco Popular Español, S.A.

11. In addition, CNMV pointed out that the net balance of shares borrowed had significantly increased after the prohibition imposed on 12 June 2017 (more than 10% according to data from the loan registry in the Spanish CSD, Iberclear). This could indicate anticipative borrowing by investors in order to create or increase their short positions once the ban would have expired on 12 July 2017.

12. For the reasons described above, on 11 July 2017, in accordance with Article 26 of the Short Selling Regulation, CNMV notified ESMA of its intention to make use of its intervention powers in exceptional circumstances and to renew the emergency measure under Article 20(2)(a) and (b) of the Short Selling Regulation. On 12 July, ESMA issued a positive opinion regarding this renewal (ESMA 70-146-10), which is due to expire on 12 September 2017 at 23:59:00 (CET).

**III. Present measure**

13. On 11 September 2017, in accordance with Article 26 of the Regulation, CNMV notified ESMA and other competent authorities of its intention to make use of its powers of intervention in exceptional circumstances and to renew the emergency measure under Article 20 of the Regulation as described above until 30 November 2017.

14. Such notification follows the public announcement on 6 September 2017 of a strategic plan whereby Liberbank intends to sell more than 800 million euros in non-performing assets and undertake a capital increase of 500 million euros.

15. The public announcement reported the call made by the board of Liberbank for a General Assembly of shareholders for the approval of the abovementioned capital increase of 500 million euros. This announcement indicated that shareholders holding 25% of the capital of Liberbank have already expressed their intention to make use of the subscription rights in full. In addition, another set of shareholders, holding 43,8% of the capital, expressed their intention to tail-swallow, i.e. subscribe to new shares by means of selling other shares or subscription rights, so as to ensure that the operation is economically neutral for them. Liberbank also informed the public that it had signed a pre-underwriting agreement (a pre-underwriting letter or PUL) with Deutsche Bank and Citigroup by which these institutions agreed to subscribe the unsubscribed portion of capital. However, this pre-underwriting agreement is subject to suspensive conditions, linked to market, bank-specific or country-related events that could occur before the start of the rights issuance.

16. With respect to the identification of adverse events or developments which constitute a serious threat to financial stability or to market confidence, CNMV reports that as of 8 September, market capitalization of Liberbank is only Euro 751 million and its total equity is € 2.4 bn. Therefore, the capital increase represents 66.5% of its market capitalization.

17. In the notification, CNMV states that following the publication of the strategic plan, Liberbank’s price fell by 12.37% on 07/09/2017 compared to the previous closing price. The drop in price continued the following day (5.41% on 08/09/2017). Intra-day falls were much heavier (maximum of 28.9% on 07/09 and 7.53% on 08/09).

18. Additionally, CNMV has detected a significant increase in the amount of securities loans over Liberbank’s shares between Friday 08/09/2017 and Monday 11/09/2017, which could indicate a preparation of the build-up of short positions anticipating a possible lifting of the ban.

19. The CNMV considers that the renewal of the measure is necessary in order to minimize the risk of a loss of market confidence and preserve the financial stability of the Spanish banking sector.

20. Regarding the need of the short-selling ban to address the risk of further price declines induced by short-sale strategies and the reasons why such extension would not have a detrimental effect on the efficiency of financial markets, CNMV notifies that the extension of the ban should minimise the risk of a loss of market confidence and persistent uncertainty regarding Liberbank, similar medium-sized Spanish banks and ultimately regarding the Spanish banking system. In CNMV's view, it should also reduce the risk of contagion to other shares of the Spanish banking sector when Liberbank is undertaking a plan for the reduction of the non-performing loans and the related capital actions.

21. The combination of an increasing number of short positions in Liberbank if no ban were in place and an expected severe volatility in the share price along with an expected decline in its price due to the dilutive capital increase, would certainly constitute an adverse scenario.

22. CNMV reports that those risks would be mitigated if the build-up of short positions that might exacerbate price falls were prevented temporarily. Without this measure, the threat to market confidence would remain and would be difficult to tackle.

23. In the notification, CNMV considers that when a bank is in the process of completion of a significant capital increase, short selling restrictions may be needed. Right offerings extend over a period of at least 15 days, entailing a degree of execution risk for the issuer and creating vulnerability for investors. Short selling activity can complicate the rights offering process by creating temporarily additional volatility and making stock prices potentially less informative, forcing a larger price discount and/or making it less attractive for shareholders to exercise their subscription rights. CNMV also notes that the price of the new shares to be subscribed has not been fixed yet and that at this stage there is only a PUL subject to suspensive conditions.

24. Nonetheless, CNMV recognizes that a ban on short positions should remain an exceptional measure and should not become standard practice when an ordinary capital increase of a financial entity is taking place. CNMV stresses in its notification that the last few months, following the resolution of Banco Popular in June 2017, have not been ordinary times in the Spanish banking sector. The volatility of Liberbank's share price in June and the importance of this capital increase for the viability of the bank (66,5% of its current market cap), indicates the exceptional character of this case.

25. CNMV remarks that the ban will not have any negative impact on the acquisition or holding of pre-emptive rights of Liberbank as the ban will allow short positions in shares as a hedge. Moreover, in order to minimize the impact of the measure, an exemption is granted to market making activities, in accordance with Regulation No 236/2012 on short selling.

26. In the same vein, CNMV also highlights that although Liberbank is not included in any major benchmark, in order to limit any possible detrimental effect on the efficiency of financial markets, net short positions arising from trading in index-related instruments and baskets of financial instruments are not affected by the ban.

27. Finally, CNMV relates the current notification with preceding short-selling bans on the shares of credit institutions where ESMA took into account whether the capital increase had already been completed by the issuer (agreed, priced and subscribed and publicly announced) and the significance of the credit institution in terms of financial stability.

## IV. Opinion

28. The current opinion is based on the information provided by the notifying competent authority.

29. ESMA is adopting the following opinion on the notified measure, on the basis of Article 27(2) of the Short Selling Regulation.

### On the adverse events or developments

30. ESMA reiterates most of the considerations made in the past with respect to the short-selling bans on this credit institution: Liberbank is a “significant supervised entity” directly supervised by the SSM/ECB. As elaborated by ESMA with respect to the first short-selling ban on Liberbank on 12 June 2017, this institution is relevant not only at national level, but also Europe-wide. Therefore, it is important to prevent any market dynamic that may put at risk the re-capitalisation of this institution, its financial situation and potentially trigger any contagion effect.

31. ESMA remains of the view that the resolution of Banco Popular in June 2017 still impacts the sensitivity of the Spanish markets and of institutional investors with regards to the assessment of Liberbank and the risks that such investment may entail.

32. Moreover, that sensitivity can be increased by the public announcement made by Liberbank on 6 September which refers to a plan to re-capitalise the financial entity, which is still subject to the approval of the assembly of shareholders and the execution of that plan.

33. ESMA notes that following the publication of the announcement, and while still subject to the short-selling ban that expires on 12 September, Liberbank’s shares fell by 12,37% in a single day (7 September 2017) with respect to the previous session’s closing price. Over that day there was significant volatility in terms of prices and volumes: the drop in price reached 28% over the trading session and the volume traded reached 15,458,752 euros, whereas, since the introduction of the short-selling ban on 12 June the volumes had never exceeded 4.404.783 euros. The price went down a further 5,41% over the following trading session on 8 September.

34. ESMA considers that those price declines cannot be considered in isolation but they have to be understood within a wider context in which the credit institution had already lost 45% of its market capitalization prior to the first short-selling ban.

35. ESMA notes that as of 8 September the market capitalisation of Liberbank is 751 million Euros and its total equity is 2.4 billion euros. Therefore, the capital increase will represent 66.5% of its market capitalisation. ESMA considers that within the ongoing process of re-capitalisation of Liberbank, the financial stability of the concerned credit institution is still threatened and there is a risk of high volatility in the market of Liberbank's shares.

36. In particular, ESMA notes that despite the publicly displayed commitment of major existing shareholders to subscribe to the new shares and the pre- underwriting agreement reached, substantial selling pressure and unusual volatility in the prices of the shares issued by Liberbank could continue to occur thus affecting the market confidence in Liberbank, endangering the operation to strengthen the bank's capital and ultimately putting at risk its financial stability.

37. Based on the reasons described above, ESMA considers that the circumstances are adverse events or developments which constitute a serious threat to market confidence and potential risk to financial stability in Spain, as described in Article 20, paragraph 1 (b) of Regulation (EU) No 236/2012 as further specified in Article 24 of Commission Delegated Regulation No 918/2012.

**On the appropriateness, necessity and proportionality of the measure**

38. ESMA considers that the proposed emergency measure under Article 20(2)(a) and (b) of the Short Selling Regulation in relation to Liberbank's shares is appropriate, necessary and proportionate to address the threat in the Spanish financial markets, as described in Article 20, par 1 (b) of Regulation (EU) No 236/2012.

39. Liberbank has effectively experienced significant volatility and selling pressure following the disclosure of the public announcement, noting in particular that this occurred while the share remains under the short-selling ban approved on 12 July 2017.

40. Given the new information disclosed by Liberbank and the subsequent selling pressure and volatility, ESMA considers that the renewal of the emergency measure limited to the shares of Liberbank and other related instruments is appropriate and proportionate to address the above mentioned adverse events in the Spanish market, particularly taking into account that the measure proposed by CNMV does not affect index-related instruments or baskets of financial instruments.

41. The renewal of the measure is deemed appropriate because other potential less stringent measures would not sufficiently address the threat: on the one hand, a short-term restriction on short selling under Article 23 of the Short Selling Regulation would not address the timing of the threat, as it will remain applicable for a maximum of three trading

sessions whereas the determination of the terms of the capital increase and the effective subscription of the new shares will last for a longer time; on the other hand, adopting a new long term measure to only prohibit short sales would not cover activities through derivatives that result in building of a net short positions.

42. Additionally, given that the adverse context where new information has been recently disclosed about Liberbank's need for re-capitalisation and given the uncertainties regarding the details and the conditions of the capital increase process not renewing the existing measure would increase the volatility and the risk of market participants betting on further price decrease by taking new short positions, exacerbating any potential downward movement of Liberbank's shares.

43. Lastly, the measure proposed by the CNMV does not extend the prohibition to index-related instruments or baskets of financial instruments, to market making activity and to short positions entered into to hedge positions on convertible bond or subscription rights, to minimize possible detrimental effects of this measure.

**On the duration of the measure**

44. ESMA considers that maintaining the short-selling ban until 30 November is justified in light of the information publicly available on the expected timetable of the operation of the capital increase. ESMA particularly notes that CNMV intends to lift the ban as soon as the capital increase is completed and also declares that it does not intend to extend the short-selling ban for Liberbank any further beyond the above-mentioned date.

45. ESMA recommends that CNMV monitors closely the situation.

46. This opinion will be published on ESMA's website.

Done at Paris, 12 September 2017

For the Board of Supervisors

Steven Maijoor

Chair