

OPINION OF THE EUROPEAN SECURITIES AND MARKETS AUTHORITY

of 19 March 2020

on a proposed emergency measure by the Financial Securities and Markets Authority 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. In accordance with 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 swaps¹ (the 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 is necessary to address the exceptional circumstances as further specified in Article 24 of Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012.

II. Background

2. On 17 March 2020, pursuant to Article 26 of Regulation (EU) No 236/2012, the Belgian Financial Securities and Markets Authority (FSMA) notified ESMA of its intention to make use of its powers of intervention in exceptional circumstances and to introduce an emergency measure under Article 20(2)(a) and (b) of that Regulation.
3. In particular, the concerned measure bans any legal or natural person from entering into transactions which might constitute or increase net short positions on stocks admitted to trading on Belgian trading venues (Euronext Brussels and Euronext Growth), where the FSMA is the competent authority for the most relevant market, as well as to all related instruments relevant for the calculation of the net short position as determined in Annex I, part 1, Articles 5 and 6 of Commission Delegated Regulation (EU) No 918/2012. The ban applies to transactions executed both on a trading venue and over the counter.

¹ OJ L 86, 24.3.2012, p. 1–24.

4. The measure applies to any natural or legal person domiciled or established within the Union or in a third country.
5. The measure does :
 - a. not apply to market making activities, as defined in Article 2(1)(k) and pursuant to Article 17 of Regulation (EU) No 236/2012;
 - b. apply to index-related instruments only if the shares represent more than 20% of the index weight.
6. The FSMA will re-evaluate these exemptions depending on market circumstances and could amend the decision accordingly if the need arises.
7. The proposed measure is expected to enter into force on 18 March 2020 before the opening of the trading session and to expire after the close of the trading session on 17 April 2020 after the trading session is closed. The proposed measure may be lifted before the deadline if the risks of a loss of market confidence are reduced, or may be further extended after the deadline taking into account market conditions. Pursuant to Article 26(3) of Regulation (EU) No 236/2012, the FSMA notified ESMA less than 24 hours before the measure is intended to take effect.
8. On 16 March 2020 the FSMA temporarily prohibited short selling pursuant to Article 23 of Regulation (EU) No 236/2012 for the trading day of 17 March 2020.
9. The FSMA considers that the measure is justified by the existence of specific adverse circumstances that constitute a serious threat to market confidence in Belgium, and to the general impact on the Belgian economy of the pandemic. As a consequence of the above, the FSMA deems that, should prices of financial instruments and assets in general continue to fall, there could also be risks to financial stability.
10. The World Health Organisation pointed out that the COVID-19 contagion will normally peak in the coming weeks. However, Belgium has registered during the last days a rapid increase of the number of both infected people and people needing continuous medical supervision in intensive care units. According to statistics published by the Belgian National Health Minister, the number of infected people and casualties has more than doubled overnight. Responding to the emergence of several clusters on the Belgian territory, the Belgian government has taken on Thursday 12 March 2020 several measures to limit contamination, including but not limited to: closing of schools, universities and several public services (including public transports), mandatory closures of non-necessary shops during all weekends and interdiction of any public or private meetings, including religious ceremonies and sport events. The population is invited to remain confined in their homes across the whole Belgian territory. Authorities are expecting a significant impact on the economy, but wish to polarize all efforts in limiting

the spreading of the COVID-19. These measures are exceptional for Belgium and have never been taken before for medical concerns.

11. In light of the above situation, the FSMA considers that there are three different specific threats to market confidence.
12. First, the FSMA considers that as opposed to a deterioration affecting just one issuer, based on fundamental economic factors, in the current context investors do not have accurate and public information on the impact of the public health crisis on each listed company, since events develop quickly and restrictions adopted by the Government might come with little or no advance notice. Hence, price formation may take place in an environment of partial information.
13. Second, the FSMA has observed examples of desinformation, rumours and false news in media and social networks regarding activities that could be affected by decisions of the Government or by the evolution of the crisis. Such rumours may affect listed companies and damage the confidence of investors in an efficient market, where prices should be formed with public, reliable information.
14. Third, the FSMA considers that, although Regulations (EU) No 236/2012 and Article 24 of Regulation (EU) No 918/2012 were drafted without considering the scenario of a pandemic, when identifying situations that could be considered a threat to market confidence, they refer to “natural disasters” that may damage financial institutions, market infrastructures, clearing and settlement systems and supervisors. The effect of the restrictions within the state of emergency on the availability of resources (including human and IT) could be similar to some natural disasters. The FSMA considers that the restrictions to the movement of workers and the fact that key personnel of infrastructures may be affected and unable to continue working, puts the market infrastructures, clearing and settlement systems at enormous strain to monitor, supervise and manage markets. The stock market is the most sensitive to this situation or distress. At the same time, the FSMA has not observed any disruption of clearing and settlement systems yet.
15. In this context, the FSMA considers that a growth of short positions betting on negative news (be them real or ill-based) affecting Belgian and EU companies could destabilize markets in a way that could be self-reinforcing, with downward price spirals as serious as that observed in the session of 12 March 2020.
16. The FSMA also considers that, as a consequence of the above, a negative effect on the financial stability of the system cannot be discarded. According to the FSMA, prices of Belgian credit institutions stocks are rapidly deteriorating, and the risk of weaker confidence of the public in financial stability based on false rumours cannot be discarded. However, the FSMA also notes that they have not observed signs of these effects on financial stability since the outbreak of the COVID-19 pandemic. These scenarios could develop quickly if selling panic as in the week from the 9 to 13 March 2020 happens again.

III. Opinion

17. ESMA considered the information provided by the FSMA and is adopting the following opinion on the notified measure, on the basis of Article 27(2) of Regulation (EU) No 236/2012:

On the adverse events or developments

18. First, as also indicated in ESMA Decision ESMA70-155-9546 and in the ESMA Opinions ESMA70-155-9556, ESMA70-155-9565, ESMA70-155-9581 respectively on proposed emergency measures by the Comisión Nacional del Mercado de Valores (CNMV), the Commissione Nazionale per le Società e la Borsa (CONSOB) and the Autorité des marchés financiers (AMF) under Section 1 of Chapter V of Regulation (EU) No 236/2012, ESMA agrees that the outbreak of the COVID-19 pandemic is having serious adverse effects on the real economy and on the financial markets of the Union. As regards the latter, since 20 February 2020 the stock markets in the EU lost up to or more than 30% in value, and all sectors and types of issuers were affected by severe share price falls (details in the Annex).
19. ESMA considers that the adverse situation linked to the COVID-19 with the consequent adoption by EU Member States of restrictive measures which impact all economic sectors has greatly increased the vulnerability of EU financial markets. There is a concrete risk that the observed downward trend will continue in the coming days and weeks,
20. Pursuant to Article 20(1)(a), the measure under Article 20(2) of Regulation (EU) No 236/2012 requires the presence of adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned as also further specified in Article 24 of Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012.
21. The FSMA considers in its notification that the measure is justified by the adverse circumstances which constitute serious threats to market confidence, and potentially to the confidence in financial stability, in Belgium. Namely, the FSMA considers that the current context is not compatible with the availability of accurate information, with the consequence that price formation may take place in an environment of partial information. Rumours of false news linked to the pandemic may have the effect of impacting listed companies and damage the confidence of investors in the markets. A third source of threat to market confidence is that the COVID-19 pandemic is at the origin of restrictions on the availability of human resources at issuers and financial market participants.
22. ESMA notes that, following the outbreak of the COVID-19 pandemic, Belgian stocks were subject to severe downward price movements and high price volatility, and the Belgian main index (the Euronext BEL 20) decreased by 28.03% between 2 and 16

March 2020 (a decrease of 5.44% occurred between 12 and 18 March 2020). It should be noted that the Euronext BEL 20 index includes relevant financial issuers. Similar or greater decreases can be observed in other main Belgian indices (see the Annex), amounting in one case to a drop of 30.63% for the Euronext BRUSSELS ALL-SHARE INDEX.

23. As previously stated with respect to CNMV's, CONSOB's and AMF's proposed short selling bans, ESMA agrees with the FSMA that the severe losses observed, the uncertainty as regards the spreading of the COVID-19 contagion and the possible consequent further volatility and downward price spirals risk the loss of market confidence. ESMA also considers that the observed increase in net short positions in the last days may further exacerbate the downward price spirals, thereby further weakening market confidence in Belgium. ESMA therefore agrees that the threats to market confidence on the Belgian market amount to serious threats. On the basis of the above ESMA considers that the circumstances described in Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 are met.
24. Furthermore, taking also into account that the losses observed in the main Belgian indices, ESMA agrees that such circumstances impact market confidence in general, with consequences for all listed issuers.
25. ESMA agrees with the FSMA's assessment that the impact of COVID-19 and the extraordinary market conditions caused by it qualify as "adverse events or developments" under Article 24(1) of Commission Delegated Regulation (EU) No 918/2012 and agrees that there are serious threats to market confidence.
26. With reference to the broader EU-markets scenario, ESMA has assessed that there are existing threats to market integrity, orderly functioning of markets and to financial stability. On that basis, on 16 March 2020 ESMA has adopted a decision to temporarily lower the notification thresholds of net short positions to national competent authorities in accordance with point (a) of Article 28(1) of Regulation (EU) No 236/2012 (ESMA70-155-9546). ESMA considers that its decision will enable national competent authorities to better monitor the existing threats.
27. At the same time, ESMA considers that the circumstances described above are adverse events or developments which constitute a serious threat to market confidence in Belgium and under Article 20(1) of Regulation (EU) No 236/2012.

On the appropriateness and proportionality of the measure

28. In order to assess whether the measure would be appropriate and proportionate in relation to the threat, ESMA has analysed how and the degree to which sharp price declines pose a risk to the orderly functioning, integrity and stability of the Belgian market as a whole, looking not only at the range of shares affected by the latest market developments but also at the build-up of net short positions on the shares in scope.

29. From the analysis of the shares impacted by these sharp price declines, it becomes evident that the downfall spiral spreads across the Belgian markets and across different sectors, including systemically important institutions. Such widespread impact is consistent with the global nature of the outbreak of a global pandemic (COVID-19), as announced by the World Health Organisation², that has proven to be serious in Belgium.
30. From that perspective, ESMA understands that limiting the scope of its measure to one or several sectors or to a subset of the issuers may not achieve the desired outcome. Without the broad scope applied by this measure the FSMA may have to adopt additional restrictive measures in the near future at a time when their effectiveness may be limited.
31. As also indicated by the data submitted to ESMA by FSMA, the latest developments in relation to COVID-19, have put an extremely wide range of Belgian shares in a situation of vulnerability. In case short-selling strategies start targeting those shares, the prices may drop further potentially triggering downward spirals and further 'runs' on the market.
32. ESMA considers that suspending the capacity of market participants in the Belgian market to enter into short sales or into transactions with equivalent effect in relation to shares admitted to trading on regulated markets would not have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to its benefits. ESMA rather deems this measure appropriate to provide a uniform level of protection to all Belgian issuers and investors and the wider Belgian market as a whole.
33. ESMA considers that the measure is less stringent than other more intrusive measures that could adequately address the threat to confidence in the Belgian market. At the same time, a further temporary restriction on short selling according to Article 23 of the Regulation (EU) No 236/2012 would not address the threat to market confidence as it would remain applicable for a few days only and would be limited to short selling without covering any opening or increasing of net short positions.
34. Additionally, ESMA notes that the proposed measure does not extend the prohibition to index-related instruments composed by less than 20% of shares and to market making activity. This is with a view to limit the measure to the strictly necessary scope and not to be overly restrictive to trading strategies of market participants, with particular reference to those ones that provide an important service in terms of increasing liquidity and reducing volatility, which is particularly relevant in the current situation.
35. For the above reasons, ESMA considers that the emergency measure proposed by the FSMA under Article 20(2)(a) and (b) of Regulation (EU) No 236/2012 as further specified by Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 in relation to the shares in scope of the measure is appropriate and proportionate to address the existing threat to market confidence in the Belgian market.

² https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200310-sitrep-50-covid-19.pdf?sfvrsn=55e904fb_2

On the duration of the measure

36. In terms of duration of the measure, ESMA considers that maintaining the prohibition for one month is justified considering the information publicly available at the moment. While the FSMA expressed its intention to lift the ban as soon as the evolution of the situation allows, it does not discard the possibility of extending the measure if the situation so requires.

Conclusion: on the necessity of the measure

37. Having considered the adverse situation linked to the COVID-19, the appropriateness, proportionality and justified duration, ESMA considers as necessary the emergency measure proposed by the FSMA under Article 20(2)(a) and (b) of Regulation (EU) No 236/2012, as further specified in Article 24(1)(c) of Commission Delegated Regulation (EU) No 918/2012 in relation to Belgian shares.

This opinion will be published on ESMA's website.

Done at Paris, 19 March 2020

For the Board of Supervisors

Steven Maijor

Chair

ANNEX II

FIGURE 1 – MAIN BELGIUM INDICES

Index	% variation between 3 February and 17 March 2020	% variation between 3 and 17 March 2020	% variation between 13 and 17 March 2020	% variation between 2 and 16 March 2020	% variation between 12 and 18 March 2020
Euronext BEL 20	-35.64%	-28.23%	-7.47%	-28.03%	-5.44%
Euronext BRUSSELS ALL-SHARE INDEX	-37.89%	-30.16%	-7.00%	-30.63%	-7.38%
Euronext BEL MID	-29.04%	-24.66%	-10.86%	-22.46%	-8.31%
Euronext BEL SMALL	-30.61%	-22.56%	-12.37%	-17.97%	-10.78%
Euronext BEL CONSUMER GOODS NR	-48.44%	-33.20%	-12.18%	-31.95%	-9.21%
Euronext BEL BASIC MATERIALS NR	-33.78%	-26.43%	-5.63%	-26.63%	-2.69%
Euronext BEL CONSUMER SERVICES NR	-11.97%	-7.43%	5.61%	-13.00%	5.74%
Euronext BEL HEALTH CARE NR	-26.26%	-24.25%	-4.39%	-22.27%	-8.78%
Euronext BEL INDUSTRIALS NR	-40.21%	-33.08%	-12.66%	-33.17%	-16.67%
Euronext BEL FINANCIALS NR	-39.22%	-32.77%	-12.53%	-31.33%	-10.33%
Euronext BEL TECHNOLOGY NR	-30.98%	-27.71%	-7.41%	-26.38%	-3.35%
Euronext BEL TELECOMMUNICATIONS NR	-19.83%	-9.92%	16.43%	-23.56%	31.10%
Euronext BEL UTILITIES NR	-33.48%	-32.34%	-3.56%	-34.01%	-5.39%