



Transparency rules: information reporting on net short position in shares and in sovereign debt and public disclosure on net short position in shares in articles 5 to 8 of the Regulation. March 2012.

The Regulation 236/2012, of 14 March 2012, on short selling and certain aspects of credit default swaps, published in the Official Journal of the European Union, has been during the last for months being developed by ESMA who has prepared a draft technical standards that should be submitted to the EC by 31 March and in which, among other issues, notification to competent authorities of significant net short positions in shares and in sovereign debt and public disclosure of significant net short positions in shares are developed (arts. 5 to 8 of the Regulation). ESMA expects to submit the draft advice on Delegated Acts to the EC by mid-April 2012.

A natural or legal person who has a net short position in shares shall, according to Regulation, notify competent authorities of net short positions in shares in relation to the issued share capital of a company that has shares admitted to trading on a trading venue and the position reaches the relevant notification threshold (0,2% of the issued share capital of the company concerning and each 0,1% above that percentage) or falls under it (arts. 5. 1 and 2). The public disclosure of significant net short positions in shares will take place when it reaches thresholds of 0,5% of the issued share capital of the company and each 0,1% above that percentage or falls below them. (arts. 6.1 and 2).

The relevant notification thresholds of significant net short positions in sovereign debt shall be fixed, according to the Regulation, by the CE taking into account the total amount of outstanding issued sovereign debt and the liquidity (art. 7); ESMA, in the public consultation paper on draft technical advice, proposes to group sovereign issuers into three categories depending on the total amount of outstanding sovereign debt, average size of positions and liquidity, and fix initial amounts based on the three different categories of initial thresholds: 0,1%, 0,25%, and 0,5% respectively. For each category the additional incremental levels are set at 50% of the initial threshold.

ESMA, in its consultation paper on its draft technical advice on possible delegated acts concerning the Regulation on short selling and certain aspects of credit default swaps, progresses on the contents of those articles that describe transparency obligations for short sales (Transparency rules) as follows:

1. Method of calculation of net positions to determine if the notification and disclosure thresholds are met.

ESMA, for the purpose of net short positions calculation, intends to avoid that one position might be considered more than once and introduce the concept of decision maker that means a single natural person or several natural persons, a body within a legal entity or a legal entity within a group pursuing the same investment strategy in relation to a particular issuer through one sub entity or different sub entities within the same legal entity or within a group, and defines investment strategy as the strategy that is pursued by an investor, regarding a particular issuer, to have either a net short or a net long position taken through transactions in various financial instruments issued by this particular issuer or that relate to that issuer.

When different legal entities within a group have long or short positions in relation to a particular issuer: a) the calculation of the net short position shall be made for each legal entity constituting the group; b) the net positions of these legal entities that are managed by the same decision maker and for which the same investment strategy is pursued in relation to a particular issuer shall be aggregated; c) the net short and long positions of all the legal entities constituting the group shall be aggregated and netted.

In relation to a legal entity constituted of several different non-legal entities with different activities (such as an investment firm that performs different activities apart from management), the aggregation and netting shall be made at the level of each of the decision makers to be considered as the separate business lines and the net short and long positions of all the decision makers within this legal entity shall be aggregated and netted.

For fund management activities related to several funds, the calculation of the net short position shall be made for each individual fund, the net positions of the funds managed by the same decision maker and for which the same investment strategy is pursued shall be aggregated and the net short and long positions of all the funds under the responsibility of a management company shall be aggregated and netted. When the management of funds has been delegated to an external party, that party shall be considered as the decision maker although the management company delegating still has to aggregate and net the positions of the respective funds.

2. Notification to competent authorities of net short positions.

ESMA, regarding the complement of the transparency obligations in the short selling Regulation, tries to simplify them as it is exposed in its consultation paper on its draft technical advice on possible delegated acts concerning the Regulation on short selling and certain aspects of credit default swaps when the same net short position can be considered more than once in the calculation within a fund management company, a group or a single legal entity, taking into account at which specific level or levels a notification/disclosure threshold have been crossed.

Related to the notification of net short positions ESMA considers that the highest of the net short positions on a specific issuer should be reported at whatever level this position lies. Therefore, ESMA suggests: a) when an individual fund or a legal entity crosses a threshold, the reporting should be done by the management company or the group on behalf of the fund or legal entity; b) when a threshold is crossed at decision maker level, the management company or the group reports on its behalf except when the decision maker is independent or is not part of or does not belong to the management company and manages several funds from several management companies and, when the management of a single fund is delegated to more than one manager where there should be an arrangement to ensure who of those independent parties or if the delegating company is obliged to notify the position; c) when a threshold is crossed at management company level, the management company reports the position; and d) when a threshold is crossed at fund, decision maker and management company levels, the latter reports only the highest of the three positions.

If you want to read the whole ESMA's consultation paper on ESMA's draft technical advice on possible delegated acts concerning the Regulation on short selling and certain aspects of credit default swaps, please do click on: <http://www.esma.europa.eu/system/files/2012-98.pdf>