



Deutsche Börse Group

Deutsche Börse Group
Response to
European Securities and Markets Authority
(ESMA)
Consultation Paper ESMA/2012/30

**Draft technical standards on the Regulation on short
selling and certain aspects of credit default swaps**

Frankfurt / Main, 13 February 2012

Introductory remarks

Deutsche Börse Group (DBG) appreciates the opportunity to respond to ESMA's consultation paper on ESMA's technical standards on the Short Selling Regulation.

During the financial crisis, exchanges with their transparent and regulated markets have proven to be resilient and have had a stabilizing effect on the financial markets. Established and proven security mechanisms exist in a transparent on-exchange environment. Settlement takes place within two or three days and there are buy-in mechanisms and penalties by central counterparties in place to ensure high settlement discipline, both for long and short trades. The OTC market does not follow similar standards yet.

The established German act on short selling¹ has proven to be well suited. It provides transparency for net short positions following the CESR recommendations². Covered short selling is allowed while uncovered short selling is allowed intraday, but banned on an overnight basis. Market makers and similar liquidity providers are exempt from the ban. DBG welcomes the European regulation on short selling as it will lead to a harmonization of the different national rules.

We note that the provisions in article 15 only cover trades in shares that are cleared through a CCP. This excludes all transactions that are not cleared by CCPs (including OTC transactions and all transactions on regulated markets that are not cleared by a CCP). This can represent up to 40% market share, implying that almost half of the market will be exempted from the legislation. We want to emphasize that transactions clear by a CCP already follow a strict buy-in regime and in contrast all transactions outside a CCP have no consistent regimes to enforce high settlement efficiency. With the current provisions there will be incentives to perform transactions OTC or on platforms without CCP clearing. There will as well be incentives for platforms to move trade flows out of a CCP into non-guaranteed post-trade processes.

We encourage the Commission and ESMA to clarify in the technical standards that buy-in and fines regimes should apply to all transactions in shares and not only those cleared through a CCP. If this is not possible, we consider that the provision should be deferred until clarification in the upcoming proposal for the CSD Regulation.

We elaborate on questions raised in the ESMA's consultation paper in more detail below.

¹ On 27 July 2010, the Act on the Prevention of Improper Securities and Derivatives Transactions (Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivategeschäfte) entered into force.

² CESR Report "Model for a Pan-European Short Selling Disclosure Regime", March 2010.

Detailed remarks

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?

We believe that Regulated Markets (and more generally trading venues) should not be included on the list of third parties which may be parties to the arrangements or measures to confirm that settlement will take place. Regulated Markets serve as the neutral and transparent platform where buyers and sellers meet to execute transactions in financial instruments. Regulated Markets do not trade on its own account nor do they have any stocks at their disposal to confirm that settlement will take place on a short sale transaction. We believe the responsibility to confirm that settlement of a short sale transaction will take place should lie on the investment firm that accepts to initiate the transaction, rather than on the neutral venue that purely executes it.

We want to be sure that the definition of the "securities settlement system" includes both, Central Securities Depositories (CSDs) and International Central Securities Depositories (ICSDs). Both entities should be included in the definition of the entities that would be allowed to be third parties in terms of the regulation.

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.

DBG considers that the benefits of this proposal are very limited. In line with current market practice, most trading desks rely on in-house resources to ensure the most optimal stock lending arrangement for investors. A failure to provide this service would increase drastically investment costs without producing any obvious benefit for the investor or the market as a whole. Therefore, we believe that ESMA should not interpret the requirement for a third party too strictly.

Q7: 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?

We agree with the overall approach proposed by ESMA. We particularly welcome the arrangements and measures to be taken in relation to shares included in Article 6.1.b for Standard Same Day Locate. We have some concerns however with article 6.1.b.iv which requires that 'when executed short sales are not covered by purchases in the same day and for liquid shares, 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'. Moreover, we have concerns with article 6.1.c.ii for liquid shares arrangements.

Regulated Markets have different arrangements in place to ensure that such an instruction in the event of failure is not needed. E.g. the German short selling ban foresees flexibility and ensures settlement efficiency³. The German ban has shown to be effective (high settlement efficiency).

Carrying out the calculations (Section VI.IV)

We note that national competent authorities are responsible for ensuring that the calculations of the turnover of the relevant share are made and that they may delegate the actual calculations to a third party (e.g. to a Regulated Market). DBG members welcome the thrust of European supervisors on Regulated Markets as a source of reliable turnover statistics. Regulated Markets would be glad to provide this service to competent authorities. If competent authorities would require Regulated Markets to perform these calculations, some type compensation would have to be ensured to cover for the costs incurred upon in performing these calculations. This issue is particularly sensitive in the current market conditions of fierce competition between all types of EU trading venues (Regulated Markets, MTFs, etc).

We trust you would have found these comments useful and remain at your disposal for further discussion. Should you have any questions please do not hesitate to contact:

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³ For details refer to:
http://www.bafin.de/clin_235/nn_720494/SharedDocs/FAQ/EN/Unternehmen/BoersennotierteUnternehmen/leerverkaeufe/wphg30h/faq_30hwphg_00.html? nnn=true