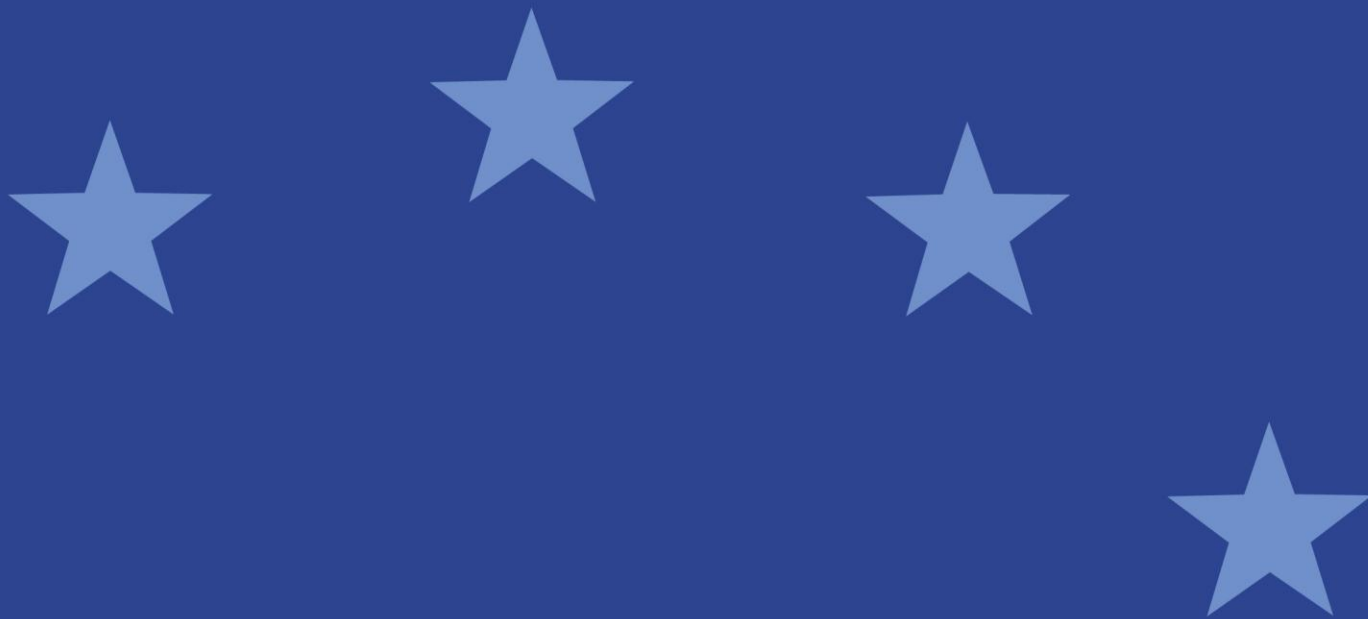




European Securities and  
Markets Authority

# Questions and Answers

## Implementation of the Regulation on short selling and certain aspects of credit default swaps (2<sup>nd</sup> UPDATE)





## Contents

|   |    |
|---|----|
| I. Background   | 2  |
| II. Purpose   | 3  |
| III. Status   | 4  |
| IV. Questions and answers   | 4  |
| Question 1: Scope - UPDATED   | 5  |
| Question 2: Transparency of net short positions   | 8  |
| Question 3: Calculating the net short position - UPDATED  | 10 |
| Question 4: Duration adjustment for calculating net short positions in sovereign debt - UPDATED   | 14 |
| Question 5: Net short positions when different entities in a group have long or short positions or for fund management activities - UPDATED | 16 |
| Question 6: Handling of notification and disclosure of net short positions  | 21 |
| Question 7: Uncovered short sales – UPDATED   | 21 |
| Question 8: Uncovered sovereign CDS - ADDED   | 25 |
| Question 9: Exemption for market making activities and for primary dealers operations - MOVED   | 27 |
| Question 10: Enforcement - MOVED  | 28 |

### I. Background

1. 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 (“Regulation”) has already entered into force and will be fully applicable on 1 November 2012. It is supplemented by delegated regulations adopted by the European Commission specifying certain technical elements of the Regulation, to ensure its consistent application and to facilitate its enforcement. The objectives of this short selling legislative framework are to increase transparency of short positions held by investors in certain EU securities, reduce settlement and other risks linked with uncovered or naked short selling and create a harmonised framework for coordinated action at European level.
2. The short selling framework is made up of the following EU legislation:
  - a. Regulation (EU) No 236/2012 of the European Parliament and the Council of 14 March 2012 on short selling and certain aspects of Credit Default Swaps<sup>1</sup> (“Regulation”). It is supplemented by a European delegated regulation as well as regulatory and implementing technical standards.
  - b. Commission Delegated Regulation (EU) No 826/2012 of 29 June 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council with regard to regulatory technical standards on notification and disclosure requirements with regard to net short positions, the details of the information to be provided to the European Secu-

---

<sup>1</sup> OJ L 86, 24.3.2012, p. 1.

rities and Markets Authority in relation to net short positions and the method for calculating turnover to determine exempted (“RTS 1”)<sup>2</sup>.

- c. Commission implementing Regulation (EU) No 827/2012 of 29 June 2012 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 the European Securities and Markets Authority 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 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps (ITS)<sup>3</sup>.
  - d. Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events (“DR”)<sup>4</sup>.
  - e. Commission Delegated Regulation (EU) No 919/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to regulatory technical standards for the method of calculation of the fall in value for liquid shares and other financial instruments (“RTS 2”)<sup>5</sup>.
3. Beyond the legislation, ESMA plays an active role in building a common supervisory culture by promoting common supervisory approaches and practices. In this regard, ESMA has adopted this Q&A and will update and expand it as and when appropriate.

## II. Purpose

4. The purpose of this document is to promote common supervisory approaches and practices in the application of the European short selling regulatory regime. It provides responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of the short selling framework.
5. The content of this document is aimed at competent authorities under the Regulation to ensure that in their supervisory activities their actions are converging along the lines of the responses adopted by ESMA. It should also help investors and other market participants by providing clarity on the requirements under the short selling framework.

---

<sup>2</sup> OJ L 251, 18.09.2012, p. 1.

<sup>3</sup> OJ L 251, 18.09.2012, p. 11.

<sup>4</sup> OJ L 274, 06.10.2012, p. 1.

<sup>5</sup> OJ L 274, 06.10.2012, p. 16.



### III. Status

6. The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation.<sup>6</sup>
7. Therefore, due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may check them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties. In this particular case, considering the date of application of the Regulation, ESMA has not engaged in such consultations.
8. ESMA will review these questions and answers to identify if, in a certain area, there is a need to convert some of the material into ESMA guidelines and recommendations. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation will be followed.

### IV. Questions and answers

9. This document is intended to be continually edited and updated as and when new questions are received. The date on which each question was last amended is included after each question for ease of reference.
10. Questions on the practical application of any of the short selling requirements may be sent to the following email address at ESMA: [shortselling@esma.europa.eu](mailto:shortselling@esma.europa.eu)

---

<sup>6</sup> Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

---

**Question 1: Scope - UPDATED**

Date last updated: **January 2013**

---

**Question 1a:** Do the provisions of the Regulation also apply outside the EU and to non-EU natural or legal persons?

**Answer 1a:** Article 1 of the Regulation defines the scope of the Regulation by listing the financial instrument to which the provisions of the Regulation apply. For financial instruments referred to in Article 1(a) of the Regulation, the only decisive criterion is the admission of the instrument in question to trading on a trading venue in the Union (except where the principal trading venue of that instrument is in a third country), including when they are traded outside a trading venue. For debt instruments referred to in Article 1(c) of the Regulation, the main defining element is that these financial instruments are issued by a Member State or the Union. The same applies to sovereign CDS as defined under Article 1(e) of the Regulation. Neither the domicile or establishment of the person entering into transaction on these financial instruments nor the place where these transactions take place, including in third countries, are of any relevance in this regard.

**Question 1b:** Does the Regulation impact EU sovereign CDS trades booked outside the EU (e.g. Head Office in NY or Tokyo) but executed by traders in the EU (where a single global CDS book is run)?

**Answer 1b:** Recital 3 of the Regulation states that it is appropriate and necessary for the rules to take the legislative form of a regulation in order to ensure that provisions directly imposing obligations on private parties are applied in a uniform manner throughout the Union. Therefore, the legislative act taking a form of regulation excludes the possibility of any discretion by a national competent authority when applying the rules. Recital 16 of the Regulation specifies that in order to be effective, it is important that the transparency regime applies regardless of where the natural or legal person is located, including in a third country. Where that person has a significant net short position in a company that has shares admitted to trading on a trading venue in the Union or a net short position in sovereign debt issued by a Member State or by the Union, they need to be reported wherever these are executed or booked.

It should be noted that 'regime' is to be understood not as a mere set of rules for submission of a net short position notification, but as a broad concept encompassing as well rules applicable to entering into or acquiring a net short position.

**Question 1c:** How do the net position requirements impact on third country branches where there is not a distinct legal entity in the EU or no relationship with subsidiaries in other EU jurisdictions except having the same parent?

**Answer 1c:** Article 10 of the Regulation specifies that the notification and disclosure requirements apply to any legal person irrespective of where that person is domiciled or established. Therefore, there is no distinction to be drawn between a legal entity or a group in the EU or in a third country as to how they have to calculate their net short position in a given issuer and report it when a notification/disclosure threshold is reached or crossed.

**Question 1d:** Do shares of all companies traded on markets in the Union fall under the net short position notification and disclosure requirements under Articles 5 and 6, and the restriction on uncovered short sales of Article 12 of the regulation?

**Answer 1d:** When determining whether the shares of an issuer fall under the regime, two cumulative conditions have to be taken into account:

- the shares are admitted to trading/traded on a trading venue (i.e. regulated market or MTF) in the Union;
- the principal trading venue for the share is in the Union (and not in a third country in case of multiple trading).

For instance, shares of a company domiciled in the USA which are admitted to trading on a trading venue in Germany but whose principal trading venue is located in the USA are exempt from the notification/disclosure requirements (Articles 5 and 6 of the Regulation), the restrictions on uncovered short sales (Article 12) and from the buy-in procedures (Article 15 of the Regulation).

**Question 1e:** What financial instruments are covered by the net short position notification and disclosure requirements, and the restrictions on uncovered short sales? Is there a list available and where can it be found?

**Answer 1e:** The financial instruments concerned by the net short position notification and disclosure requirements, and the restrictions on uncovered short sales are:

- shares admitted to trading on a European regulated market or MTF, provided that, in case they are also traded on a third country venue (outside the EU/EEA), their principal trading venue is not located in that third country;
- sovereign debt issued by a sovereign issuer as defined by the Regulation;
- CDS on sovereign debt of a sovereign issuer as defined by the Regulation.

With respect to shares, the Regulation on short selling and certain aspects of CDS requires that a list of exempted shares is published by ESMA on its website on the basis of the information provided by national competent authorities. Therefore, any share not mentioned in that list that is admitted to trading on a regulated market in the EEA or traded on a MTF in the EEA is subject to the requirements of the Regulation.

It should be noted that ESMA has already published a list of shares admitted to trading on an EEA regulated market (<http://mifidatabase.esma.europa.eu/>) which identifies the relevant competent authority for each share for the purpose of the Regulation.

With respect to sovereign debt and CDS on sovereign debt, ESMA is required to publish on its website the net short position notification thresholds applicable for each sovereign issuer falling under the scope of the transparency requirements set out by the Regulation. This publicly available list will identify the relevant competent authority for each sovereign issuer (<http://www.esma.europa.eu/page/Short-selling>).

**(New – January 2013)**

**Question 1f:** Should Global Depository Receipts (GDR) and American Depository Receipts (ADR) be included in the definition of shares for the purposes of article 12 of the Regulation?

**Answer 1f:** No, GDR and ADR are not shares for the purpose of Article 12 of the Regulation.

However, for the purpose of notification of net short position GDR and also ADR should be taken into account for the calculation (Articles 5 and 6 supplemented by Annex I of the DR)

**(New – January 2013)**

**Question 1g:** Should ETFs be included in the definition of shares for the purposes of Article 12 of the Regulation?

**Answer 1g:** ETFs are not per se subject to Article 12 of the Regulation, unlike shares of a company (on restriction on uncovered short sales).

However, the position held through an ETF should be taken into account when calculating the net short position in an issuer which is represented in that ETF (Articles 5 and 6 supplemented by Annex I and Annex II of the DR).

**(New – January 2013)**

**Question 1h:** How should shares pledged as collateral be considered in terms of ownership and how should given collateral be treated for the uncovered short sale prohibition and position reporting?

**Answer 1h:** In line with Article 3(1) of the DR, the ultimate beneficial owner of a share is deemed to be the investor who assumes the economic risks of acquiring the shares in question and the beneficial owner is defined by reference to the applicable national laws. In the case of shares pledged as collateral or given as collateral, the rules relating to collateral vary across the EU. Beneficial ownership should then be considered on a case by case basis taking into account the national rules and laws as well as the specific terms of the collateral contracts to determine whether such shares pledged as collateral or any given collateral amounts to ownership for the purpose of the short sale prohibition and consequently for the purpose of position reporting through the connection between owning and holding set out in Article 4 of the above mentioned DR.

**(New – January 2013)**

**Question 1i:** What is meant by debt instruments issued by a sovereign issuer (Article 2(1)(f) of the Regulation)? In particular, are bank loans or bonds issued by a company wholly owned by a Member State included?

**Answer 1i:** Debt instruments issued means transferable securities as defined under Directive 2004/39/CE (MiFID) i.e. money market instruments and bonds issued by the Member State, including those issued by a government department, an agency or a SPV of the Member State as well as the other cases provided for by Article 2(1)(d) of the Regulation.

Therefore, bank loans borrowed by a Member State and bonds issued by companies owned by a Member State (except SPV) are excluded from the definition. Moreover, according to Recital 9 of the Regulation,

debt instruments issued by regional or local bodies or quasi-public bodies in a Member State are excluded as well.

This definition would apply to the calculation of the outstanding issued sovereign debt as well as to the calculation of net short positions and, needless to say, to the restrictions on uncovered short sales in sovereign debt.

---

## Question 2: Transparency of net short positions

Date last updated: October 2012

---

**Question 2a:** When and for which trading day must the first notification and/or publication pursuant to Articles 5 to 10 of the regulation be submitted?

**Answer 2a:** The Regulation shall apply from 1 November 2012. The first notification or, as the case may be, disclosure relates to all net short positions existing or having arisen on 1 November 2012 unless it is not a trading day in the Member State of the financial instrument concerned.

Therefore, in Member States where 1st of November 2012 is a trading day<sup>7</sup>, net short positions should be notified not later than at 15:30h on 2 November 2012 and, to the extent they are subject to a publication requirement, also disclosed within such period.

In Member States where 1st of November 2012 is not a trading day<sup>8</sup>, the first net short positions to consider should be the ones held at the end of 2nd November 2012 (5 November for Hungary) and, where relevant, these net short positions should be notified not later than at 15.30 on 5 November 2012 (6 November for Hungary). To the extent they are subject to a publication requirement, they should also be disclosed within the same time period.

**Question 2b:** Which trading days should be used for the purpose of the timetable for making a notification or disclosure?

**Answer 2b:** The time specified in Article 9(2) of the Regulation for the notification (i.e. not later than 15:30h of the following trading day) is the one of the Member State of the relevant competent authority (RCA) for the purpose of notification. By analogy, it is assumed that the trading days would be the one of the Member State of the RCA for the purpose of the notification.

**Question 2c:** In Member States where a national transparency regime was already in place before the Regulation applies, do holders of existing short positions already notified to the concerned competent authority and/or publicly disclosed under that regime have to make new notifications and (if applicable) disclosures according to European regime?

---

<sup>7</sup> Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Iceland, Ireland, Italy, Latvia, Malta, the Netherlands, Portugal, Romania, Spain, Sweden, United Kingdom.

<sup>8</sup> Austria, Germany, Hungary, Lithuania, Luxembourg, Poland, Slovakia and Slovenia



If so, how should the “position date” field in the form be filled in if the threshold has been crossed before the entry into application of the Regulation?

**Answer 2c:** Yes they do. Notifications, and where relevant, disclosures of net short positions need to comply with the format specified in the Regulatory and Implementing Technical Standards adopted under the new European regime. This applies to existing notifiable or disclosable positions obtained before 1 November 2012 as well as those created on or after that date.

The “position date” field in the form to use for notification or for disclosure should be filled in with either 1st November 2012 or 2nd November 2012, depending on the trading calendar of the Member State for the concerned financial instrument. (See above).

**Question 2d:** How is a notification and/or disclosure to be submitted?

**Answer 2d:** Regulatory and implementing technical standards have been published specifying the details of the information on net short positions to be provided to the competent authorities and disclosed to the public.

The reporting channel (e.g. via fax, electronic systems, web-based solutions) will be specified by each competent authority on its website or on a website it supervises. ESMA will publish on its website the links to the relevant web page (<http://www.esma.europa.eu/page/Short-selling>).

**Question 2e:** How will competent authorities manage cases of legal or natural persons notifying for the first time a net short position?

**Answer 2e:** According to the Regulation, competent authorities or the operator of the central website supervised by the competent authority need to implement mechanisms for authenticating the source of notifications to them.

It should be emphasised that a position holder or the notifying entity remains responsible for the information that it reports to the relevant competent authority and, where relevant, that is publicly disclosed.

However, in order to ensure that disclosures are only made in respect of authenticated sources, competent authorities or the operator of the central website supervised by the competent authority can delay, unless it is not technically feasible, the publication of relevant net short positions until the authentication process has been completed.

Competent authorities or the operator of the central website supervised by the competent authority that have already implemented a strong and robust authentication process under their national transparency regime in force prior to the application of the Regulation will be able to rely on it for those legal or natural persons that have already been accepted under this process.

**Question 2f:** For the purpose of the reporting and disclosure of net short position in shares, what should be the approach to rounding a net short position expressed in percentage?

**Answer 2f:** The net short position resulting from the calculation to be performed by an investor and expressed in percentage of the issued share capital of a particular issuer should be reported when a relevant notification threshold (e.g. for net short positions in shares: 0.2 %, 0.3 %, 0.4 %, 0.5 %, 0.6 %, etc.) is



reached, exceeded or crossed downwards. In such case, the position to report should be rounded to the first two decimal places by truncating the other decimal places.

For instance, if the net short position is 0.3199 %, a notification is required and should indicate the 0.31% position.

However, for a net short position of 0.1987% of the issued share capital, no notification is required.

**Question 2g:** What to do when a net short position that has already be notified is changing?

**Answer 2g:** A notification is required where the position reaches, exceeds or falls below a relevant notification threshold that equals 0.2 % of the issued share capital of the issuer concerned and each 0.1 % above that. If there is a change of net short position which remains within the relevant notification threshold, for which a notification has already been made, there is no requirement for a further notification, e.g. if first a notification threshold was reached and then exceeded.

For example, if the first notified net short position is 0.30 % on a rounded basis and then that net position increases but remains below 0.4% (e.g. to 0.312% or 0.3989%), no further notification is required.

---

### **Question 3: Calculating the net short position - UPDATED**

Date last updated: **January 2013**

---

**Question 3a:** Do shares in funds have to be taken into account when calculating net short positions?

**Answer 3a:** Shares in funds which are managed on a discretionary basis by a management entity are not required to be taken into account since the calculation takes place at fund or fund manager level. However, shares in ETFs are within the scope and should be taken into account when calculating net short positions to the extent to which the underlying shares are represented in the ETF.

**Question 3b:** At what level is the net short position to be calculated in the case of umbrella structures and master feeder structures?

**Answer 3b:** In the case of umbrella structures, the calculation of the net short position must take place at the level of the respective subfunds. In the case of master-feeder structures, it takes place at the level of the respective master fund.

**(Updated – January 2013)**

**Question 3c:** To what extent are instruments which give claims to shares not yet issued (subscription rights, convertible bonds) taken into account in the calculation of a net short position?

**Answer 3c:** Instruments that give a claim to shares that are not issued yet should not be taken into account as long positions when calculating a net short position. In particular, subscription rights, convertible

bonds and other comparable instruments are not long positions within the meaning of Article 3(2)(b) of the Regulation.

If a convertible bond converts into new shares rather than shares already in issue where possible under national law, the holding cannot be treated as a long position in determining whether there is a net short position in the share. However, if the bonds (often known as exchangeable bonds) convert into shares already in issue, it would be legitimate to take the equity component of the bond into account in the net short position calculation, subject to the condition set by Article 3(2)(b) of the Regulation being met and to the method of calculation set by article 10 of the DR.

If the convertible bondholder does not know what kind of shares (new shares or shares already issued) the bond will convert into, then the bond should not be taken into account as a long position for the sake of calculation of net short positions.

**Question 3d:** Should dividends in the form of shares that must be returned by a borrower to the lender (as a result of a lending agreement) be taken into account to calculate short positions?

**Answer 3d:** No. Those shares which the lender is entitled to receive under the terms of a stock lending agreement as a result of a share dividend distribution and that must be reimbursed by the borrower shall not be included by the latter in calculating their net short position. The mere conclusion of a lending agreement does not confer in itself any financial advantage in the event of a decrease in price of the share borrowed.

**Question 3e:** Do shares received as a consequence of a bonus share issue or share dividend distribution fall to be treated as a long position for the purposes of calculating a net short position?

**Answer 3e:** Yes, as shareholders receive shares that can be used to offset short positions taken in the same issuer with other financial instruments. This may happen when, for instance, a net short position is constituted by having a long position in cash and a short position in derivatives.

**(New – January 2013)**

**Question 3f:** The Regulation defines the “*issued share capital*” as “*total of ordinary and any preference shares issued by the company*”. It is correct to suppose that the scope of this Regulation does not include shares that do not give to the stockholder any right to vote (so called saving shares)?

**Answer 3f:** All classes of issued shares should be considered in the calculation of the net short position (both numerator and denominator) irrespective of their characteristics (common stock, preferred, saving, etc.) as the regulation refers to the issued share capital of an issuer, in particular irrespective if voting rights are included or not.

**Question 3gf:** Can a short position in sovereign debt be offset against an interest rate swap trade?

(For example, Sell 10 year German Bund and receive Fixed (pay floating) 10 year interest rate swap denominated in Euro)

**Answer 3gf:** No. An interest rate swap is not per se an instrument related to the concerned sovereign debt in the meaning of Article 8(2) of the Regulation unlike derivative instruments on the sovereign debt itself.

**(New – January 2013)**

**Question 3h:** Article 8(3) of the DR states that “*provided always that they are highly correlated in accordance with Article 3(5) of the Regulation and with paragraphs 4 and 5, all net holdings of sovereign debt of a sovereign issuer which is highly correlated with the pricing of the sovereign debt in any short position shall be included in the calculation of the long position*”. Does the use of the language “*shall be*” imply that it is a mandatory requirement to net long positions in sovereign debt of one Member State which are “*highly correlated*” with a short position in another Member State?

**Answer 3h:** ESMA considers that there is no obligation to assess systematically all long positions in sovereign debt which are highly correlated with another sovereign debt i.e. forcing the investor to compare all possible correlation pairs.

However, when deciding to offset the net long position in a sovereign issuer with the net short position in another sovereign to which it is highly correlated, the investor should comply with the requirements of the DR No 918/2012 (Annex II, Part 2, Article 11 (10) sentence 2 and 3), in particular the requirement that a given long position shall only be used once to offset a short position in cases where the investor maintains several short positions in different sovereign issuers.

**(Updated – January 2013)**

**Question 3ig:** Under Article 3(3) of the Regulation and Annex II Part 1.3 & 2.4 of the DR, firms need only to look-through indices, baskets and ETFs to the extent that doing so is reasonable having regard to publicly available information. How should this condition be understood?

**Answer 3ig:** ESMA understands “*publicly available information*” on an index, basket of securities or ETF composition as information which is easy to access on the market operator’s or issuer’s website and which is obtainable free of charge. Such information, notably on indices, is generally available free of charge when provided with a certain delay.

ESMA is aware that the provision of a real time index, basket or ETF’s composition is likely to be charged. However, it should be recalled that there is no requirement under the Regulation to obtain information on the composition of the above on a real time basis. ESMA considers that market participants should strive to use the most recent publicly available information for look-through purposes.

ESMA would like to specify that “*acting reasonably*” relates only to obtaining information about the composition and not to how investors process that information for conducting the calculation of the net short position. The Regulation is straightforward and requires that the index weighting, the composition of the basket of securities and the interests held in ETFs are considered **and used** in this calculation **including when such information could not be integrated as such in the firm’s monitoring system.**

**(New – January 2013)**

**Question 3j:** In calculating a net short position in sovereign debt for purposes of notification to the relevant competent authorities, it would seem that "single sovereign bond futures" need to be included. A number of sovereign debt futures contracts reference an underlying basket of securities. Would these futures be excluded from such calculations or is there an expectation that there is a need to look through to, say, the cheapest-to-deliver bond (see bund futures, for example)?

**Answer 3j:** For futures on a basket of sovereign bonds of the same sovereign issuer, the following calculation should be performed: N<sup>o</sup> of futures contracts x nominal of each contract x delta. If the basket underlying the future is composed of bonds issued by different sovereign issuers, and provided that the basket composition is freely available, then the futures position will have to be broken down for each individual sovereign issuer following the general rules for index look-through.

**(New – January 2013)**

**Question 3k:** Can we include a long position in a UCITS fund in the calculation of the net short position? And if the position in the UCITS fund has to be included in the calculation, and taking into account that Article 3(3) of the Regulation specifies that “*no person shall be required to obtain any real-time information as to such composition from any person*”, is there a requirement to update its composition on a daily basis?

**Answer 3k:** If the concerned UCITS fund is an ETF or similar instrument included in Annex I, Part 1, of the DR, and if its composition is publicly available for look-through purposes, then it should be included in the calculation of net short position. Otherwise, it should be excluded. In this last case, in fact, the net short position calculation should be conducted at the level of the fund management entities.

If the position has to be included in the calculation of net short position, the fact that the Regulation does not require the investor to obtain real time information should not prevent them from checking the composition on a daily basis if this information is publicly available and if it is likely that the composition can change on a daily basis. As stated in Q&A no. 3g, once information on index composition has been obtained, investors have to process that information for conducting the calculation of the net short position.

**(New – January 2013)**

**Question 3l:** Could the meaning of the following statements included in point 2 of Part I of Annex II of the DR be clarified:

- a. *"a nominal cash short position may not be offset by an equivalent nominal long position taken in derivatives"*?
- b. *"Delta-adjusted long positions in derivatives may not compensate identical nominal short positions taken in other financial instruments due to the delta adjustment"*?

**Answer 3l:** In ESMA's view, the two mentioned statements are ways to illustrate that persons taking positions through derivatives need to adjust the nominal/notional value of these positions by the relevant delta in order to calculate net short positions in the underlying.

For example, if you hold a long position in an option and you have carried out a short sale in the underlying share, you do need to take into account the delta of your long position in the calculation of your net short position

Moreover, delta adjusted long positions in derivatives can compensate short positions taken in other financial instruments on the same underlying. For example, a delta adjusted long position in an option can compensate a delta adjusted short position in a future (ESMA assumes that futures have generally a delta equal to 1).

---

**Question 4: Duration adjustment for calculating net short positions in sovereign debt - UPDATED**

Date last updated: **January 2013**

---

**Question 4a:** The DR<sup>9</sup> specifies in the Annex II part 2 para. 1 that positions should be calculated in “nominal value duration adjusted”. What duration definition should be used in the calculation?

**Answer 4a:** The duration formula to use is the Modified Duration. Information about the Modified Duration for a specific debt issue by a sovereign issuer is easily available from data providers. Modified Duration can also be computed from other available “duration” or sensitivity indicators such as the Macaulay duration or PVO1.

**Question 4b:** How should an investor calculate the duration-adjusted net short positions on sovereign debt?

**Answer 4b:** For a particular sovereign issuer, the method to calculate the net short position is to multiply the duration of each individual issued debt instrument in which the investor has, at the end of the day, a long or short position by the nominal value of each of those positions, with a positive sign for long positions and a negative one for short positions, and add up all the products.

For each short and long position held on sovereign debt instruments (i) and being D= Modified Duration of each instrument held and V=Nominal volume (in €) of each position debt instrument held, the “nominal value duration adjusted” (NVDA) would be:

$$NVDA = \sum_{i=1}^n (D_i \times \pm V_i)$$

For example, an investor with a short position of 10 million € in a bond with Modified Duration 5 and a 1 million € short position in a bond with Modified Duration 3,5 will have a net short position equivalent to -53,5 million € (-10 x 5) + (- 1 x 3,5).

---

<sup>9</sup> Commission Delegated Regulation regarding definitions, calculation of net short positions, covered sovereign CDS, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events (DR), adopted by EU Com on 5 July 2012



Since only net short positions are to be communicated, the negative sign shall not be included in the official notification.

**Question 4c:** How will ESMA calculate the amount of outstanding sovereign debt of sovereign issuers on a duration adjusted basis?

**Answer 4c:** Every quarter, the relevant national competent authorities will provide ESMA with a duration adjusted figure of the outstanding amount of sovereign debt for their respective Member States or federated states. The figures for all sovereign issuers will be published on the ESMA website together with the notification thresholds applicable.

On each reference date (end of quarter) for calculation, the method to calculate this figure will be to multiply the Modified Duration of each individual debt instrument issued by the concerned sovereign issuer by its outstanding volume (i.e. nominal amount issued and not redeemed) and add up all these individual results.

For each instrument (i) and being D=Modified Duration of each issued instrument and V=Outstanding volume (in €) of each issued debt instrument, the “nominal value duration adjusted” (NVDA) would be:

$$NVDA = \sum_{i=1}^n (D_i \times V_i)$$

**Question 4d:** If I reach or cross a notification threshold just because the duration of my position increased or decreased, without having taken any investment decision and without changes in the nominal position, should I update my notification to the competent authority?

**Answer 4d:** Yes. The net short position should be calculated taking into account any change in the duration of the position held, and be notified to the relevant competent authority if it results in this net short position reaching a threshold.

**(New – January 2013)**

**Question 4e:** For the purpose of the calculating the net short position in the sovereign debt of a sovereign issuer, is a duration adjustment required to be applied to derivative positions referenced in that sovereign debt?

**Answer 4e:** For the purpose of calculating the net short position in a sovereign debt, ESMA considers that the text of Part 2 of Annex II of the DR only suggests that the positions held through derivative instruments in the sovereign debt of a sovereign issuer (e.g. options, futures, CDS...) should be delta adjusted.

**(New – January 2013)**

**Question 4f:** Would the issuance of a Credit Linked Note be subject to the duration adjustment or to the delta adjustment?

**Answer 4f:** Unless a credit Linked Note is issued directly by a sovereign issuer, it should be treated as any other derivative on a sovereign debt (see Q&A 4e).

---

**Question 5: Net short positions when different entities in a group<sup>10</sup> have long or short positions or for fund management activities - UPDATED**

Date last updated: **January 2013**

---

**Question 5a:** Are funds (or portfolios under management) managed by the same management entity expected to report net short positions?

**Answer 5a:** No. At individual fund (portfolio) level, only the calculation of the net short position for each particular issuer takes place. Only the positions of the funds that are net short in the particular issuer i.e. pursuing the same investment strategy (i.e. being short), should be aggregated to determine the net short position at the management entity level and whether a threshold is reached warranting thus reporting and, where relevant, disclosure of the aggregated net short position in that particular issuer (see Annex 1).

For the purposes of the Regulation, an investment strategy is whether the fund (portfolio) is long or short in a particular issuer.

**Question 5b:** How should net short position calculation and reporting be conducted when the same single legal entity performs both management and non-management activities?

**Answer 5b:** According to Article 12(5) and 12(6), when a single legal entity performs both management and non-management activities, it should conduct two different and separate calculations, one for each activity.

For the management activities, the net short position of each individual fund or portfolio under management should first be calculated for each issuer in which a position is held. The second step consists in aggregating, for each issuer, only the positions of the funds and/or portfolios that are net short at the level of the entity/division/unit/department that manages these funds and/or portfolios. If this aggregated net short position reaches a notification threshold, then the aggregated net short position should be reported.

For non-management activities, the legal entity should calculate its net short position in each particular issuer, excluding the management activities, and report (or disclose) when a relevant threshold is reached.

Potentially, on the same issuer, a legal entity may report two net short positions, one for the management activities and the other for the non-management activities.

(See Annex 2)

**Question 5c:** According to Article 12(4) of the DR, the management entity level report specifically excludes from the calculation the positions of funds and portfolios the management of which is delegated to a third party and includes those of funds and portfolios the management of which has been delegated by a

---

<sup>10</sup> In this Q&A document, group has the meaning specified in Article 2(a) of the DR adopted by the Commission on 5 July 2012.



third party. Should the same approach apply to the single legal entity level report when that entity is performing both management activities and non-management activities, even though Article 12(5) of DR does not explicitly refer to Article 12(4) on delegation of management?

**Answer 5c:** Article 12(4) of the DR clarifies the method set out in Article 12(1) to (3). Therefore, ESMA considers that the approach to delegation for calculating the net short position (excluding mandates delegated away and including received mandates) applies to the management activities of a legal entity also performing non-management activities.

**Question 5d:** Being a global fund manager of funds, I use derivative instruments that may result in net short positions in particular issuers when calculated as described in the DR though the strategies being implemented do not, however, relate to particular issuers but aim at increasing or reducing exposure to markets or sectors. An example of the type of strategies that may be employed is: selling exposure to European bank equity through the EuroStoxx Banks index (SX7E) using futures contracts.

In light of the definition of investment strategy under Article 12(2)(a) of the DR<sup>11</sup> and considering that such strategies are aimed at reducing my exposure to sectors or markets and do not relate to particular issuers are they subject to short position reporting requirements ?

**Answer 5d:** Yes they are subject to the net short position reporting requirement.

According to the DR, the calculation of the net short position should be performed at each individual fund level. For a particular issuer, it should include not only cash positions but also positions held by the individual fund through indices where that issuer is represented and in accordance with its weight in the index.

The concept of investment strategy is used to determine whether the fund position is net short or net long. In the former, the net short position of that fund should be aggregated at the level of the management entity with the other funds having a net short position in the concerned issuer.

**Question 5e:** In a group constituted only of legal entities performing exclusively management activities, how should calculation and reporting be conducted? Who should report?

**Answer 5e:** As described above in Q&A 5a, positions are calculated at fund or portfolio level. The positions of funds (or portfolios) which are net short in a particular issuer are then aggregated at the level of the management entity managing these funds (or portfolios). The management entity or another entity on its behalf should report the net short position when a threshold is reached.

The funds having net long position in this particular issuer should not be considered in the aggregation.

No aggregation and netting of the short and long positions of the several management entities constituting the group is required.

---

<sup>11</sup> Art 12(2)(a) of DR states: "Investment strategy" means a strategy that is pursued by a management entity regarding a particular issuer, that aims to have either a net short position or a net long position taken through transactions in various financial instruments issued by or that relate to that issuer.



(See annex 3

**(New – January 2013)**

**Question 5f:** In line with Article 13 (2) of the DR, the group shall report, and disclose where relevant, the net short position in a particular issuer when it reaches or exceeds a relevant notification disclosure threshold. Provided that a group is not a legal entity, which legal entity within a group shall submit a notification?

**Answer 5f:** A definition of a group is provided in Article 2(a) of the DR. However, the DR does not provide for the necessary information to determine which legal entity within a group is empowered to represent the said group when the latter has to notify a net short position to a competent authority.

Article 13(3) of the DR only prescribes that a legal entity shall be designated for this purpose. Where a legal entity within a group is designated to report on behalf of the group, ESMA strongly encourages that the same legal entity is used for all such reports.

Even if no further requirement on this matter can be imposed, ESMA nevertheless recommends that, where a group has to notify a net short position to a competent authority, a good practice would be to consider that the head company of the group is the relevant legal entity to represent the group. Indeed, the head company of a group generally is the legal entity that controls all undertakings within the group.

**Question 5gf:** In the case of a group, should a legal entity that is a part of this group always report/disclose its position when it reaches a threshold?

**Answer 5gf:** No, not always. Any legal entity within a group that reaches or crosses a threshold would only have to report its net short position in a particular issuer when the aggregated net short position at the group level (aggregating and netting the net positions, long and short, of all the entities within the group, with the exception of the net positions resulting from management activities by one or more of the legal entities) does not simultaneously reach or cross a notification threshold (See Annex 4).

**Question 5hg:** In a group constituted of several legal entities, including management entities, should the short positions of the management entities arising from their ‘non-management activities’ be aggregated with those of the legal entities not performing management activities as part of the ‘group position’ for reporting, or should they be reported separately?

**Answer 5hg:** According to Articles 12(5) and 12(6), a legal entity within a group that performs both management activities and non-management activities should calculate separately, and report where relevant, the net short position resulting from its management activities in a particular issuer from the net short position resulting from its non-management activities.

The latter should be calculated at the concerned legal entity level. It should be aggregated and netted at group level with the net short and long positions of the other legal entities of the group that do not perform management activities.

**Question 5ih:** In the case of a group,

- a) What if the group and the legal entity within the group cross different thresholds, or they cross the same threshold in different directions?
- b) If the legal entity within the group exceeds the 0.5% threshold and, at the same time, the group exceeds the 0.2% threshold, would the legal entity within the group still have reporting/disclosing obligation?

**Answer 5ih:** According to the conditions laid down in Article 13(3) of the DR,

- a) In both situations, only the position at the group level should be reported.
- b) The legal entity within the group does not have to report/disclose its net short position; only the net short position at group level is reported/disclosed.

**(New – January 2013)**

**Question 5j:** In the case of a group, both the group and the legal entity within the group acquire positions that exceed the 0.2% threshold simultaneously. Subsequently, only the group's position falls below the 0.2% threshold. Should the legal entity within the group then report even though it has not crossed up or down another threshold?

**Answer 5j:** The overall net short position of a group should be reported according to Article 5 of the Regulation. In this regard, it is recalled that the group is required to report its net short position when it falls below, reaches or exceeds applicable notification thresholds.

According to Article 13(3) of the DR, the legal entity within this group does not have to report as the said group has a reportable position on that date.

However, this article prescribes that a net short position has to be reported at a legal entity level in the case where the group overall net short position is under the minimum notification threshold (e.g. 0.2% for equities).

It results from the DR that if on the trading day following the notification by the group, the legal entity within the group still holds a net short position reaching or exceeding a notification threshold, then the legal entity should notify its net short position even though such position was already taken into account in the notification previously submitted at group level.

In such a case, the position date that has to be specified in the legal entity's notification (date on which the position was created, changed or ceased to be held as provided by RTS 1<sup>12</sup>, should be the trading day on which the group's last notification (i.e. the one crossing down the threshold) was submitted.

**Example:**

- **Day 1:** The group has an overall net short position of 1.0%. One of its legal entities has a net short position of 0.5% that was taken into account by calculating the group's overall net short position. The group's overall net short position has to be notified/disclosed by 15.30h of the next trading day (day 2).

---

<sup>12</sup> Commission Delegated Regulation (EU) No 826/2012.

- **Day 2:** The group notifies/discloses its overall net short position of 1.0% before 15.30h (reporting date: day 2; position date: day 1); there is no further notification requirement for the one legal entity.  
On that day 2 the group's overall net short position falls below the applicable notification thresholds and is 0.1%. One of the group's legal entities has a net short position of 0.5% that was taken into account by calculating the group's overall net short position for that day 2. Again the group's overall net short position has to be notified/disclosed by 15.30h of the next trading day (day 3).
- **Day 3:** The group notifies/discloses its overall net short position of 0.1% until 15.30h (reporting date: day 3; position date: day 2). There is no further notification requirement for the one legal entity.  
On that day 3 the group's overall net short position stays below the applicable notification thresholds and is still 0.1%. But the one legal entity of that group has a net short position of 0.5% (that was taken into account by calculating the group's overall net short position for that day 3). Now the legal entity net short position has to be notified/disclosed by 15.30h of the next trading day (day 4). But there is no notification requirement for the group's overall net short position.
- **Day 4:** The legal entity notifies/discloses its net short position of 0.5% (reporting date: day 4; position date: day 3). The group has no overall net short position to report.

**(New – January 2013)**

**Question 5k:** Is there a definition of the terms "*position holder*" and "*reporting person*", in order to establish for instance if the position holder is the fund, i.e. the legal entity which owns the short position, or the discretionary investment manager who makes the decision to take the short position.

**Answer 5k:** In principle the position holder is the person, natural or legal which owns the position.

Nevertheless the DR develop specific approaches to calculation and reporting of net short positions for, on one hand, management entities of several funds or managed portfolio and group constituted of several legal entities on the other hand.

With respect to management activities as defined in Article 12 (1)(b) of the DR, the position holder when several funds pursue the same investment strategy is the management entity. ESMA considers that the position holder should also be the management company in cases when only one fund has reportable positions.

With respect to group of legal entities, the position holder can be, depending on the situation set out in Art 13 of the DR, either a legal entity within the group or the group itself. In general, the position holder and the reporting person (i.e. the legal or natural person who makes the notification to the competent authority) should be the same entity. However in the case of a group, another legal entity (reporting entity) which is part of the group can be appointed to report the group's net short position when a regulatory threshold is crossed (see Q&A 5f above).

In addition, there is in all cases the possibility to engage or mandate an external third party, including an investment firm on behalf of its clients, to report and disclose the net short position of the position holder but this does not affect the way the field "*position holder*" is filled in.

---

## Question 6: Handling of notification and disclosure of net short positions

Date last updated: September 2012

---

**Question 6a:** Should competent authorities accept handling late submissions i.e. notification, modification or cancellation submitted days, weeks or months after the date of the crossed threshold?

**Answer 6a:** Without prejudice to sanctions that could be applied for breaching the Regulation, a competent authority should handle such late submissions relating to net short positions in shares, sovereign debt and sovereign CDS for supervisory purposes including ensuring consistency over time of the information. Where relevant, for proper information of the public, the net short position in shares should also be publicly disclosed. To avoid confusion of the public in such a case, the position date field of the notification form must include the date on which the position was effectively created, changed or ceased to be held, no matter how far back in the past, and not refer to the date when the notification is made.

**Question 6b:** How will late submissions of disclosable short positions be dealt with by competent authorities? When will publication of such late disclosures take place?

**Answer 6b:** A person with a disclosable net short position is required to make the disclosure by the officially specified method no later than 15:30h on the trading day following that on which the position reached or crossed the relevant publication threshold. If the disclosure is made after that time, the competent authority or operator of the central website supervised by the competent authority will aim to publish it as soon as possible after its receipt, provided this is during normal business hours. Depending on the checking process implemented by the competent authority, the disclosure may occur on the following trading day. Disclosures received after normal business hours will normally only be published the following trading day. Late disclosures will constitute breaches of the Regulation and, as such, competent authorities will pursue cases of late disclosures in line with their stated investigation and enforcement policies.

**Question 6c:** What happens if a person has made a disclosure before 15.30 but, because of regulatory checks or other issues outside the person's control, the disclosure is not published until after that time?

**Answer 6c:** The person has met its obligation under the Short Selling Regulation by making the disclosure by no later than 15.30h local time even if the notification is published by the competent authority or the operator of the central website supervised by the competent authority at a later point.

---

## Question 7: Uncovered short sales – **UPDATED**

Date last updated: **January 2013**

---

**Question 7a:** Can a legal person within a group enter into an uncovered short sale provided that another legal entity within the same group has fulfilled one of the conditions set out in Article 12(1) of the Regulation with regards to the same instrument?

**Answer 7a:** No, short sales cannot be covered with an agreement, pursuant to Article 12(1) of SSR, entered into by another legal entity within the same group. The same entity carrying out the short sale has indeed to cover it with an agreement pursuant to Article 12(1) of SSR, including a locate agreement concluded with another legal entity within the group.

**(New – January 2013)**

**Question 7b:** In case of a short sale and a same time cover through a repo transaction, Article 5 of the ITS requires this being “*for the duration of the short sale*”. However, in practise, the duration of the short position resulting from that the short sale is unknown and that position is covered by a repo that is rolled at maturity as long as the short position exists. Would such an extension of the repo be possible and cover the requirement of the Regulation?

**Answer 7b:** According to Article 5(1)(c) of the ITS, the investor has to enter into the repo contract prior or at the same time as the short sale. The repurchase date specified in that repo has to ensure that settlement of the short sale can be effected when due. Therefore, the expiry date of this has to be consistent with the settlement date.

However, the resulting short positions may exist well after the short sale has been settled. In this respect, ESMA considers that nothing in the ITS precludes the rolling of the repo after the short sales have been executed and settled.

**(New – January 2013)**

**Question 7c:** Can telephone call registrations be considered as a durable medium for the purpose of evidencing the existence of an agreement to borrow or other enforceable claim under Article 5 of the ITS, or of arrangements, confirmations and instructions under Article 6 and 7 of the ITS<sup>13</sup>?

**Answer 7c:** Telephone call registrations are considered an adequate durable medium under Article 5, 6 or 7 of the ITS.

**(New – January 2013)**

**Question 7d:** How long should the durable medium under Article 5, 6 and 7 of the ITS<sup>14</sup> be stored as evidence of the existence of the agreement to borrow or other enforceable claim?

**Answer 7d:** Although Articles 5, 6 and 7 of the ITS do not specify the length of time for retaining the relevant evidence, ESMA recommends that the durable medium used should allow the evidence to be kept unaltered, accessible and retrievable for 5 years.

---

<sup>13</sup> Commission Implementing Regulation EU No 827/2012

<sup>14</sup> Commission Implementing Regulation EU No 827/2012

### **In shares**

| **Question 7eb:** To what extent are instruments which give claims to as yet unissued shares (subscription rights, convertible bonds) affected by the restriction?

| **Answer 7eb:** According to Article 12(1) of the Regulation, the provisions of the restriction on uncovered short sales of shares relate only to shares admitted to trading on a trading venue. That means that transactions in instruments such as subscription rights and convertible bonds e.g. performed as part of a capital increase do not fall within the scope of Article 12(1) of the Regulation.

| **Question 7fe:** Can claims to as yet unissued shares (subscription rights, convertible bonds) cover a short sale?

| **Answer 7fe:** Claims to as yet unissued shares (subscription rights, convertible bonds) may only cover a short sale if the availability of the new shares for settlement by the arrangement is ensured when settlement is due e.g. the concerned rights or convertible bonds can be converted into shares that would be available in time for ensuring the settlement.

### **In sovereign debt**

| **Question 7gd:** Are foreign currency bonds of EU Member States also covered by the restrictions on uncovered short sales in sovereign debts?

| **Answer 7gd:** Yes, the prohibition provision covers sovereign debt securities irrespective of the currency in which they are issued.

| **Question 7he:** Could a short sale on sovereign debt be considered covered by a repo contract executed in the days following the short sale but with the same settlement date as the short sale (e.g. a spot next repo for a T+3 cash sale)?

| **Answer 7he:** Yes, it is possible to cover a short sale by entering into a repo contract afterwards provided that:

1/ prior to the short sale, the short seller entered into one of the arrangements with a third party under Article 13(1)(c) of the Regulation and Article 7 of the ITS (e.g. obtained an “easy to purchase sovereign debt confirmation” according to Article 7(5));

2/ the repo contract has an earlier or the same settlement date as the short sale, so that the delivery of the relevant sovereign debt can be effected when it is due.

| **Question 7if:** A market operator who manages a regulated market for sovereign debt can be considered a third party in accordance with Article 8(1)(f) of ITS?

| **New answer 7if:** Yes, a market operator can be considered a third party according to Article 8(1)(f) of ITS if:



- it “is subject to the authorization or registration requirements in accordance with Union law” (Article 8 (1)(f));
- it “participates in the management of borrowing or purchasing of [...] the sovereign debt” (Article 8(2)(a)), for example by managing a repo platform (for borrowing the debt) or a cash platform (for purchasing the sovereign securities);
- it is able to “provide evidence of such participation” and, “on request, to provide evidence of its ability to deliver or process the delivery of [...] sovereign debt on the dates it commits to do so to its counterparties including statistical evidence” (Article 8(2)(b)- (c)) (e.g. with official statistics of market activity)

Such a third party can provide an “Easy to purchase sovereign debt confirmation” according to Article 7(5) of the ITS (pursuant Article 13(1)(c) of the Regulation), confirming that the sovereign debt is liquid on the platform so that there is a reasonable expectation that the securities can be borrowed or purchased in due time to ensure the settlement of the short sale.

**Question 7jg:** When firms are comparing the correlation between two sovereign issuers (under Article 3(5) of the Regulation and Article 8(5) of the DR) should they do this on an issue per issue basis, or by comparing the yield curve of the two issuers?

**Answer 7jg:** Since net short positions are to be calculated on a sovereign issuer basis, ESMA considers that the calculation of correlation should be undertaken on the basis of the issued sovereign debt. So it would be a matter of comparing the yield curves of the two sovereign issuers to determine whether the test of high correlation as defined in the DR was met.

**(New – January 2013)**

### **Reminder on the locate requirements**

The requirements for the “locate” vary according to the financial instrument concerned and to the fact that the short sale will be covered by same day purchases (i.e. intraday short selling), as follow:

1. for sovereign debt, at least one of the conditions set out in Article 7 of ITS has to be satisfied;
2. for MiFID liquid shares and shares included in the main national index, all the conditions set out in Article 6(4) of ITS have to be satisfied; alternately, the person can meet the conditions set out in Article 6(3) – in case of intraday short selling - or Article 6(2) of ITS;
3. for other shares and in case of intraday short selling, all the conditions set out in Article 6(3) of ITS have to be satisfied; alternately, the person can meet the conditions set out in Article 6(2) of ITS;
4. for other shares and cases, all the conditions set out in Article 6(2) of ITS have to be satisfied.

**(New – January 2013)**

**Question 7k:** What are the main national indices identified by the competent authorities for the purpose of Article 6(4) of the ITS?



**Answer 7k:** See in annex 5 the list of main indices.

**(New – January 2013)**

**Question 7l:** Under Article 6 of the ITS, if the intention is to execute a short sale and cover intra-day, a locate and easy to borrow confirmation is sufficient provided that the broker is informed that the short sale will be covered by purchases during the same day as the short sale takes place. However, if a put on hold confirmation is sought (even if not strictly required for liquid shares), is there still a requirement to provide a same-day request for confirmation to the third-party that the short sale will be covered by purchases during the same day?

**Answer 7l:** A put on hold confirmation is not required for intra-day short sales provided that the conditions specified in Article 6(3) of the ITS are met. However, if a put on hold confirmation is nevertheless sought for an intra-day short sale, ESMA considers that it is not necessary for the party intending to undertake the short sale to provide a confirmation that the short sale will be covered by purchases during the same day. It would, however, be necessary to comply with all the other applicable requirements laid down in the implementing technical standards, including in particular seeking a locate confirmation for the shares.

**(New – January 2013)**

**Question 7m:** Is it permitted - in the context of Article 12, first paragraph, (c) of the Regulation - to meet the locate requirement by simply referring to an existing “easy-to-borrow list”?

**Answer 7m:** No, the practice of referring to an easy-to-borrow list as a locate arrangement is not compliant with the Regulation. A reference to a list as a locate arrangement is not identical to a confirmation, as required by Article 12, first paragraph, (c) of the Regulation. Article 6, paragraph 4, (b) of the ITS indicates the existence of a specific confirmation.

---

**Question 8: Uncovered sovereign CDS - ADDED**

Date last updated: January 2013

---

**Moved**

**Question 8a7h:** Do the restrictions on uncovered sovereign credit default swaps also apply to the protection seller?

**Answer 8a7h:** No, the restriction on uncovered sovereign credit default swaps applies only to the protection buyer of a CDS.

**Moved**



**Question 8b7i:** May a sovereign CDS be used to hedge the risk under another CDS referring to the same sovereign debt?

**Answer 8b7i:** Yes, it would be legitimate to use a sovereign CDS position to hedge a risk related to another CDS position in so far as the conditions prescribed in Chapter V (in particular Articles 18 and 19) of the DR (Commission Delegated Regulation No 918/2012) are fulfilled.

**(New – January 2013)**

**Question 8c:** Is it legitimate for an investor to hedge a risk through a CDS position which is either longer or shorter in duration than the term of the asset/liability being hedged? As examples, could a 12 year sovereign bond be hedged by 5 year sovereign CDS contract which was then rolled until the maturity date for the bond or a 2 year bond be hedged with a 5 year sovereign CDS contract?

**Answer 8c:** Article 19 (3) of the DR states that the duration of the sovereign CDS position is aligned as closely as practicable given market conventions and liquidity with the duration of the exposures being hedged or the period during which the person intends to hold the exposure. ESMA recognises that the term of liquid sovereign CDS contracts may not be aligned with the term of the hedged exposure. Differences in duration (to be understood as meaning length of time) would therefore be permitted subject to the overriding condition that the person's sovereign CDS position should never be uncovered as defined in the DR. Hence it would be legitimate to purchase a 5 year sovereign CDS to hedge a 12 year sovereign bond and 'roll' the contract every quarter while the position was held. It would also be legitimate to use a 5 year sovereign CDS position to hedge a holding of a 2 year sovereign bond provided that, on maturity of the bond, it was either replaced by an equivalent exposure or the CDS position was reduced or otherwise disposed of as required.

**(New – January 2013)**

**Question 8d:** Should the holding of a sovereign bond be treated as a static or dynamic hedge for the purposes of Articles 19 and 20 of the DR?

**Answer 8d:** Article 20(2) of the DR specifies that direct exposures to sovereign or public sector bodies in the sovereign are examples of static hedging. The holding of a sovereign bond should therefore be treated as a static hedge.

**(New – January 2013)**

**Question 8e:** Can a sovereign CDS position be used to hedge against the risk not only of default in respect of an exposure but also against the risk of credit spreads widening e.g. by maintaining different durations in static or dynamic hedges to hedge against spread widening risk?

**Answer 8e:** ESMA considers that this would be permissible as long as the sovereign CDS position never became uncovered. Article 19(3) of the DR recognises that the same sovereign CDS position can be used to hedge different risks i.e. when one risk is liquidated another risk could be substituted provided it met the tests.

**(New – January 2013)**

**Question 8f:** Article 15(2)(a) of the DR provides that “*where the exposure being hedged relates to the Union or the Member States which have the euro as their currency, it shall be permissible to hedge it with an appropriate European or Euro area index of sovereign bond credit default swaps*”. In cases where such indices are used, is it necessary to undertake a look through assessment of correlation and proportionality to each underlying long position and reference obligation that underlies the index being used?

**Answer 8f:** ESMA’s understanding is that where the risks being hedged are in each of the 27 EU Member States or of the members of the Euro area, the correlation and proportionality tests would need to be met in each of the components of the sovereign CDS index. So there would therefore need to be a full look through. However, if the asset being hedged was Union debt or debt of a Euro area institution such as the EFSF or ESM, this would be treated as a single asset which could be hedged by the appropriate sovereign CDS index.

**(New – January 2013)**

**Question 8g:** A replacement trade is a practice used in compression service for CDS. They aims partially terminate a CDS and subsequently replace with new swap corresponding in economic terms with the trades they replace. With respect to sovereign CDS concluded before 25 March 2012, are replacement trades on these CDS deemed to fall under the transitional measures set out in Art 46(2) of the Regulation (sovereign CDS concluded before 25 March 2012 may be held until the maturity date of the contract even if such CDS result in an uncovered position)? Or should such replacement trades be subject to Article 14 of the Regulation (restriction to enter into an uncovered CDS)?

**Answer 8g:** Provided that the replacement trade does not extend the life or value of the sovereign CDS position beyond what they were when originally taken out before 25 March 2012, ESMA considers that it would be legitimate to treat the trade as an existing rather than a new contract and so not encompassed by the Regulation's prohibition on entering into uncovered sovereign CDS transactions.

---

## **Question 9: Exemption for market making activities and for primary dealers operations - MOVED**

Date last updated: **January 2013**

---

**Question:** In order for any non-EEA entity to be able to use the market making activities exemption as defined in the Regulation, the market in its home jurisdiction should be subject to a legal and supervisory regime which is equivalent to the MiFID, MAD and Transparency directive and should be declared “equivalent”. Has such a determination of “equivalence” already taken place? Will non-EEA entities be able to use the exemption for their market making activities under the Regulation in time for 1 November, 2012?

**Answer:** According to Article 17(2) of the Regulation, the legal and supervisory framework of a third country is considered equivalent when the European Commission has adopted a decision to that effect.

The Commission has not issued any equivalence decision; thus, at this stage, no third country entity can claim the use of the exemption in relation to a third country market.

**Question 10: Enforcement - MOVED**

Date last updated: September 2012

---

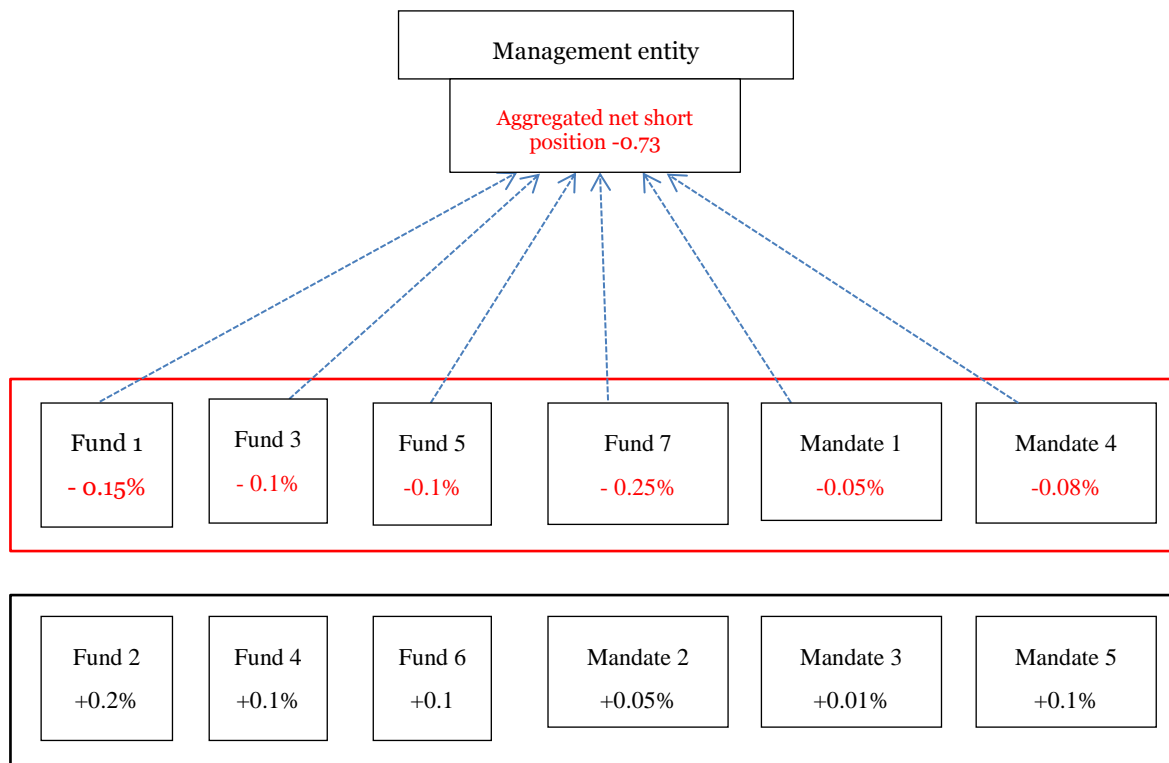
**Question:** How will any violations of the provisions of the Regulation be sanctioned?

**Answer:** Pursuant to Article 41 of the Regulation, rules on penalties and administrative measures shall be established by Member States and notified to ESMA.

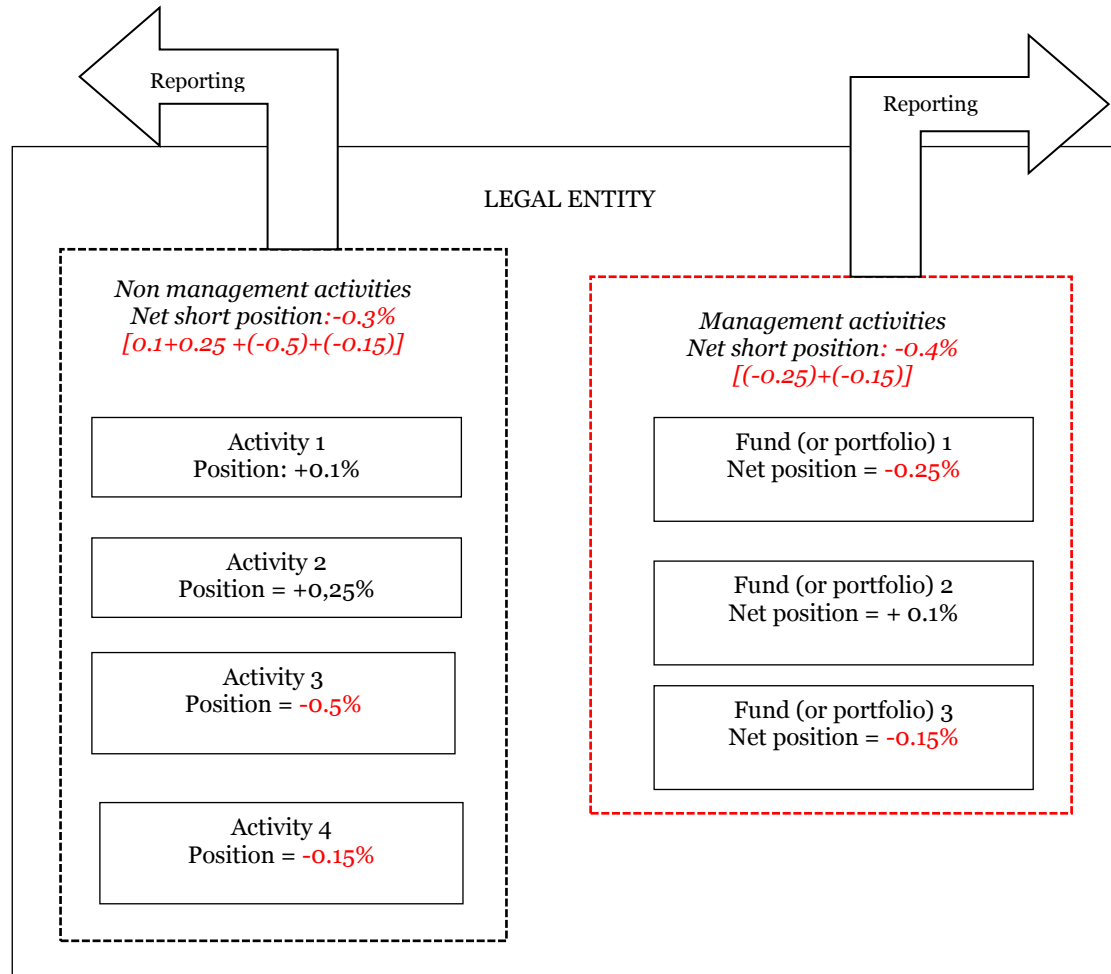
In addition, ESMA has to publish a list of the existing penalties and administrative measures applicable in Member States on its website (<http://www.esma.europa.eu/page/Short-selling>).



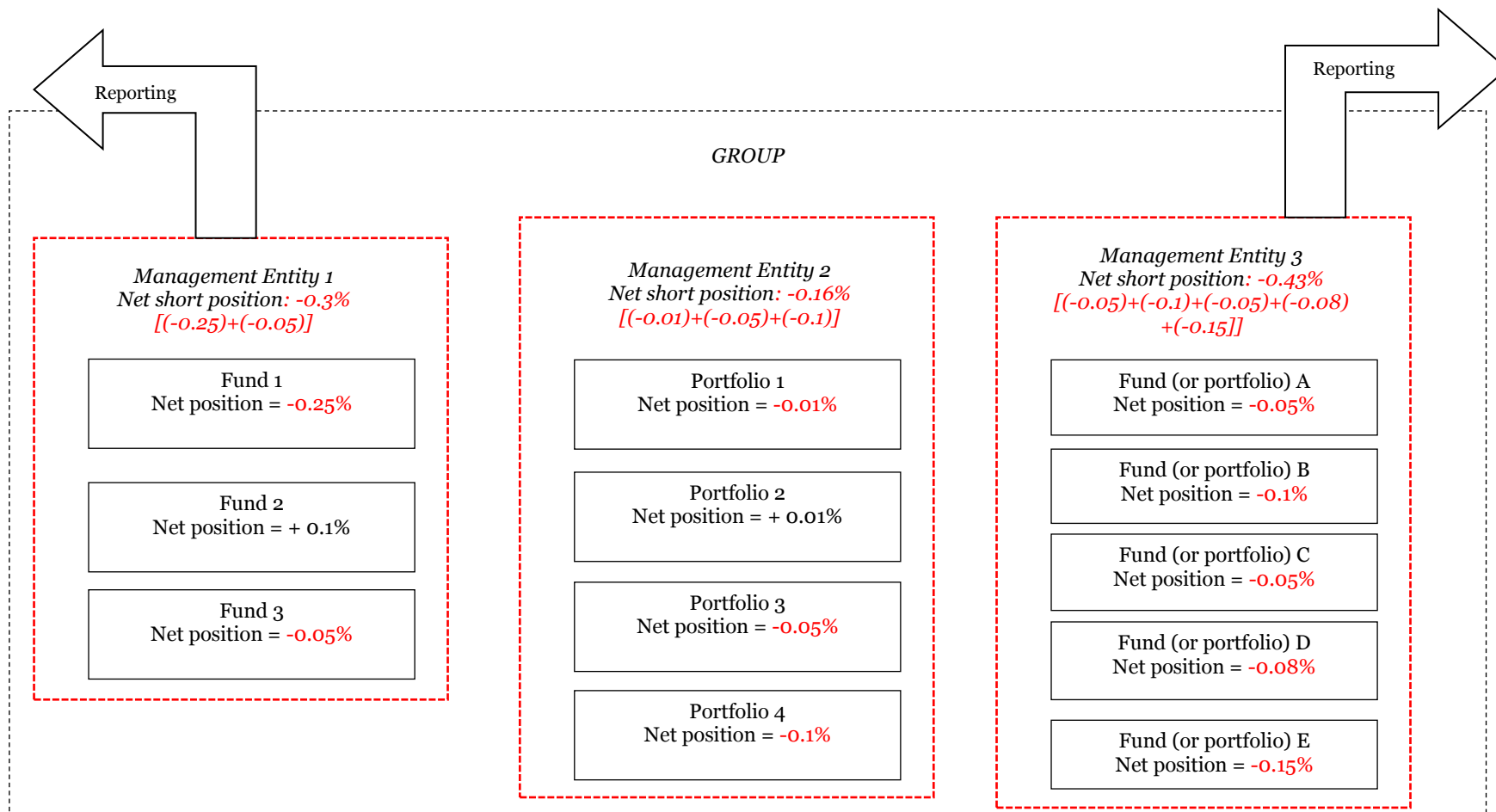
Annex 1: Example of calculation within a management entity



Annex 2 – Example of a single legal entity performing both management and non-management activities

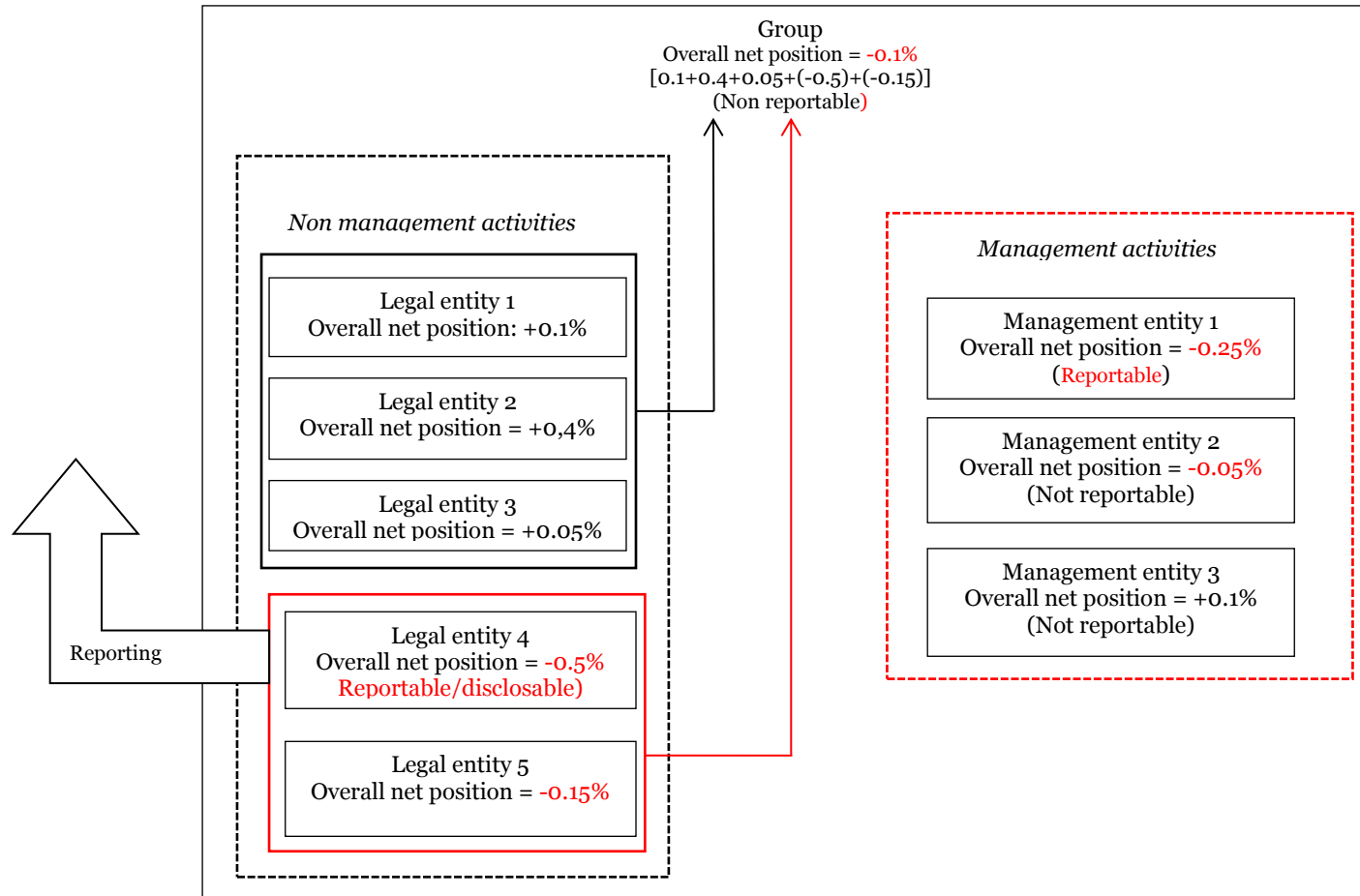


Annex 3 – Example of a group constituted only of management entities performing exclusively management activities



Annex 4 – Examples of calculation within a group

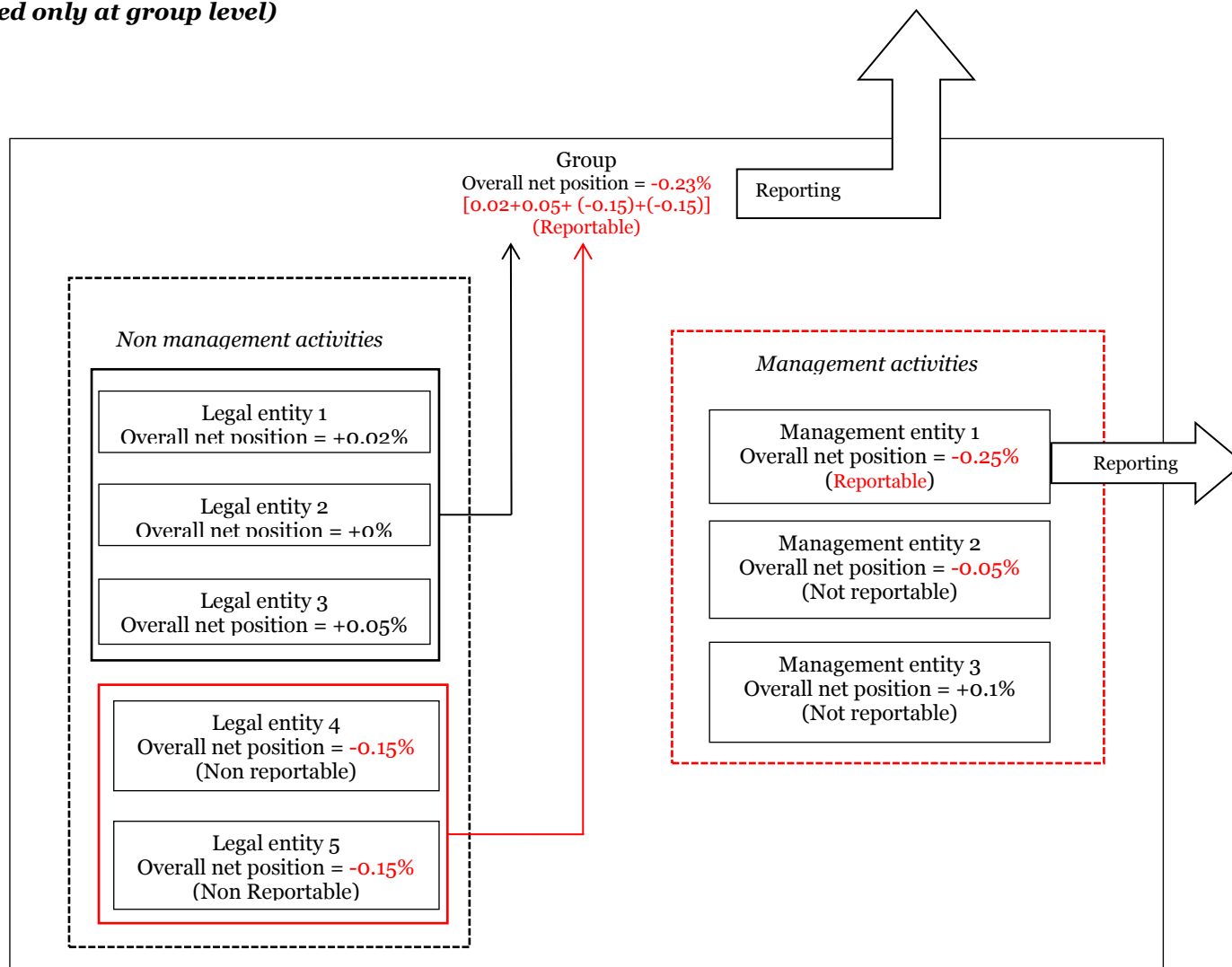
**1/ Only the legal entity belonging to the group reports/discloses**



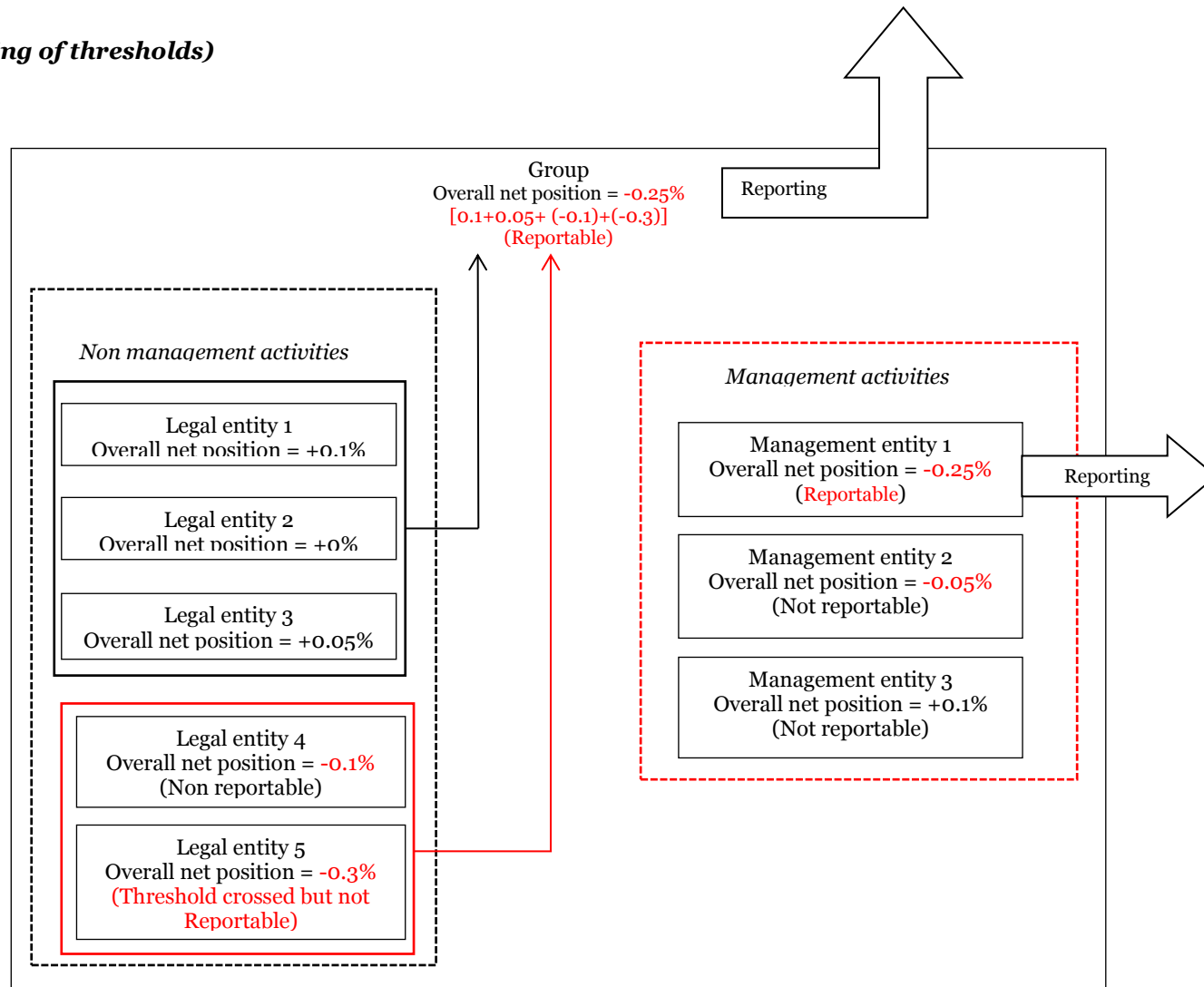


**2/ Only the net short position at group level is reported/disclosed**

**Case 1 (threshold crossed only at group level)**



**Case 2 (simultaneous crossing of thresholds)**



Annex 5 : List of the main national indices identified by the NCAs for the purpose of locate rules for liquid shares under Regulation No 236/2012

| <b>Member State</b>   | <b>Country Code</b> | <b>Main national index</b>                | <b>Index code</b> |
|-----------------------|---------------------|---|-------------------|
| <i>Austria</i>        | <i>AT</i>           | Austrian Traded Index                     | ATX               |
| <i>Belgium</i>        | <i>BE</i>           | BEL20                                     | BE0389555039      |
| <i>Bulgaria</i>       | <i>BG</i>           | SOFIX.                                    |                   |
| <i>Cyprus</i>         | <i>CY</i>           | GENERAL INDEX                             | GEN_IN_C          |
| <i>Czech Republic</i> | <i>CZ</i>           | PX  | PX                |
| <i>Denmark</i>        | <i>DK</i>           | OMX C20                                   | DX0000001376      |
| <i>Estonia</i>        | <i>EE</i>           | OMX Baltic 10 Tradable – PI               |                   |
| <i>Finland</i>        | <i>FI</i>           | OMX Helsinki 25                           | FI0008900212      |
| <i>France</i>         | <i>FR</i>           | CAC 40                                    |                   |
| <i>Germany</i>        | <i>DE</i>           | DAX 30                                    |                   |
| <i>Greece</i>         | <i>GR</i>           | FTSE/Athex 20                             | FTSE              |
| <i>Hungary</i>        | <i>HU</i>           | BUX index – the official index of BSE     | BUX               |
| <i>Ireland</i>        | <i>IE</i>           | ISEQ® Overall                             | IE0001477250      |
| <i>Italy</i>          | <i>IT</i>           | FTSE MIB                                  | FTSE MIB          |
| <i>Latvia</i>         | <i>LV</i>           | na  | na                |
| <i>Lithuania</i>      | <i>LT</i>           | OMX Vilnius                               | OMXV              |
| <i>Luxembourg</i>     | <i>LU</i>           | Indice LuxX cours (base 1.000 au 4.01.99) | LuxX              |
| <i>Malta</i>          | <i>MT</i>           | MSE share index                           |                   |
| <i>Netherlands</i>    | <i>NL</i>           | NYSE Euronext Amsterdam - AEX             | AEX-INDEX         |
| <i>Poland</i>         | <i>PL</i>           | WIG20                                     | PL9999999987      |
| <i>Portugal</i>       | <i>PT</i>           | Portuguese Stock Index 20                 | PSI20             |
| <i>Romania</i>        | <i>RO</i>           | BET-Bucharest Exchange Trading            | BET               |



|                       |           |                            |        |
|-----------------------|-----------|----------------------------|--------|
| <i>Slovakia</i>       | <i>SK</i> |                            |        |
| <i>Slovenia</i>       | <i>SI</i> | Slovenski blue chip indeks | SBITOP |
| <i>Spain</i>          | <i>ES</i> | IBEX-35                    |        |
| <i>Sweden</i>         | <i>SE</i> | OMXS30                     | OMXS30 |
| <i>United Kingdom</i> | <i>GB</i> | FTSE 100                   |        |