

OPINION

Renewal of emergency measure by the Greek HCMC under Section 1 of Chapter V of Regulation No 236/2012 on short selling and certain aspects of credit default swaps

I. Legal basis

1. According to Article 27(2) of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (the Regulation), the European Securities and Markets Authority (ESMA) shall within 24 hours of the notification having been made by a competent authority under Article 26 of the Regulation issue an opinion on whether it considers the measure or proposed measure necessary to address the exceptional circumstances.
2. ESMA's competence to deliver an opinion is based on Article 29(1) (a) of Regulation (EC) No 1095/2010 (ESMA Regulation). In accordance with Article 44(1) of the ESMA Regulation the Board of Supervisors has adopted this opinion.

II. Background

3. On the 29th of June 2015, ESMA issued an opinion on the emergency measure introduced by the Hellenic Capital Market Commission (HCMC) under Article 20 of the Regulation. The measure consisted of a temporary prohibition of transactions in any financial instrument that create, or increase, a net short position on any of the shares admitted to trading on the Athens Exchange and the Multilateral Trading Facility of "EN.A" (Alternative Market of the Athens Exchange) of which the relevant Competent Authority is HCMC and was applied from 30th June 2015 at 00.00.01 CET to the 6th July 2015 at 24:00:00 (CET).
4. The measure concerned the following financial instruments: all shares admitted to trading on the Athens Exchange and the Multilateral Trading Facility of "EN.A", as well as all related instruments included in the calculation of the net short position in accordance with Regulation (EU) No 236/2012 and Commission Regulation (EU) No 918/2012 of 5 July 2012 (see in particular Annex I, Part I thereof). It applied to any person irrespective of their country of residence, and did not envisage any exemption for market maker activities.

5. In the original notification to ESMA, the HCMC indicated that the measure was a complementary action to the ones already established on the 29th of June 2015 by the Greek Authorities, namely:
 - closure of the ATHEX regulated market and the Multilateral Trading Facility of “EN.A” until the 6th of July (included);
 - closure of the Electronic Secondary Market “HDAT” for government bonds operated for the same period;
 - suspension of redemption of mutual funds’ units;
 - suspension of operation of ATHEXClear for the securities traded on the Greek market and the MTF “EN.A”;
 - suspension of the settlement of securities traded on the Greek market by the Hellenic Central Securities Depository;
 - trading suspension of all the securities of listed companies covered by the above measures, as well as the related financial instruments (the trading suspension is effective also in other Member States).
6. The reason for proposing a temporary prohibition for the creation, or increase, of net short position on the shares admitted to trading on the Athens Exchange and on “EN.A” was that the HCMC deemed it necessary for the protection of the investors and the preservation of financial stability. In fact, such prohibition was considered a relevant component to ensure the effectiveness of the other measures adopted by the Greek authorities. The HCMC also stated that given that the main liquidity and trading activity on those instruments normally is located within the Hellenic Republic, the measure would have not created disproportionate negative effects, since it would have affected a fairly small part of the EU overall market.
7. On the 6th, the 13th, the 20th and the 27th of July 2015, the measures described in paragraph 5 were renewed by the Greek authorities. On the same days, the HCMC notified ESMA and competent authorities of its intention to renew the short selling measure and ESMA issued in all cases a positive opinion concerning these renewals pursuant to Article 27 of the Regulation.
8. The renewals concerned the same financial instruments of the original measure (see paragraph 5), but the HCMC specified in the related notifications that although the ban covers all transactions in the financial instruments listed in Part I of Annex I of Commission Regulation (EU) No 918/2012, transactions in index-related instruments and ETFs are included to the extent that the shares admitted to trading on the Athens Exchange and the Multilateral Trading Facility of “EN.A” of which the relevant Competent Authority is the HCMC represent more than 5% of the total value (or composition) of these instruments.

9. The renewal notified on the 27th of July entered into force at 00:00:01 hours (CET) on the 28th of July 2015 and will expire at 24:00:00 (CET) on the 3rd of August 2015.
10. On the 3rd of August 2015, following and due to the Decision of the Greek Minister of Finance “*Lifting of the restrictions of the Act of Legislative Content of 18.07.2015 (A’84) regarding transactions in financial instruments on Greek regulated markets*”, the HCMC decided to reopen the ATHEX regulated market, the Multilateral Trading Facility of “EN.A”, the Electronic Secondary Market “HDAT” for government bonds, and to restart the operations of settlement of securities traded in Greek regulated markets, by the Hellenic Central Securities Depository.
11. On the same day, in accordance with Article 26 of the Regulation, the HCMC has notified ESMA and other competent authorities of its intention to make use of its powers of intervention in exceptional circumstances and to renew again the current emergency measure under Article 20 of the Regulation.
12. In the notification for this fifth renewal, the HCMC explains that since the Athens Exchange and the MTF “EN.A” have reopened after a period of more than one month, domestic capital market activity and securities’ prices are expected to be volatile. In particular, given that the markets will reopen after such an unprecedented closure and time may be necessary until their complete normalisation, additional pressure on stock valuations due to net short positions would pose a significant risk of deterioration of market conditions.
13. The proposed fifth renewal would concern exactly the same instruments as of the previous renewals. The latest notification featured the same wording used in the 20th of July 2015 notification to ESMA and competent authorities, where the HCMC revised its previous wording to the benefit of legal certainty regarding the nature of the emergency measure and the scope of the financial instruments concerned. In particular, the HCMC latest notification refers to short sales of shares under Article 20(2)(a) and any transaction referred to in Article 20(2)(b) of the Regulation (EU) No 236/2012. The notification also lists explicitly all the categories of financial instruments relating to the concerned shares to which the measure will apply, rather than identifying these related instruments by cross referring to the Annex of Commission Regulation No 918/2012. Thus, the following financial instruments under MiFID are included: options, covered warrants, futures, index-related instruments, contracts for difference, shares/units of exchange-traded funds, swaps, spread bets, packaged retail or professional investment products, complex derivatives, certificates linked to shares, and global depository receipts.
14. The proposed fifth renewal of the short selling measure would apply to any natural or legal person, irrespective of their country of residence, but would be subject to the exemption for market making activities, provided that short positions have been entered into for hedging purposes. The exemption for market makers is a new element of this latest renewal of the short position ban, and it is justified by the fact that the Greek

financial markets are now open and market making activities are important providers of liquidity for the Greek shares, as well as for warrants, derivatives, index derivatives and ETF related to Greek shares.

15. The renewed measure shall apply for a period of twenty-eight days and shall be in force as of 00:00:01 hours (CET) on the 4th of August 2015 until 24:00:00 (CET) on the 31st of August 2015. The proposed renewal is longer than the previous ones, which all were of seven days each. The HCMC justified such a longer renewal explaining that upon reopening of Greek financial markets, considerable pressure is anticipated: capital controls are still in force and the return to normality will probably require a longer period of time. As a result, HCMC considers the short selling measure as an important element for the transitional period.

III. Opinion

16. ESMA is adopting the following opinion on the notified measure, on the basis of Article 27(2) of Regulation 236/2012 on Short selling and certain aspects of credit default swaps:

On the adverse events or developments

ESMA considers that adverse developments which constitute a serious threat to market confidence in the Greek market still persist. Comparing the current situation in the Hellenic Republic with related events over the past few years, the threat to financial stability and investor protection at least in the Hellenic Republic is obvious. Despite the partial reopening of credit institutions on 20 July 2015, and the reopening on 3 August 2015 of the ATHEX regulated market, the Multilateral Trading Facility of “EN.A”, and of the Electronic Secondary Market “HDAT” for government bonds, the situation of fragility in the financial system and in the Greek economy persists, as highlighted by the extreme volatility already experienced on the ATHEX in the course of the first hours of reopening.

On the appropriateness and proportionality of the measure

ESMA considers that the measure is appropriate and proportionate to address the above mentioned threats that persist in the Greek financial markets. Allowing short positions to be built at this stage could exacerbate the threats to financial stability, especially as regards the financial sector. The new exemption foreseen for market making activities is justified by the fact that Greek financial markets are now open, and therefore market makers should be allowed to properly carry out their activity, thus enhancing the liquidity on the Greek shares and related instruments, and contributing to the normalisation of the activities on the Greek financial markets.

On the duration of the measure

ESMA considers that the duration of the measure is justified. In the previous extensions, measures were always proposed for a seven day period each, considering that the moment in which the Greek financial markets would have reopened was not known at that time. This is no longer the case, since Greek financial markets have reopened after more than one month. An unusual degree of volatility on the Greek financial markets is therefore anticipated in the short term. Such expectation is exacerbated considering that the month of August is generally characterised by lower volumes of transactions.

Under these circumstances, ESMA considers it is necessary and appropriate for HCMC to impose a net short position ban that would last until the end of the month, in view of supporting the proper functioning of the Greek financial markets in this transitional period. Besides, ESMA takes into consideration HCMC's statement in its notification of intent that the measure may be lifted before the end of the established period or renewed in accordance with the provisions of Regulation (EU) No 236/2012 if circumstances that justified the imposition of the measure improve, persist or worsen.