Date: 11 January 2016
ESMA/2016/28

OPINION

Emergency measure by the Greek HCMC under Section 1 of Chapter V of Regulation (EU) 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 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. Previous measures adopted by the Hellenic Capital Market Commission (HCMC)

3. On the 29th of June 2015, ESMA issued an opinion on an emergency measure proposed by the 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 HCMC indicated that the measure was a complementary action to the ones already established on the 29th of June 2015 by the Greek Authorities in order to tackle the broader Greek financial system crisis.

5. On the 6th, the 13th, the 20th and the 27th of July and on the 3rd of August 2015, some of the measures adopted by the Greek authorities were renewed until the 30th of August 2015.

6. On the 31st of August 2015, in accordance with Article 26 of the Regulation, the HCMC introduced a new emergency measure under Article 20 of the Regulation consisting in a ban on short selling of shares and units of Exchange Traded Funds (ETFs) 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 the HCMC. It also concerned all depository receipts (ADRs, GDRs) representing shares admitted to trading on the Athens Exchange and the Multilateral Trading Facility of "EN.A" (Alternative Market of the Athens Exchange). The short selling measure applied to any natural or legal person, irrespective of their country of residence, but contained the exemption for market making activities, provided that short selling transactions were conducted for hedging purposes. The emergency measure adopted on August 31st expired at 24:00:00 (CET) on the 30th of September 2015.

7. In respect of all the above cases, the HCMC notified ESMA and other competent authorities of its intention to impose/renew the relevant short selling measures in accordance with Article 26 of the Regulation and ESMA issued in all cases a positive opinion concerning the imposition/renewal of the relevant short selling measure pursuant to Article 27(2) of the Regulation.

III. Present measure

8. On the 30th of September 2015, in accordance with Article 26 of the Regulation, the HCMC notified ESMA and other competent authorities of its intention to make use of its powers of intervention in exceptional circumstances and to introduce a new emergency measure under Article 20 of the Regulation.

9. The measure consisted in a ban on short selling of shares of five credit institutions admitted to trading on the Athens Exchange and comprising the FTSE/Athex Banks Index, irrespective of the venue where the transaction was executed. The temporary prohibition included sales of shares covered by subsequent intraday purchases. The temporary prohibition of short selling applied to all depository receipts (ADRs, GDRs) and warrants representing shares of such credit institutions admitted to trading on the Athens Exchange and comprising the FTSE/Athex Banks Index.

10. The above mentioned credit institutions were:

    - Alpha Bank A.E. (ISIN GRS015013006)
    - Attica Bank S.A. (ISIN GRS001003003)
    - National Bank of Greece S.A. (ISIN GRS003003019)
    - Eurobank Ergasias S.A. (ISIN GRS323003004)
    - Piraeus Bank S.A. (ISIN GRS014003008)

11. In the notification, the HCMC explained the reason for the measure was that in July 2015 the Eurogroup agreed on a specific package of measures regarding the development of the Greek Economy, the most important element of the Eurogroup agreement being that 25 billion euros would be earmarked for the re-capitalisation needs of the Greek Banking system. Nevertheless, the amount of funds needed to secure the capital adequacy of the Greek banks, and most importantly, the legal framework that would apply in relation to such re-capitalisation, including whether some incentives for private shareholders will be provided or not, had not been officially disclosed at the time.

12. On the 30th of September 2015, ESMA issued a positive opinion (ESMA/2015/1489) regarding this new emergency measure. The measure entered into force as of 00:00:01 hours (CET) on the 1st of October 2015 and the original expiring date was the 9th of November 2014 24:00:00 hours (CET).

13. On the 9th of November 2015 and on 7th of December 2015, the HCMC notified ESMA and other competent authorities of its intention to make use of its powers of intervention in exceptional circumstances and to renew the emergency measure originally introduced on the 30th of September 2015. On the same days ESMA issued positive opinions regarding these renewals (ESMA/2015/1638 and ESMA/2015/1854), which expired on the 21st of December 2015 at 24:00:00 (CET).

14. The proposed renewals in November and December 2015 concerned exactly the same instruments as the original measure (see paragraph 9 and 10), foreseeing an exemption for market making activities in the affected financial instruments.

15. In the notifications for the renewals, the HCMC considered that adverse circumstances were persisting in the Greek capital market, including also the existence of capital controls in respect of stock exchange transactions, but mainly in connection with the re-capitalisation of the systemic credit institutions that was not finalised yet, resulting in persistent market uncertainty that posed threats to the financial stability and the general level of market confidence

16. The HCMC explained that the re-capitalisation of the Greek Banking System, that the law voted by the Greek Parliament on October 31st 2015 provides for, was actually in progress and had not been yet concluded for all credit institutions. Moreover, considering that the trading in the new shares issued from the relevant capital raising had not yet been started in all cases, the HCMC argued that, the lifting of the ban on short sales would tend to increase price volatility on listed credit institutions and would increase market uncertainty.

17. Taking into consideration that the market behaviour of banking sector securities has traditionally played a very important role in driving overall market valuations, concerns remained as regards unexpected sudden and significant swings in market confidence and therefore in relevant asset prices. The HCMC added that the successful conclusion of the aforementioned bank re-capitalisation and restructuring process as well as the

commencement of trading of the new shares of all credit institutions were thus absolutely necessary, in order to safeguard the stability of the financial system and of the Greek capital market.

18. On the 21st December 2015, the HCMC notified ESMA and other competent authorities of its intention to make use of its powers of intervention in exceptional circumstances and to renew the current emergency measure introduced on the 30th of September 2015 once more, but this time with a limited scope.

19. The renewed measure consisted of a ban on short selling limited only to the shares of Attica Bank S.A. (ISIN GRS001003011) admitted to trading on the Athens Exchange, irrespective of the venue where the transaction is executed. The temporary prohibition included sales of shares covered by subsequent intraday purchases. The temporary prohibition of short selling applied to all depository receipts (ADRs, GDRs) and warrants representing shares of Attica Bank S.A. (ISIN GRS001003011) admitted to trading on the Athens Exchange. As for previous bans, an exemption for market making activities in the affected financial instruments would be foreseen.

20. In the notification for the partial renewal, the HCMC explained that the re-capitalisation of the Greek Banking System, based on the law 4340/2015 voted by the Greek Parliament on October 31st 2015, was still not fully concluded. Re-capitalisation of Attica Bank was still on-going. HCMC indicated that the capital increase was to be concluded at the latest by the 31st of December 2015 and that, subject to the successful completion of the issue, the trading of the new shares of Attica Bank was expected early January 2016, and thus the effect on the share price of this credit institution and on the volatility this trading might impose, had not yet been fully evaluated by market participants.

21. The HCMC considered that the lifting of the ban on short sales on Attica Bank shares would tend to increase price volatility on the institution and would increase market uncertainty. Within this context, the HCMC argued that, as done previously for the other banks for which the short selling ban applied during the re-capitalisation process and also covered a few trading days of the new shares, the proposed renewal should be limited to Attica Bank and should expire on the 11th of January 2016.

22. In the notification, the HCMC also explained that the proposed limited temporary ban of short-selling concerning shares of Attica Bank admitted to trading on the Athens Exchange was not expected to significantly impair price discovery and therefore market efficiency. Given that the main liquidity and trading activity on those instruments normally is located within Greece, the HCMC believed the proposed renewal would not create disproportionate negative effects, since it would affect a fairly small part of the EU overall market.

23. On the 21st of December 2015, ESMA issued a positive opinion regarding the renewal of the emergency measure (ESMA/2015/1900), which is expiring on the 11st of January 2016 at 24:00:00 (CET).

24. On the 11th January 2016, the HCMC notified ESMA and other competent authorities of its intention to make use of its powers of intervention in exceptional circumstances and to renew the emergency measure introduced on the 21st of December renewal as described in paragraph 19 above, namely Attica Bank.

25. In the notification of renewal of the measure for Attica Bank, the HCMC indicated that the re-capitalisation of the Greek banking system is not yet fully completed, the one of Attica Bank still being in progress. Even though the capital increase of Attica Bank was finalised since the end of December 2015, the trading of the new shares has not started yet. Both the dates of the delivery of the new shares to the beneficiaries of the capital increase and of their admission to trading remain to be announced by Attica Bank and the Stock Market operator. The HCMC expects this will take place within the next week following the relevant decision of the Athens Exchange.

26. Within this context, the HCMC argues that the short selling ban on Attica Bank should be extended to also cover a few trading days of the new shares to ensure equal treatment with the banks that had undertaken and concluded the re-capitalisation process before. Furthermore, the HCMC considers that such an extension would mitigate any possible risk of market volatility of the shares of Attica Bank and respond to any possibility of market uncertainty.

27. In the notification, the HCMC also explained that the proposed limited temporary ban of short-selling concerning shares of Attica Bank admitted to trading on the Athens Exchange was not expected to significantly impair price discovery and therefore market efficiency. The proposed renewal of the emergency measure should be in force as of 00:00:01 hours (CET) on the 11th January 2016 until 24:00:00 (CET) on the 25 January 2016.

IV. Opinion

28. ESMA is adopting the following opinion on the measure notified on the 11 January 2016, on the basis of Article 27(2) of the Regulation:

On the adverse events or developments

ESMA considers that adverse developments which constitute a serious threat to market confidence in Greece could be understood as having considerably decreased with the successful completion of the share capital increase of Attica bank as announced by that bank on the 30th December 2015. Attica Bank has been the last of the five banks to undertake the re-capitalisation process envisaged under Greek law. It represented less than 1 % of the total market capitalisation of the 5 re-capitalised banks before the Attica capital increase and less than 7% after the increase. It also stands for a very small fraction of the Greek banking sector. Not surprisingly, and unlike the other banks mentioned in paragraph 10 above, Attica Bank is not a significant supervised entity under the direct supervision of the ECB.

Although acknowledging that the successful and full conclusion of all the Greek banks' re-capitalisation is important in order to safeguard the stability of the financial system as a whole and of the Greek capital market, as well as the protection of investors, ESMA considers that given that the capital increase of Attica Bank is agreed, priced, subscribed and publicly announced on the 30th of December 2015, the threat to the financial stability of the bank, and more widely to the financial stability of the Greek financial market, is much less acute than in December 2015.

ESMA notes that the trading of the newly issued shares further to the completed capital increase has not started yet and thus there is a risk of increased volatility in the relevant market and that the confidence in the concerned bank could be affected if price movements were extreme. However, the evolution of the stock price of Attica Bank during the last month does not point towards, on average, a significant downward pressure on the prices. The volatility observed on Attica Bank is relative to the currently volatile stock markets in the EU.

In the trading figures of Attica Bank shares since late November 2015, it is evident that the trading volumes have reduced progressively but the price of the stock has not suffered from a downward price spiral. Only in one occasion (10 December2015) the stock price fell more than 10% in a single session. In general, looking at the last 30 trading sessions, the price has increased by 37%. In the last 10 trading sessions, the price has moved in an overall range (counting intraday minimum and maximum values) of 13% around the average closing price of the period. In terms of closing prices, the maximum fluctuation has been -3,97% since 22 December (observed on January 7 2016). Putting these moves in the context of quite volatile EU stock markets, linked to the international market trends, it is questionable whether the volatility of the stock price of Attica Bank could be qualified as extreme or even high. Obviously, one could argue that the price has found a support thanks, among other things, to the existing ban on short sales. While it is extremely difficult to isolate the price effect of the short selling ban with current data, it is ESMA's view that, all in all, the pricing history of the stock does not give the impression of a highly fragile situation.

The main risk related with extreme volatility in a re-capitalisation exercise arises when the issuance price of the new shares and the allotment of the volume to be subscribed is not yet complete. In that scenario, significant (downward) price movements can dis-incentivise the investors that were considering to subscribe to new shares or can affect the issuance price in a manner that the re-capitalisation (in terms of the effective amount of funds to be received by the bank) can be put at risk. Once the pricing and the subscription are firm, price moves have a much lower impact on the success prospects of a re-capitalisation. They mainly affect the willingness of the new investors to hold their new shares or to sell them when the new shares start to trade. But the effects of this process on the financial stability of the entity are much less direct than when the volatility scenario precedes the establishment of the price and of the allotment of the capital increase. The latter was the prevalent scenario in most of the other occasions in which the measures of the HCMC was extended and on which ESMA issued positive opinions in the past. In ESMA's opinion, such scenarios should be distinguished from the case at hand.

The question of whether the risk of falling prices on Attica Bank shares (which has not yet been observed) would endanger the orderly functioning of the whole Greek financial market and its integrity is not evident to ESMA, due to the small size of this particular institution and to the fact that the only pending element is the formal admission to trading of the new shares.

On the appropriateness and proportionality of the proposed measure

ESMA considers that the renewal of the emergency measure limited to the shares of Attica Bank is not appropriate and proportionate to address the above mentioned potential threat stemming from the volatility of the price of the market of Attica Bank shares. Given that the share capital increase of Attica Bank is firm and definitive as well as publicly known, ESMA considers that the prohibition of short sales in the shares of Attica Bank admitted to trading on the Athens Exchange will only serve the purpose of assisting in reducing market volatility until the final admission of the new shares and the first days of their trading. While this may be a positive goal, ESMA notes that the situation of Attica Bank is very different from the ones of the other Greek banks both in terms of quantitative significance with respect to financial stability (much smaller in the case of Attica Bank) and in terms of the timing in the process of re-capitalisation (given that only the final listing of the new shares is pending, as opposed to the fixing of the issuance price and the allotment of the subscriptions).

ESMA is thus of the view that there are alternative tools and measures, including those provided by Article 23 of the Short Selling Regulation consisting in a short term restriction of short selling in case of a significant fall in price, to address extreme market volatility concerns, should this volatility materialise in the coming days and more specifically risks of a downward spiral of the price of Attica shares. Those measures would be in ESMA's opinion more appropriate and proportionate to address the risks that would arise from that situation than a total ban on short sales.

On the duration of the proposed measure

Considering the above negative opinion on the appropriateness and proportionality of the measure, ESMA is not further assessing the duration of the proposed renewal.