074394/EU XXVII. GP
Eingelangt am 28/09/21

Council of the
European Union

Brussels, 28 September 2021
(OR. en)

12314/21

EF 290
ECOFIN 910
DELACT 209

COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	27 September 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	C(2021) 6815 final
Subject:	COMMISSION DELEGATED REGULATION (EU) …/... of 27.9.2021 amending Regulation (EU) No 236/2012 of the European Parliament and of the Council as regards the adjustment of the relevant threshold for the notification of significant net short positions in shares

Delegations will find attached document C(2021) 6815 final.

Encl.: C(2021) 6815 final

EUROPEAN
COMMISSION

Brussels, 27.9.2021
C(2021) 6815 final

COMMISSION DELEGATED REGULATION (EU) …/...

of 27.9.2021

amending Regulation (EU) No 236/2012 of the European Parliament and of the Council as regards the adjustment of the relevant threshold for the notification of significant net short positions in shares

(Text with EEA relevance)

www.parlament.gv.at

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

1.1. General background

The Short Selling Regulation[1] creates a set of harmonised rules that (i) increase transparency of significant net short positions held by investors; (ii) reduce risks associated with uncovered short sales and credit default swaps; (iii) provides national regulators and the European Securities and Markets Authority (ESMA) with intervention powers in exceptional circumstances (e.g. to temporarily restrict or ban short selling).

This Delegated Regulation aims to enhance transparency for competent authorities on significant net short positions in shares. Net short positions must be notified to relevant competent authorities to enable them to monitor and, where necessary, investigate short selling that could create systemic risks, be abusive or create disorderly markets (0,2 % of the issued share capital and each 0,1 % above that). The Short Selling Regulation provides the opportunity for ESMA to take emergency measures, such as lowering this threshold on a temporary basis.

Furthermore, to address the issue that developments in financial markets might render the relevant notification threshold inappropriate, the Short Selling Regulation has introduced a mechanism that enables (i) ESMA to issue an opinion to the Commission on adjusting the relevant notification threshold, and (ii) the Commission to adopt delegated acts to amend it.

This Delegated Act is about amending the relevant threshold for the notification to competent authorities of significant net short positions in shares. Such threshold was originally set at 0,2 % of the issued share capital of the company concerned (and each 0,1 % above that), taking into account the work conducted by the Committee of European Securities Regulators in 2010[2], in order to identify reporting thresholds that could generate both meaningful information for competent authorities and market participants, and a proportionate compliance burden for investors. The notification threshold was then reviewed in 2013[3], too early, however, to gather meaningful data as the Short Selling Regulation had entered into application only on 1 November 2012.

On 21 December 2017, ESMA provided the Commission with a technical advice on certain elements of the Short Selling Regulation[4] that included an analysis of the effectiveness of the notification threshold, which appeared to be still appropriate. However, only a limited number of stakeholders had provided feedback during ESMA's public consultation.

---

[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 (OJ L 86, 24.3.2012, p. 1).

[2] CESR Model for a pan-European short selling disclosure regime (CESR/10-088). Available at: https://www.esma.europa.eu/sites/default/files/library/2015/11/10_088.pdf

[3] ESMA's technical advice on the evaluation of the Regulation (EU) 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps (ESMA/2013/614). Available at: 2013-614_final_report_on_ssr_evaluation.pdf (europa.eu)

[4] ESMA's technical advice on the evaluation of the Regulation (EU) 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps (ESMA 70-145-386). Available at: https://www.esma.europa.eu/sites/default/files/library/technical_advice_on_the_evaluation_of_certain_aspects_of_the_ssr.pdf

www.parlament.gv.at

In February 2020, a substantial selling pressure and unusual volatility followed the outbreak of the COVID-19 pandemic, leading to significant downward price spirals affecting issuers from all sectors across financial markets. In the course of that year, and despite a partial price recovery in equity prices within the EEA, the consequences of the COVID-19 pandemic kept affecting the real economy with the overall outlook for a future recovery remaining uncertain. On 16 March 2020 ESMA made use of its emergency intervention powers under Article 28 of the Short Selling Regulation and issued a decision[5] to lower the notification threshold for net short positions in shares admitted to trading on a regulated market from 0,2 % to 0,1 % for a period of three months. ESMA subsequently renewed that decision in June, September and December 2020.

In its decision, ESMA considered that market participants engaging in short selling and building up significant net short positions could amplify substantial selling pressure and unusual volatility in the price of shares. As consequence, ESMA decided to lower the threshold for notification of net short positions to competent authorities to intensify the monitoring of aggregated net short positions in shares admitted to trading on regulated markets and improve ESMA's and competent authorities' capacity to react quickly in case more stringent actions were needed. Overall, competent authorities reported to ESMA the net short positions using the new threshold in a timely manner and did not signal any particular issue in relation to the compliance with the new threshold by market participants.

When the last ESMA's temporary measure to lower the notification threshold expired on 19 March 2021, ESMA considered that the conditions to take emergency measures laid down in Article 28 of the Short Selling Regulation were no longer applicable under that legal basis. However, the events following the COVID-19 outbreak and the increased visibility obtained by competent authorities on volumes of net short positions have convinced ESMA that the notification threshold should be established at 0,1 % on a permanent basis.

On 13 May 2021, ESMA issued an opinion[6] to the Commission, in accordance with Article 5(3) of the Short Selling Regulation on adjusting permanently the notification threshold to 0,1 % (and each 0,1 % above that). In that opinion, ESMA conducted a comprehensive empirical analysis on the relevance of the reporting of net short positions between 0,1 % and 0,2 %, comparing it with the data collected on the basis of the 0,2 % threshold, and presented the its conclusions to the Commissions. The points listed below summarise some of the key findings from ESMA's opinion:

- the number of net short positions reported by different holders per ISIN between 0,1 % and 0,2 % amounts on average to around 40 % of the overall net short positions in the period March-June 2020, hence a very significant part of the overall net short positions established in the Union, which is critical for market surveillance purposes and can provide an early indication of deteriorating market conditions;

- net short positions between 0,1 % and 0,2 % represent a large proportion of net short positions in terms of absolute number of notifications (between 39 and 44 % over the period) and market value of the positions (between 23 and 33 % over the period);

5 ESMA70-155-9546. Available at: esma70-155-9546_esma_decision_-_article_28_ssr_reporting_threshold.pdf (europa.eu)

6 ESMA70-156-4262. Available at : esma70-156-4262_opinion_for_the_adjustment_of_the_threshold_set_out_in_article_52_of_ssr_0.pdf (europa.eu)

www.parlament.gv.at

- despite a general recovery across a number of jurisdictions, as for the main European stock indices, the recovery is still behind financial markets of other major economies;
- while sectoral indices related to banks and insurance have partially recovered (compared to February 2020), the implied volatility as well as credit default swaps remain very sensitive to market developments, despite having a decreasing trend;
- the reporting of net short positions at 0,1 % provided regulators with more precise information on the building up of net short positions at individual, sectorial and market-wide level. ESMA could also determine and analyse EU-wide effects;
- the reporting at 0,1 % allows to assess the effects of short selling bans (e.g. displacement effects across jurisdictions, sectors or shares with different levels of liquidity), which could help competent authorities to calibrate future measures;
- the increasing retail client activity might increase the likelihood of short squeezes which competent authorities can better identify at an early stage due to a more granular reporting at 0,1 %;
- lowering the threshold to 0,1 % on a permanent basis should be smoothly implemented and the marginal costs for its implementation by market participants are expected to be negligible, for the following reasons:

  (i) market participants that engage in short selling have already put in place monitoring systems for positions above 0,1 % throughout 2020 and 2021 (low level of non-compliance);

  (ii) the lower threshold only concerns notifications to competent authorities, not public disclosure to the market, hence it should have no impact on the strategies of the individuals holding net short positions.

ESMA's findings corroborate the Commission's view on recent developments in financial markets observed by the Commission, such as the instability caused by the global outbreak of COVID-19, which has led to a more frequent recourse to emergency measures on short selling by regulators and ESMA, as well as the growing risk of retail investors being involved in short squeezes, which have stressed the importance to gather additional intelligence in significant net short positions in shares on permanent basis, which is critical for market surveillance purposes. Furthermore, the Commission considers that uncertainty with respect to the regulatory reporting obligation should be avoided and rules and obligations in this respect should be stable. The best way to achieve stability and planning security would be to lower the notification threshold at 0.1% on permanent basis. This approach is much clearer than having the threshold determined by a temporary measure, which implies uncertainty as the potential date of expiry approaches.

1.2. Objective of the Delegated Regulation

The objective of this Delegated Regulation is to adjust the relevant threshold for the notification to competent authorities of significant net short positions in shares set out in Article 5, paragraph (2) of the Short Selling Regulation from 0,2 % to 0,1 % (and each 0,1 % above that).

1.3. Legal background

www.parlament.gv.at

This Delegated Regulation is based on the empowerment set out in Article 5(4) of the Short Selling Regulation and takes into account the opinion issued by ESMA in accordance with Article 5(3) of that Regulation.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

ESMA did not consult on its opinion, as it considered that engaging in a public consultation and a full cost-benefit analysis was disproportionate due to the particular urgency of the matter. ESMA considered that the impact of the COVID-19 crisis, the uncertain economic outlook and the decoupling of real economy and financial markets required swift action in adjusting the reporting threshold to provide competent authorities with sufficient visibility for market surveillance.

The draft Delegated Regulation was published on the Better Regulation portal for a four-week feedback period from 15 July to 12 August 2021 and was submitted to the Expert Group of the European Securities Committee (EGESC) on 19 July 2021 for consultation, in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making. The received feedback was thoroughly examined before deciding to move forward with the adoption of the Delegated Regulation.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

The right to adopt delegated acts is provided for under Article 42 of the Short Selling Regulation.

Article 1 of this Delegated Regulation amends Article 5(2) of the Short Selling Regulation by setting the threshold for the notification to competent authorities of significant net short positions in shares to 0,1 % of the issued share capital of the company concerned, and each 0,1 % above that.

www.parlament.gv.at

COMMISSION DELEGATED REGULATION (EU) …/...

of 27.9.2021

amending Regulation (EU) No 236/2012 of the European Parliament and of the Council as regards the adjustment of the relevant threshold for the notification of significant net short positions in shares

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[7], and in particular Article 5(4) thereof,

Whereas:

(1) Regulation (EU) No 236/2012 establishes the obligation to notify to competent authorities of significant net short positions in relation to the issued share capital of a company that has shares admitted to trading on a Union trading venue, where the position reaches or fall below the relevant notification threshold. It is necessary for the Commission to monitor whether such relevant notification threshold remains appropriate in light of developments in financial markets and to assess whether it is necessary to modify that threshold in accordance with Article 5(4) of that Regulation.

(2) In early 2020, a substantial selling pressure and unusual volatility stemming from the global outbreak of COVID-19 led to significant downward price spirals affecting issuers from all sectors across financial markets. The European Securities and Markets Authority (ESMA) made use of its intervention powers in exceptional circumstances to temporarily lower the relevant notification threshold for significant net short positions in shares, in order to improve both ESMA's and regulators' monitoring activity of such positions, determine whether more stringent actions could be appropriate and be able to react quickly.

(3) As the lower relevant notification threshold for significant net short positions in shares, which has been in place for twelve consecutive months and, due to partially improved market conditions, could no longer be extended as an emergency measure, it is appropriate to assess the impact of such measure and determine whether it should be made permanent by replacing the existing threshold. In that regard, the Commission takes into account the opinion[8] that ESMA issued on 13 May 2021.

[7] OJ L 86, 24.3.2012, p. 1.
[8] ESMA70-156-4262.

www.parlament.gv.at

(4) The recent developments in financial markets observed by the Commission, such as the instability caused by the global outbreak of COVID-19, which has led to a more frequent recourse to emergency measures on short selling by regulators and ESMA, as well as the growing risk of retail investors being involved in short squeezes, have stressed the importance to gather additional intelligence in significant net short positions in shares on permanent basis, which is critical for market surveillance purposes. In that regard, ESMA's opinion assessed that the lower relevant notification threshold significantly improved transparency and monitoring of significant net short positions in shares at individual, sectorial and market-wide level, resulting in an increase in regulatory efficiency. ESMA also considered that marginal costs for implementation by market participants should be negligible, considering that they have been applying such threshold for several months. Furthermore, the Commission considers that uncertainty with respect to the regulatory reporting obligation should be avoided and rules and obligations in this respect should be stable. On that basis, and taking into account recommendations set out in ESMA's opinion, with which the Commission agrees, it is appropriate to amend the current relevant notification threshold and set it permanently at 0,1 %.

(5) Regulation (EU) No 236/2012 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

In Article 5 of Regulation (EU) No 236/2012, paragraph 2 is replaced by the following:

> '2. A relevant notification threshold is a percentage that equals 0,1 % of the issued share capital of the company concerned and each 0,1 % above that.'.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27.9.2021

For the Commission
The President
Ursula VON DER LEYEN

www.parlament.gv.at