

Remarks on short selling notification standards

Response to the ESMA consultation paper on technical standards re short selling and credit default swaps of January 2012

Version 2.0

Date 13 February 2012

DACSI (the Dutch Advisory Committee Securities Industry) is the principal not-for-profit association in The Netherlands for firms active in the securities industry. The association represents the interests of its members as users/clients of infrastructure providers in the field of securities, e.g. exchanges, central counterparties, central securities depositories. With 12 members, DACSI represents the vast majority of the banks active in The Netherlands, and positions the Dutch view to the market infrastructure service providers and the regulatory authorities in The Netherlands and the European Union.

Keizersgracht 62-64
1015 CS Amsterdam
The Netherlands
t : +31 20 520 7588
e : secretariat@dacsi.nl
w : www.dacsi.nl

Thank you for the opportunity to comment on the consultation paper “Draft technical standards on the Regulation (EU) xxxx/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps”. We hope that our contribution is helpful in further detailing the technical standards on the various issues addressed in the paper and are of course more than prepared to provide further detail and explanation on particular items when helpful.

As we represent the interests of our members as users/clients of infrastructure service providers in the field of securities, we have restricted our comments to those principles that are most relevant in this context and where we think a remark might be helpful.

Remarks on individual questions

1. Relating to “Third party arrangements”, sections 15-19

Q6: Does the fact that a third party should be a distinct legal entity from the entity entering into the short sale entail costs? If so please provide estimates of those costs.

This requirement would imply significant complications compared to the current practice. We do not see any necessity for a trading desk within the same legal entity as the securities borrowing/lending desk being forced to contract a third party in order to cover its short sale. Providing a cost estimate would be arbitrary since the requirement would significantly change the borrowing & lending market, but it is also not relevant, as this is a matter of principle. The overall net position of a legal entity is the subject of this regulation; hence short and long positions of desks/departments within the same legal entity should be netted before a net short position is due to be notified.

2. Relating to “Locate confirmation arrangements and measures in relation to shares”, sections 20-27

Q7: Do you agree with the approach proposed by ESMA on the standard/same day/liquid shares locate confirmation arrangements and measures and the criteria they must fulfil?

We would appreciate ESMA prescribing the minimal content and the format of the notification data re the location confirmation arrangement.

Q8: In circumstances other than intraday short selling or short selling on liquid shares, can you suggest any additions to the methods for effective allocation set out in this consultation paper which would provide the necessary comfort that shares can be delivered for settlement in due time?

We highlight that the (further) harmonisation of settlement cycles and the synchronisation of timelines for cross-border settlements will strongly contribute to the objectives of the Regulation. From this perspective, we suggest that:

- this harmonisation and synchronisation be expedited;
- the recognition of specific arrangements takes into account whether availability and/or settlement is in accordance to standard cycles/procedures, since standard settlements tend to be more reliable in terms of timeliness than non-standard ones.

Q9 In relation to the approach suggested for liquid shares, do you consider it appropriate to use the MiFID definition of liquid shares? Do you think ESMA should consider different approaches to determine the reasonable expectation test for liquid and illiquid shares?

If not, can you provide indications as to the criteria to consider to define liquid shares or to take into account the liquidity of the shares in these circumstances?

Is securities lending activity an additional factor to consider when determining liquidity of a share?

We would like to underscore that liquidity in terms of absolute and relative trading turnover is not key, but rather the availability for borrowing. Consequentially, the MiFID definition does not seem an acceptable criteria. Lending activity should be the prime factor, rather than an additional one.

3. Relating to “Details of the information on net short positions”, sections 32-65

Q11: Do you agree that there should be one standard format for notifying relevant competent authority for each type of instrument?

Q12: Do you agree that there should be one standard form for public disclosure of information on significant net short position in shares?

Yes, we completely agree that one standard format should be used. This does not only contribute to an unambiguous information, but will also enable investors and their agents to use one format in their communication to the various national competent authorities.

Q13: Do you agree with the proposed way to identify natural and legal persons, including the contact information details?

To a large extent: we would argue that electronic communication channels, viz. e-mail are sufficient. The accumulation of telephone, fax and e-mail seems unnecessarily redundant.

Q14: Do you agree with the proposed way to notify and disclose the size of the relevant position?

In the consultation paper, ESMA already highlights that evident errors in the amount of issued capital – the denominator – are made “not infrequently”. Our experience tells us that this is possibly worse: the exact amount/number of issued shares is often published not correctly or timely by the issuer and therefore not accessible for investors.

Hence, it would be very helpful when ESMA will maintain and publish a list of the total issued capital. This could take away relevant ambiguities around the obligation to notify and the actual data notified.

Q17: Do you agree that the additional information described above should be provided?

We appreciate that this additional information is beneficial to the competent authority, but we have a reservation about the requirement to provide the “date of the previous notification of the net short position” with each notification.

This might be cumbersome if not impossible for banks if they provide notifications for/on behalf of clients/funds; a previous notification might have been provided by somebody else, or by a different entity. We foresee that this information cannot be provided in particular circumstances and suggest that in such cases the date can be left unmentioned but an explanation in the “comment information sub c.” becomes mandatory.

4. Relating to “Means by which information ... may be disclosed ...”, sections 66-71

Q18: Do you agree that information on the central website should be provided at least in a machine-readable format?

We would suggest that the output is not only machine-readable, but that the content should be (formatted) according to the same standards as the input provided by position holders.