

**ESMA 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**  
**Comments by AMAFI**

Association française des marchés financiers (AMAFI) has more than 120 members representing over 10,000 professionals who operate in the cash and derivatives markets for equities, fixed-income products and commodities. Nearly one-third of the members are subsidiaries or branches of non-French institutions.

AMAFI welcomes the opportunity to comment on the Consultation paper (hereafter referred as to the "CP") on "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" issued by the European Securities and Market Authority.

AMAFI would like to point it out that the 3 weeks consultation period available to market participants is insufficient to adequately consider all the impacts of the ESMA proposals. Moreover it would have been more efficient, in order to have a general view of the framework envisaged by ESMA, that the consultation concerns also the delegate acts.

## **ESMA questions and draft guidelines.**

### **II. Agreements, arrangements and measures that adequately ensure that the share or the sovereign debt will be available for settlement**

**Q1: Do you agree with the approach of providing an exhaustive list of types of agreement, arrangement and measure that adequately ensure shares or sovereign debt instruments will be available for settlement and setting out the criteria these should fulfil?**

AMAFI is not in favour of the approach of providing an exhaustive list of types of agreement and arrangement. If an indicative list is welcome, it should not be considered as an entirely exhaustive list because it would not take proper account of future markets and documentation developments. We would also expect that the list be reviewed periodically to assess whether any amendments or additions are appropriate.

### **II.III. Agreements to borrow or other enforceable claim having similar effect**

**Q2: Do you agree with the proposed list of agreements and enforceable claims and the criteria they should meet? Are there any other types of agreement or enforceable claims or criteria which should be added?**

At least, prime brokerage agreements and stock lending agreements should be added to the list.

**Q3: Do you consider that these criteria will entail additional costs as compared to current practices on the market? If so, could you specify the drivers for those additional costs and any indication of their amount?**

AMAFI does not consider that these criteria will entail significant additional costs, provided that the list of agreements is updated to the extent appropriate, and provided that the list is expanded as suggested above.

### **II.IV. Third party arrangements**

**Q4: Do you agree with the proposed list of third parties which may be parties to the arrangements or measures and the criteria proposed by ESMA that they should fulfil?**

AMAFI has concerns about the third party provisions in the consultation. According to Article 12(1) of the Short Selling Regulation ESMA has to develop draft implementing technical standards “to determine the types of agreements, arrangement and measures that adequately ensure that the share will be available for settlement”. By providing a limited list of third parties ESMA goes well beyond the mandate assigned to it by the regulation.

Moreover, Article 12(1) applies to “legal entities”. That is to say that it is the overall position of the legal entity which determines whether a sale is short or not. It is current market practice that a firm’s securities financing desk allocates available long positions existing in the firm to the respective trading desk which intends to sell short. Therefore our understanding is that, in this circumstance, the reference to “third party” does not mean that such party is a separate legal entity. A trading desk located in the same legal entity as the securities financing desk should, therefore, not be forced to contact a third party in order to cover his short sale.

**Q5: Are there further criteria which should be added?**

Defining a list of third parties does not fall into the scope of the implementing technical standard.

**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.**

As stated above, we do not consider that the reference to “third party” in Article 12(1)(c) and 13(1)(c) of the Short Selling Regulations should be construed to require that only a separate legal entity could constitute a third party for that purpose.

To require that sellers of securities source those securities from external counterparties when they could have sourced them via internal trading desks would surely increase the potential risks of settlement fails, and the related counterparty and credit risks that come with any external trading relationship. This would be a counterproductive outcome of such a provision. It would indeed increase transactions costs, as the benefits from efficient securities management via in-house netting, would be lost

## II.V. Locate confirmation arrangements and measures in relation to shares

### **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 that they must fulfil?**

AMAFI has concerns with the proposed requirements under Articles 6 and 7.

Firstly the proposed drafting does create some confusion as to the types of measures that are required and in which circumstances. The draft standards would lead to seven different situations according to the following criteria: the share is liquid or not (MIFID rule), the share is in reality easy to borrow or not, the share is traded intraday or not.

Secondly, as an overall point we do not consider that the prescribed criteria regarding intra-day trading is workable in this context. An investor will not always know at the time it intends to sell a security whether it also intends to purchase that security on the same day. An investor may buy back shares it has sold within the same trading day, having originally intended to purchase at a later date, and vice versa. It is essential that such trading flexibility be maintained, and we have significant concerns that the proposal in the ESMA guidance may cause unnecessary restrictions on trading activity in that regard. Also, to require that this intention be communicated to the locate provider, and that this information determine the level of cover required, seems operationally and practically difficult, and involves the unnecessary sharing of proprietary information. As such, we would suggest that the criteria relating to the intra-day trading activity be removed.

Therefore, only the liquidity criteria should be maintained and could be put in place according to the following rule. In any circumstance, an investor would need a confirmation from the third party that a share is easy to borrow. In terms of the liquidity of shares available to third parties providing such confirmations (including prime brokers and other securities lending participants), this will be a function of the external trading relationship and internal sources of liquidity available to such parties, who would review inventory available both internally and externally, taking into account any liquidity concerns foreseen. External inventory may consist of 'exclusive portfolios' where a third party has committed to lend a portfolio of securities to the lender on an exclusive basis for a fixed period, and may also consist of indicative non-exclusive availability feeds from third party lenders, highlighting securities available for lending, but which may also be available to other borrowers. In addition, lenders may have their own proprietary or (where agreed) client inventory available to settle potential investor sales. These factors go to a determination of the availability of shares for the purpose of settling an investor sale.

If the shares are easy to borrow, there is no need of "icing" requirement, if not, icing would be required. This can be put in place in relation to the MIFID definition of liquid shares.

The table below clarifies our proposal.

	<b>Locate</b>	<b>Confirmation easy to borrow/ purchase</b>	<b>Icing required</b>
<b>Liquid (1)</b>	Yes	Yes	No
<b>Liquid</b>	Yes	No	Yes
<b>Illiquid</b>	Yes	Yes	No
<b>Illiquid</b>	Yes	No	Yes

(1) MIFID definition.

**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?**

See our answer question 7 above

**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?**

MIFID definition of liquid shares is not appropriate to determine whether a security is easy to borrow or not. Some of the MIFID liquid share may in some circumstances becomes very difficult to borrow. On the opposite, some of the shares that fall into the illiquid category are, in fact easy to borrow. Therefore, AMAFI considers that the responsibility to assess whether a share is liquid or not should remain at the lending desk. Between professionals, lists of liquid securities for repo markets exist and are reliable. One step further could be to constitute an European list of the “easy to borrow” securities.

## **II.VI. Locate confirmations or reasonable expectation arrangements in relation to sovereign debt**

**Q10: Do you agree with the approach proposed by ESMA on the location confirmation and reasonable expectation arrangement in relation to sovereign debt and that the reasonable expectation test should only apply in the case of intraday short selling of sovereign debt?**

We consider that ESMA approach on the location confirmation is appropriate and that the reasonable expectation test is sufficient to be applicable in case of intraday short selling only. However, we consider it not practical that the responsibility with regards to the locate and reasonable expectation falls on the third party.

## **III. Details of the information on net short positions to be notified to competent authorities and disclosed to the public**

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

AMAFI agrees with this proposal

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

AMAFI agrees with this proposal

### **III.III. Identity of the natural or legal person**

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

AMAFI supports the proposal to use LEI codes, when these are available, to identify legal entities submitting reports.

### **III.IV. Size of the relevant position**

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

AMAFI considers that for the purpose of reporting share holdings as a percentage of issued share capital publication and maintenance by ESMA of a list of the total issued share capital for each in scope equity would be useful.

### **III.V. Issuer in relation to which the relevant position is held**

**Q15: Do you have any comments on the proposed way to identify the issuer in relation to which the relevant net short position is held, including how to use the ISIN code in this matter?**

AMAFI does not have any comments.

### **III.V. Issuer in relation to which the relevant position is held**

**Q16: Do you agree with the ISO 8601 2004 standard use to notify and publicly disclose the date on which relevant position was created, changed or ceased to be held?**

AMAFI agrees with the ISO standard.

### **III.VII. Additional information**

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

AMAFI agrees with the additional information.

## **IV. Means by which information on net short positions in shares may be disclosed to the public**

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

We have no issues with machine-readable formats on the website.

**Q19: Do you agree that information on the central websites should at least include data as provided in Annex 1 of the draft implementing standard presented in appendix to this consultation paper?**

AMAFI agrees.

#### **VI.VI. Transitional arrangements for determining for the first time the list of exempted shares and dates for subsequent calculations**

**Q20: Do you foresee any other situation that might merit an update of the list of exempted shares within the two-year effectiveness period?**

We don't have any comments at this stage.



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