

Chapter 3

Commission Implementing Regulation (EU) No 827/2012

Preamble

THE EUROPEAN COMMISSION,
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Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 236/2012 of 14 March 2012 of the European Parliament and of the Council on short selling and certain aspect of credit default swaps and in particular Articles 9(6), 11(4), 12(2), 13(5) and 16(4) thereof,

After consulting the European Data Protection Supervisor,

01/01/2021

Whereas:

(1) This Regulation aims to determine the list of exempted shares as a necessary step for the disclosure to the public of short positions in all non-exempted shares and the conditions under which that information should be sent to the European Securities and Markets Authority (hereinafter "ESMA"). It is therefore essential that rules also be laid down regarding arrangements and measures to be adopted with respect to those non-exempted shares. To ensure coherence between those provisions on short selling which should enter into force at the same time, and to facilitate a comprehensive view and compact access to them by persons subject to those obligations, it is appropriate to include all the implementing technical standards required by Regulation (EU) No 236/2012 in a single Regulation.

(2) To ensure the uniform application of Regulation (EU) No 236/2012 in relation to the information to be provided to ESMA by competent authorities and to achieve the efficient processing of that information, it should be exchanged electronically in a secure way using a standard template.

(3) It is important to allow easy access to and re-use of the data on net short positions that is disclosed to the market through central websites operated or supervised by a competent authority. To this end, these data should be provided in a format that allows for flexible use of data and that does not offer only the possibility of static, facsimile documents. Wherever technically possible, machine-readable formats should be used to enable users to process the information in a structured and cost-efficient way.

(4) In order to ensure the publicity of this information to the market, in addition to disclosure on the central website operated or supervised by a competent authority, it should be possible to make available the details of a net short position to the public in other ways.

(5) It is essential for users to have two basic outputs when making public individual net short positions in shares above the relevant publication threshold. These should comprise a compact list or table of the net short positions above the publication threshold that are outstanding at the time of consultation of the central website and a list or table with historical data on all individual net short positions published.

(6) When a net short position in shares falls below a relevant disclosure threshold, the details, including the actual size of the position, should be published. In order to avoid confusion for users consulting the central websites, disclosures of positions that have fallen below 0,5 % of the issued share capital of the company concerned should not remain indefinitely alongside the live positions but should be available as historical data after being displayed for 24 hours.

(7) In order to provide for a consistent and clear framework which is nevertheless flexible, it is important to specify the types of agreement to borrow and other enforceable claims having similar effect and the types of arrangement with a third party that adequately ensure that shares or sovereign debt instruments will be available for settlement, and specify the criteria such agreements and arrangements must fulfil.

(8) The use of rights to subscribe for new shares in relation to a short sale may adequately ensure availability for settlement only where the arrangement is such that settlement of the short sale is ensured when it is due. Therefore, it is essential to specify rules to ensure that the shares resulting from the subscription rights are available on or before the settlement date and in a quantity at least equivalent to the number of shares intended to be sold short.

(9) In defining time limited confirmation arrangements, it is important to specify the timeframe for covering a short sale through purchases in a way compatible with different settlement cycles in different jurisdictions.

(10) In order to adequately ensure that instruments are available for settlement where a natural or legal person entering into a short sale has an arrangement with a third party under which that third party has confirmed that the instrument has been located, it is essential that there be confidence that the third party is, when established in a third country, subject to appropriate supervision and that there are appropriate arrangements for exchange of information between supervisors. Such appropriate arrangements could include being a signatory of a memorandum of understanding established by the International Organisation of Securities Commissions (IOSCO).

(11) To ensure proper implementation of the requirement to determine whether the principal trading venue of a share is located outside the Union, transitional arrangements should be put in place for determining for the first time the list of exempted shares under Article 16 of Regulation (EU) No 236/2012. In addition, although the list of exempted shares is effective for a two year period, it is necessary to provide some flexibility as there are cases where a review of that list might be necessary during the two-year period.

(12) In order to ensure consistency, the date of application of this Regulation should be the same as that of Regulation (EU) No 236/2012. However, in order to allow sufficient

time for natural and legal persons to process the list of shares exempted pursuant to Regulation (EU) No 236/2012, the preparation of that list and its subsequent publication on the ESMA website should take place sufficiently in advance before the application date of Regulation (EU) No 236/2012. Therefore, the provisions concerning the date and period for principal trading venue calculations, the date of notification to ESMA of shares with a principal trading venue outside the Union and the effectiveness of the list of exempted shares should apply from the date of entry into force of this Regulation.

(13) Since Regulation (EU) No 236/2012 recognised that binding technical standards should be adopted before that Regulation can be usefully applied, and as it is essential to specify before 1 November 2012 the required non-essential elements to facilitate compliance by market participants with that Regulation and enforcement by competent authorities, it is necessary that this Regulation enter into force on the day following its publication.

(14) This Regulation is based on the draft implementing technical standards submitted by ESMA to the Commission.

(15) ESMA has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority),

HAS ADOPTED THIS REGULATION: