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Commission Implementing Regulation (EU) No 827/2012 of 29 June 2012 laying down implementing technical standards with regard to the means for public disclosure of net position in shares, the format of the information to be provided to the European Securities and Markets Authority in relation to net short positions, the types of agreements, arrangements and measures to adequately ensure that shares or sovereign debt instruments are available for settlement and the dates and period for the determination of the principal venue for a share according to Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps (Text with EEA relevance)

COMMISSION IMPLEMENTING REGULATION (EU) No 827/2012

of 29 June 2012

laying down implementing technical standards with regard to the means for public disclosure of net position in shares, the format of the information to be provided to the European Securities and Markets Authority in relation to net short positions, the types of agreements, arrangements and measures to adequately ensure that shares or sovereign debt instruments are available for settlement and the dates and period for the determination of the principal venue for a share according to Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps

(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 14 March 2012 of the European Parliament and of the Council on short selling and certain aspect of credit default swaps[(1)] and in particular Articles 9(6), 11(4), 12(2), 13(5) and 16(4) thereof,

After consulting the European Data Protection Supervisor,

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.

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(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

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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)[(2)],

HAS ADOPTED THIS REGULATION:

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CHAPTER I

GENERAL PROVISIONS

Article 1

Subject Matter

This Regulation lays down implementing technical standards specifying the following:

(a) the means by which information on net short positions may be disclosed to the public by natural or legal persons as well as the format of information to be provided to the European Securities and Markets Authority (hereinafter "ESMA") by competent authorities pursuant to Article 9(6) and Article 11(4) of Regulation (EU) No 236/2012;

(b) the types of agreements, arrangements and measures that adequately ensure that the shares are available for settlement and the types of agreements or arrangements that adequately ensure that the sovereign debt is available for settlement pursuant to Article 12(2) and 13(5) of Regulation (EU) No 236/2012;

(c) the date and period for principal trading venue calculations, notification to ESMA and the effectiveness of the relevant list pursuant to 16(4) of Regulation (EU) No 236/2012.

CHAPTER II

MEANS FOR PUBLIC DISCLOSURE OF SIGNIFICANT NET SHORT POSITIONS IN SHARES

[ARTICLE 9 OF REGULATION (EU) No 236/2012]

Article 2

Means by which information may be disclosed to the public

Information on net short positions in shares shall be disclosed to the public by posting it on a central website operated or supervised by the relevant competent authority pursuant to Article 9(4) of Regulation (EU) No 236/2012. The information shall be disclosed to the public through means which:

(a) publish it in the format specified in Annex I in such a way as to allow the public consulting the website to access one or more tables offering all the relevant information on positions per share issuer;

(b) allow users to identify and filter on whether the net short positions in a share issuer at the time of accessing the website has reached or exceeded the relevant publication threshold;

(c) provide for historical data on the published net short positions in a share issuer;

(d) include, whenever technically possible, downloadable files with the published and historical net short positions in a machine-readable format, meaning that the files are sufficiently structured for software applications to identify reliably individual statements of fact and their internal structure;

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(e) show for one day, together with the information specified in point (b), the net short positions that are published because they have fallen below the publication threshold of 0,5 % of the issued share capital, before removing and transferring the information to a historical data section.

CHAPTER III

FORMAT OF THE INFORMATION TO BE PROVIDED TO ESMA BY COMPETENT AUTHORITIES IN RELATION TO NET SHORT POSITIONS

[ARTICLE 11 OF REGULATION (EU) No 236/2012]

Article 3

Format of the periodic information

1 The information to be provided on a quarterly basis to ESMA on net short positions in shares, sovereign debt and credit default swaps pursuant to Article 11(1) of Regulation (EU) No 236/2012 shall be provided by relevant competent authorities in the format specified in Annex II to this Regulation.

2 The information referred to in paragraph 1 shall be sent to ESMA electronically through a system established by ESMA that ensures that the completeness, integrity and confidentiality of the information are maintained during its transmission.

Article 4

Format of the information to be provided upon request

1 A relevant competent authority shall provide the information on net short positions in shares and sovereign debt or on uncovered positions relating to sovereign credit default swaps pursuant to Article 11(2) of Regulation (EU) No 236/2012 in the format specified by ESMA in its request.

2 Where information requested relates to information contained in the notification received by the competent authority pursuant to Articles 5, 7 and 8 of Regulation (EU) No 236/2012, that information shall be provided in accordance with the requirements established in Article 2 of Commission Delegated Regulation (EU) No 826/2012[(3)].

3 Information requested shall be sent by the competent authority in electronic format, using a system established by ESMA for exchanging information that ensures that the completeness, integrity and confidentiality of the information are maintained during its transmission.