



EUROPEAN COMMISSION  
Impact Assessment Board

Brussels,  
D(2012)

## Opinion

**Title**                    **DG MARKT - Impact Assessment accompanying a Commission Delegated Regulation on Short Selling and Certain Aspects of Credit Default Swaps (draft version of 20 April 2012)**

### **(A) Context**

On 14 March 2012 the European Parliament and the Council adopted a Regulation on short selling and certain aspects of credit default swaps (EU) 236/2012), which was adopted by the European Parliament and the Council, which will enter into application on 1 November 2012. The Regulation has two main objectives: (i) to lay down a common regulatory framework for the requirements and powers relating to short selling and credit default swaps (CDS), in particular relating to uncovered short selling and naked CDS and (ii) to ensure a more coordinated and consistent approach by Member States when measures need to be taken in exceptional situations. The Regulation requires the Commission to specify in a delegated act certain elements that will facilitate compliance by market participants with the Regulation and its enforcement by competent authorities. This impact assessment should be read in conjunction with the impact assessment for the Regulation (the "Level 1 Impact Assessment"), which provides the overall assessment of action in this area and the framework within which the scope and purpose of the delegated act can be understood. The European Securities and Markets Authority (ESMA) has issued a consultation paper (ESMA/2012/30) and a final report containing technical advice on possible Delegated Acts concerning the short selling Regulation (ESMA/2012/228).

### **(B) Overall assessment**

**The report provides a good overview of the main options to be considered in the delegated act, but should be improved in a number of respects. It should clarify the scope and derived nature of the initiative, and address all issues that are to be contained in the delegated act as part of the problem definition. The report should also better explain to what extent the advice issued by ESMA has been followed, and provide clear arguments on all issues on which the proposal deviates from this advice. The report should improve the presentation of the objective and the options, and better separate the description of the options, the analysis of their impacts, and the comparison of options. Finally, it should state more explicitly which stakeholder groups provided particular comments or abstained from providing input on specific issues in the consultation.**

### **(C) Main recommendations for improvements**

**(1) Improve the problem definition.** The problem section should more clearly emphasise the scope of the proposed measure in relation to the adopted Regulation, i.e. to specify certain elements which have not been addressed in detail in the Regulation, or which have been left outstanding from the Regulation. All these elements should be described in the problem section. Verbatim restatement of elements of the impact assessment for the adopted Regulation should be avoided, but the executive summary can usefully be attached as an Annex. Considerations in Annex 2 concerning which elements of the proposed delegated act require full impact assessment should be integrated in the main text. The full list of objectives from the impact assessment for the Regulation should be moved to an Annex. The report should state more clearly that the baseline scenario would imply that the adopted Regulation would not enter into force. It should discuss the economic consequences of a prohibition on entering into uncovered positions in sovereign CDS in the light of the general objectives for the initiative with regards to market fragmentation, systemic risk, and risks to financial stability. The report should also explain how these consequences relate to the Commission's interpretation of Article 4 and Recital 21 of the Regulation concerning cross-border hedging, as this is not covered by "Level 1" impact analysis. This should include a clear presentation and discussion of divergent interpretations by stakeholders.

**(2) Explain better how advice issued by ESMA has been taken into account.** In view of the special role that has been given to ESMA in the Short Selling Regulation the report should carefully present the agency's arguments, and provide clear explanations for all instances in which the Commission proposes to deviate from ESMA's advice. On all the issues addressed in the report the relevant elements from both the Consultation Paper (ESMA/2012/30) and the Final Report (ESMA/2012/228) should be carefully quoted and referenced, and the most important sections should be attached as Annexes.

**(3) Improve the presentation of the objectives and the options.** The report should formulate specific objectives for all the issues addressed in the delegated act. The higher level objectives of the adopted regulation should be moved to an Annex for reference where needed. The descriptive elements in section 5 'Analysis and comparison of options' should be moved to the policy options section to provide a better description and more transparent presentation of the relevant choices separate from the analysis of impacts. Regarding Issue 1 (definition covered CDS) the third policy option combining options 1 and 2 should be presented more clearly as a separate option in the main text with a clear description of how the quantitative and qualitative approach would be combined in operational terms. The report should state that the baseline option is discarded because it would be in clear conflict with the intentions of the legislator, rather than calling it 'unworkable'. The presentation of the options in Issue 4 (thresholds for price falls in other financial instruments) should be brought in line with the other options (i.e. 'No action' vs. Option 1).

**(4) Strengthen the analysis of impacts.** The report should better separate the presentation of options, the assessment of their expected impacts and the comparison of options. It should also differentiate more clearly between impacts on specific groups of economic actors and broader macroeconomic impacts (market performance and stability). The report should clearly state the underlying assumptions for what is considered the 'normal' or 'usual' volatility of the different financial instruments with reference to historic

data. Where possible, the impacts of applying specific quantitative thresholds should also be assessed against historic data, for example compliance costs for the competent authorities and market participants. The calculations for the estimate of the cost of compliance in terms of labour costs for Issue 4 should be checked. The report should explain why similar calculations were not provided for the other Issues. The results of the partial analysis of costs and benefits provided by ESMA in its Final Report (Annex II) should be integrated in the assessment of the impacts of the different options wherever relevant for the issues addressed in the report.

**(5) Present stakeholder views in a more transparent way.** The report should provide much clearer references to the views of specific stakeholder groups, especially on issues where these groups challenge the analysis provided by ESMA and the Commission. The availability of the individual submissions on ESMA's website makes it possible to be more explicit about the reasons and content of stakeholder objections to elements of the proposed Delegated Act. It is also of interest to explicitly identify the stakeholder groups that have abstained from commenting on specific issues.

#### **(D) Procedure and presentation**

The report should be restructured and focus the analysis more on the elements that deviate from ESMA's technical advice. The executive summary needs to be modified in line with the recommendations concerning the main report. The report should explain whether the empowerment in the Short Selling Regulation provides a sufficient legal basis for the decision not to fix thresholds for commodity derivatives.

#### **(E) IAB scrutiny process**

Reference number	2012/MARKT/029
External expertise used	No
Date of IAB meeting	Written procedure.