

Guidance on MiFIR Transaction Reporting Short Selling Indicator

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April 2017



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Section 1:

Introduction

1.1 Disclaimer

The content of this document is output from the BBA Transaction Reporting WG (“the WG”), and represents the views of the members of that WG. The content is for guidance only. It has not been approved by any regulatory body as official guidance, nor has it been the subject of official legal review by any external law firm. While anyone is welcome to use the document, it is entirely at their own risk.

1.2 Background

MiFIR transaction reporting introduces a number of new requirements on relevant industry participants, one of which is a new field requiring the completion of a “short sale indicator” for transaction reports. Mandating firms to indicate whether a transaction is a short sale or not is a significant change from MIFID I, and resulted in a great deal of debate within the industry, not least within the WG.

1.3 Objective of the guidance

The WG identified a number of questions which will inevitably arise when firms implement the short selling requirements of the MiFIR transaction reporting regime. Following detailed discussion and debate among participants of the WG, members agreed a common approach to the implementation of these matters. The WG agreed it would be beneficial to share these conclusions with all those interested in this subject.

Section 2: Key issues identified by the WG

2.1 Scope of the short selling indicator

Issues:

- MiFIR states any shares and sovereign debt within the scope of Articles 12, 13 and 17 of SSR.
- Article 2(1)(b) defines short sales in relation to share or debt instruments.
- Article 12 of SSR is applicable to shares admitted to trading on a trading venue.
- Article 13 of SSR is applicable to sovereign debt.
- Article 17 provides exemptions to Articles 12 and 13.

Outcome of WG discussions:

- The short selling indicator should be populated for sales of sovereign debt and shares admitted to trading on a trading venue.
- The scope has now been confirmed in the final guidelines as reportable shares or sovereign debt within the scope of Articles 12, 13 and 17 of Regulation (EU) No. 236/2012.

2.2 Calculation of positions at a legal entity level

Issues:

- RTS 22 states that transaction reports shall identify transactions which, at the time of their execution, are short sale transactions.
- ESMA's December 2014 consultation paper on the RTS states that SSR obliges firms to calculate short positions at the legal entity level, and that short sales should therefore be flagged in transaction reports at the legal entity level.
- However, this position has not been reflected in the final version of the RTS.

Outcome of WG discussions:

- The assumption is that short positions will need to be calculated at a legal entity level in order to determine short sales.
- The Final Report on Guidelines confirmed that the short selling flag is to be populated on the basis of the legal entity that is selling the financial instruments.

2.3 Calculation of real time positions

Issues:

- Market participants have raised concerns that it would be technically challenging, if not impossible, to flag whether a specific transaction is short at the legal entity level in real time.

Outcome of WG discussions:

It was noted that although the requirement is to identify transactions which are short sale transactions at the time of their execution, this does not necessarily imply a real-time solution, which is therefore not required. The options that were considered are as follows:

- Real-time determination of short sales enabling real-time reporting.
- Intra-day determination of short sales enabling intra-day batches of reports.
- EOD determination of short sales enabling EOD batches of report.
- EOD determination of short sales enabling T+1 reporting

Please note no solution was considered to fit all requirements, and it is for firms to decide how best to meet the requirement.

2.4 Identification of short sales on a transaction report when acting under an SSR Article 17 exemption

Issues:

- Firms are not currently required to report significant net short positions under SSR when acting under an exemption due to market making activities or acting as an authorised primary dealer.
- There is no obligation under SSR Articles 12 and 13 when a firm has an exemption under Article 17.
- Similarly, there is no requirement to publish net short positions under SSR Articles 5, 6, or 7 if a firm has an exemption under Article 17.
- RTS 22, as currently written, puts an obligation on firms to calculate and report short positions even if a firm has an exemption.
- This is a new obligation that does not exist today.

Outcome of WG discussions:

- RTS 22 puts a clear obligation on firms to calculate and report short positions even if a firm has an exemption.

2.5 Alignment of transaction reporting and order record keeping obligations

Issues:

- Do firms determine whether an executed order was a short sell based on:
 - (i) the position when the order was placed, or;
 - (ii) the position when the order was executed?
- If (ii), should firms determine whether an executed order was a short sell based on the position at the time when the whole order was filled, or do firms need to consider the position at the time of any partial fills, for example, as in the following scenario:

Investment Firm A is flat at 10:00:00

Desk 1 places an order to sell 100 shares on Trading Venue X at 10:00:

- receives one fill for 75 shares at 10:25:00 (Trade id 1234)
- receive a second fill for 25 shares at 11:45 (Trade id 4567)

Desk 2 places an order to buy 1000 shares on Trading Venue Y at 11:00:

- Receives one fill for 1000 shares at 11:01:00 (Trade id 3456)

For Transaction Reporting purposes:

- Short sell indicator on the Transaction report of Trade id 1234 shall be 'SESH'
- Short sell indicator on the Transaction report of Trade id 4567 shall be 'SELL'
- Short sell indicator on the Transaction report of Trade id 3456 shall be blank

Outcome of WG discussions:

The WG understands “executed order” to mean the same as “transaction”, and hence that the determination of a short sale should be calculated using the date and time of the final execution.

2.6 Requirement to “determine on a best effort basis the short sales transactions in which its client is the seller”

Outcome of WG discussions:

- Firms can meet this obligation by giving their clients the opportunity to indicate on an order whether they are:
 - (i) Selling short.
 - (ii) Selling short under an exemption.
 - (iii) Not selling short.
- Suggested practical solutions enabling firms to provide clients with this opportunity were:
 - (i) Providing new fields for short sell/exemption in any automated order capture platforms.

- (ii) Updating terms and conditions to inform clients that if they do not volunteer any information regarding short selling then firms will populate this field with UNDI to indicate that the client has not disclosed this information.
- Firms' systems will need to be updated in order to capture any information provided by the client and pass this back through the stack in order to populate the short sell indicator on the transaction report.

2.7 Winding back a trade included in the determination

Issues:

- Firms report no short sale and then a previous buy trade is cancelled, so retrospectively were short.
- Firms report a short sale and then a previous sell trade is cancelled, so retrospectively were not short.

Outcome of WG discussions:

Firms will use the information available to them at the point in time of execution based on the below:

- (i) The requirement is to identify transactions which, at the time of their execution, are short sale transactions.
- (ii) Short sale is defined in SSR as "any sale of the share or debt instrument which the seller does not own at the time of entering into the agreement to sell".

2.8 Determination of which party should identify the short selling indicator

Issues:

- RTS 22 Article 11(2) states that "an investment firm shall determine on a best effort basis the short sales transactions in which its client is the seller".
- RTS 22 Article 11(2) also states that "where an investment firm executes a short sale transaction on its own behalf, it shall indicate in the transaction report whether the short sale transaction was undertaken in a market making or primary dealer capacity".
- RTS 22 Annex I, Table 2 Field 62 states that this field should contain "a short sale concluded by an investment firm on its own behalf or on behalf of a client".
- RTS 22 Annex I, Table 2 Field 62 states that "this field is only applicable when the seller is the investment firm or the client of the investment firm".
- Example 57 in Guidelines section 5.23.1, where the Investment Firm is acting in the DEAL capacity, shows the Investment populating the short sell indicator for both:
 - The report where it is selling from the perspective of the investment firm.

- The report where its clients are selling from the perspective of the clients.

Outcome of WG discussions:

The short selling indicator is always reported from the perspective of the entity in the seller field as below:

- If the seller id field is populated with the MIC code of a venue or the LEI of a CCP then the short selling indicator remains blank.
- If the seller id field is populated with the LEI of the Investment Firm then the short selling indicator is populated from the perspective of the investment firm.
- If the seller id field is populated with the LEI of a client then it is populated from the perspective of the client.
- If the seller is another broker who is not a client we assume that they will not disclose short selling information.

2.9 Consideration of securities financing transactions in the position calculation when determining short sales

Issues:

The definition of short sale in SSR does not include:

- a sale by either party under a repurchase agreement where one party has agreed to sell the other a security at a specified price with a commitment from the other party to sell the security back at a later date at another specified price;
- a transfer of securities under a securities lending agreement.

The restrictions on short selling allow a person to enter into a short sale when:

- They have borrowed the instrument.
- They have an agreement to borrow the instrument.
- They have an arrangement to locate the instrument.

Outcome of WG discussions:

The position used for determining short sales should be traded position, not including any repos/SFTs.

Section 3: Regulatory references

3.1 MiFIR Article 26(3) – Obligation to report transactions

The reports shall, in particular, include...a designation to identify a short sale as defined in Article 2(1)(b) of Regulation (EU) No 236/2012 in respect of any shares and sovereign debt within the scope of Articles 12, 13 and 17 of that Regulation...

3.2 MiFID II / MiFIR RTS 22: Article 11 – Designations to identify a short sale

1. Transaction reports shall identify transactions which, at the time of their execution, are short sale transactions, or are in part a short sale transaction, in accordance with field 62 of Table 2 of Annex I.
2. An investment firm shall determine on a best effort basis the short sales transactions in which its client is the seller, including when an investment firm aggregates orders from several clients. The investment firm shall identify those short sale transactions in its transaction report in accordance with field 62 of Table 2 of Annex I.
3. Where an investment firm executes a short sale transaction on its own behalf, it shall indicate in the transaction report whether the short sale transaction was undertaken in a market making or primary dealer capacity under an exemption provided by Article 17 of Regulation (EU) No 236/2012.

3.3 MiFID II / MiFIR RTS 22: Annex I, Table 2 Details to be reported in transaction reports

No	Field	Content to be reported	Format and Standards to be used for Reporting
62	Short selling indicator	<p>A short sale concluded by an investment firm on its own behalf or on behalf of a client, as described in Article 11.</p> <p>When an investment firm executes a transaction on behalf of a client who is selling and the investment firm, acting on a best effort basis, cannot determine whether it is a short sale transaction, this field shall be populated with 'UNDI'</p> <p>Where the transaction is for a transmitted order that has met the conditions for transmission set out in Article 4 of this Regulation, this field shall be populated by the receiving firm in the receiving firm's reports using the information received from the transmitting firm.</p> <p>This field is only applicable when, the instrument is covered by Regulation (EU) No 236/2012, and the seller is the investment firm or a client of the investment firm.</p>	<p>'SESH' - Short sale with no exemption 'SSEX' - Short sale with exemption 'SELL' - No short sale 'UNDI' – Information not available</p>

3.4 Order Record Keeping: RTS 6 Annex II and RTS 22 Annex 1

Record Keeping of Transactions		Transaction Reporting
Record keeping of transactions and order processing by investment firms Delegated Regulation Article 75 (Section 2 of Annex IV)	Information relating to outgoing and executed orders (HFT) RTS 6 - ANNEX II (MiFID II L2)	Details to be reported in transaction reports RTS 22 - ANNEX I Table 2 (MiFID II L2)

No	Field Name	No	Field Name	Description	No	Field Name	Description
38	Short selling flag			<p>A short sale concluded by an investment firm on its own behalf or on behalf of a client, as described in Article 12 of RTS on reporting obligations under Article 26 of MiFIR.</p> <p>Where the transaction is for a transmitted order that has met the conditions for transmission set out in Article 5 RTS on reporting obligations under Article 26 of MiFIR of this Regulation, this field shall be populated using the information received from the transmitting firm.</p> <p>This field is only applicable when, the instrument is covered by Regulation (EU) 236/2012, and the seller is the investment firm or a client of the investment firm. This field shall only be applicable for executed orders.</p>			
39	SSR exemption flag;	27	Short selling indicator		62	Short selling indicator	<p>A short sale concluded by an investment firm on its own behalf or on behalf of a client, as described in Article 11. When an investment firm executes a transaction on behalf of a client who is selling and the investment firm, acting on a best effort basis, cannot determine whether it is a short sale transaction, this field shall be populated with 'UNDI' Where the transaction is for a transmitted order that has met the conditions for transmission set out in Article 4 of this Regulation, this field shall be populated by the receiving firm in the receiving firm's reports using the information received from the transmitting firm. This field is only applicable when, the instrument is covered by Regulation (EU) No 236/2012, and the seller is the investment firm or a client of the investment firm.</p>

3.5 Block 8: Short Selling Flag (report on final guidelines)

Most respondents to these questions raised the impracticability of the short selling flag and requested ESMA's guidance on how to populate this information in transaction reports. Most of the issues highlighted regarded the methodology for determining the existence of a short sale. Respondents raised the need for this determination to be made on a legal entity basis rather than on a trader by trader basis, at the time of submission of the order to sell and on an individual portfolio basis instead of the global position of the entity.

Moreover, concerns regarding the reporting to be done by trading venues on behalf of non-MiFID II firms were raised. The respondents mentioned the impossibility to collect this information from non-MiFID II firms. Furthermore, they added that this information should not be mandatory when receiving an order from a MiFID II market participant.

In light of the above comments, ESMA provided in the Guidelines that:

- The short selling flag applies to the reports showing the transactions with the individual clients rather than to the aggregated market transaction report. Therefore, where both clients or one of the clients is short selling, the short selling indicator is blank in the aggregated market transaction report since this report does not relate to a single client but instead to all clients whose orders have been aggregated. This is covered in the relevant section of the Guidelines.
- The short selling indicator for individual clients is reported in the individual client side transaction reports.
- The short selling flag is to be populated on the basis of the legal entity that is selling the financial instruments as required by level 1.

3.6 Block 8: Short Selling Flag (final guidelines)

The below business cases apply in the circumstances where the Investment Firm is short selling reportable shares or sovereign debt within the scope of Articles 12, 13 and 17 of Regulation (EU) No. 236/2012 either on own account or on behalf of a client. The Investment Firm should request the client to disclose whether it is selling short.

Where the short selling information is not made available to the Investment Firm by the client, the Field 62 should be populated with 'UNDI'.

The short selling flag applies to the reports showing the transactions with the individual clients rather than to the aggregated market transaction report. Therefore, where both clients or one of the clients is short selling, the short selling indicator should be blank in the aggregated market transaction report since this report does not relate to a single client but instead to all clients whose orders have been aggregated.

For instances where aggregation occurs and how the short selling flag applies, please see sections 5.23, 5.24 and 5.27.2.

5.15.1 Client of Investment Firm X is selling short (information known to Firm X)

Investment Firm X sells shares on behalf of Client A. How shall firm X report the short selling information?

No	Field	Values
4	Executing entity identification code	{LEI} of firm X
16	Seller identification code	{LEI} of client A
18	Seller – first name(s)	
19	Seller – surname(s)	
20	Seller – date of birth	
62	Short selling indicator	'SESH'

5.15.2 Investment Firm X is selling short on its own behalf

Investment Firm X sells sovereign debt on its own behalf. The transaction takes place under an exemption. The transaction takes place under a market making or primary market exemption provided under Article 17 of Regulation (EU) No 236/2012. How shall firm X report the short selling information?

No	Field	Values
4	Executing entity identification code	{LEI} of firm X
16	Seller identification code	{LEI} of firm X
29	Trading capacity	'DEAL'
62	Short selling indicator	'SSEX'

5.23 Grouping orders

Article 11(5) of RTS 22 provides that the short selling requirements under Regulation (EU) No 236/2012 apply where an Investment Firm aggregates orders from several clients. This means that Article 11(2) of RTS 22 only applies to the reports showing the transactions with the individual clients rather than to an aggregated market transaction report. In the case of a market transaction report aggregating trades for selling, clients, the short selling indicator should be blank. This is because the aggregated market transaction report relates to all clients whose orders have been aggregated and cannot specify the short selling indicator at the necessary granularity. The short selling indicator for individual clients is instead reported in the individual client side transaction reports (see sections 5.24 and 5.27.2).

Example: One market fill for several clients

Two clients of Investment Firm X, Client A and Client B, place sell orders for 100 and 200 instruments respectively; Client A is selling short, Client B does not disclose to firm X whether it is selling short. Firm X is flat. Firm X aggregates the orders and executes them on 16 September 2018 at

09:20:15.374215 on Trading Venue M in one transaction of 300 at EUR 25.54. This is then allocated to the clients at 09:35:1034. Firm X deals on its own account. How should firm X report?

No	Field	Values Report #1	Values Report #2	Values Report #3
4	Executing entity identification code	{LEI} of Investment Firm X	{LEI} of Investment Firm X	{LEI} of Investment Firm X
7	Buyer identification code	{LEI} of CCP for Trading Venue M	{LEI} of Investment Firm X	{LEI} of Investment Firm X
16	Seller identification code	{LEI} of Investment Firm X	{LEI} of Client A	{LEI} of Client B
28	Trading date time	'2018-09-16T09:20:15.374Z'	2018-09-16T09:35:10Z'	'2018-09-16T09:35:10Z'
29	Trading capacity	'DEAL'	'DEAL'	'DEAL'
30	Quantity	'300'	'100'	'200'
33	Price	'25.54'	'25.54'	'25.54'
36	Venue	Segment {MIC} of Trading Venue M	'XOFF'	'XOFF'
62	Short selling indicator	'SESH'	'SESH'	'SESH'

Since the sale to the market would result in firm X having a short position, firm X would need to populate Report #1 to indicate this, regardless of the fact that firm X would be flat after the purchases from the clients (see 5.27.2).

5.23.1 Example: One market fill for several clients

Investment Firm X deals on any other capacity; how should it report?

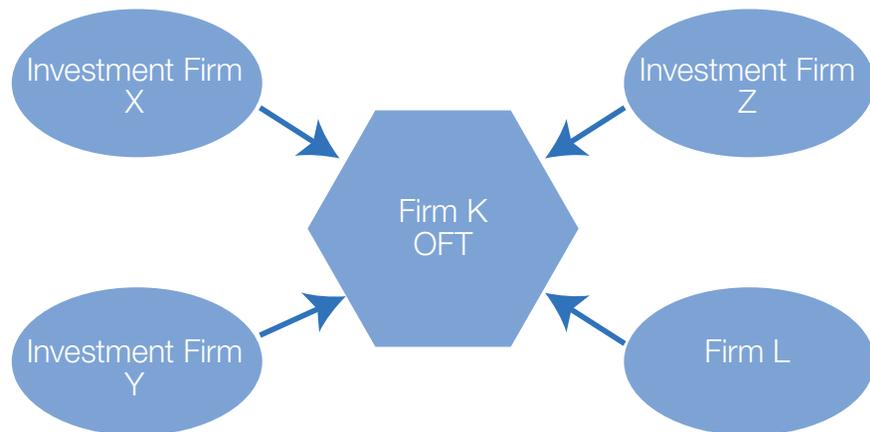
No	Field	Values Report #1	Values Report #2	Values Report #3
4	Executing entity identification code	{LEI} of Investment Firm X	{LEI} of Investment Firm X	{LEI} of Investment Firm X
7	Buyer identification code	{LEI} of CCP for Trading Venue M	'INTC'	'INTC'
16	Seller identification code	'INTC'	{LEI} of Client A	{LEI} of Client B
28	Trading date time	'2018-09-16T09:20:15.374Z'	'2018-09-16T09:20:15.374Z'	'2018-09-16T09:20:15.374Z'
29	Trading capacity	'AOTC'	'AOTC'	'AOTC'
30	Quantity	'300'	'100'	'200'
33	Price	'25.54'	'25.54'	'25.54'
36	Venue	Segment {MIC} of Trading Venue M	'XOFF'	'XOFF'
62	Short selling indicator		'SESH'	'SELL'

The trading price and date and time should be identical in all three transaction reports. The trading price and date and time should be the market price and date and time of the market execution. Reports #2 and

#3 show the client allocations of the transaction executed on the Trading Venue under “any other capacity”. Therefore, the date time granularity of the market execution should be persisted in the client allocations reports.

5.24 OTF acting on a matched principal basis

An OTF when acting on a matched principal basis is acting as an Investment Firm and reports in the same way as an Investment Firm. All parties dealing with the OTF and the OTF will report the Venue Field as the segment MIC of the OTF. An OTF acting on a matched principal basis matches a buy side order from one or more clients with a sell side orders from one or more clients.



Investment Firm K, an OTF, with a LEI of OTFOTFOTFOTFOTFOTFOT and a segment MIC of OTFX, is acting on a matched principal basis and its algo with a code of ‘1234ABC’, matches a buy order for shares from two Investment Firms, Firm X and Firm Y, with two sell orders from two other Investment Firms, Firms Z and Firm L. Firm L has a LEI of 77777777777777777777.

Investment Firms X and Y are buying 300 and 100 shares respectively and Investment Firm Z and Firm L are selling 150 and 250 shares respectively. Investment Firms X, Y, Z and L are all acting in an own account trading capacity. Trader 1 made the investment decision and carried out the execution for Investment Firm X. Trader 4 made the investment decision and carried out the execution for Investment Firm Y. Trader 5 made the investment decision and carried out the execution for Investment Firm Z. Trader 7 made the investment decision and carried out the execution for Firm L. Trader 7 is Patrick Down an Irish national with date of birth of 14 July 1960.

Firm K matches the orders on 9 June 2018 at 16:41:07.1234Z and at a price of EUR 42.7.

Investment Firm Z is selling without an exemption; Firm L is not short selling. How should Firm K (OTF) report?

No	Field	Values Report #1	Values Report #2	Values Report #3	Values Report #4
4	Executing entity identification code	{LEI} of Investment Firm K	{LEI} of Investment Firm K	{LEI} of Investment Firm K	{LEI} of Investment Firm K
7	Buyer identification code	{LEI} of CCP for Trading Venue M	{LEI} of Investment Firm Y	'INTC'	'INTC'
16	Seller identification code	'INTC'	'INTC'	{LEI} of Investment Firm Z	{LEI} of Firm L
28	Trading date time	'2018-06-09T16:41:07.123Z'	'2018-06-09T16:41:07.123Z'	'2018-06-09T16:41:07.123Z'	'2018-06-09T16:41:07.123Z'
29	Trading capacity	'MTCH'	'MTCH'	'MTCH'	'MTCH'
30	Quantity	'300'	'100'	'150'	'250'
33	Price	'42.7'	'42.7'	'42.7'	'42.7'
36	Venue	'Segment {MIC} of Firm K/OTF'	'Segment {MIC} of Firm K/OTF'	'Segment {MIC} of Firm K/OTF'	'Segment {MIC} of Firm K/OTF'
59	Execution within firm	'1234ABC'	'1234ABC'	'1234ABC'	'1234ABC'
62	Short selling indicator			'SESH'	'SELL'

Since there is more than one client involved on each side in this example, the aggregated client account 'INTC' has to be used to link the buyer side and the seller side. Please see section 5.23.

How should the OTF's clients report the executed trades?

No	Field	Values Report #1	Values Report #2	Values Report #3	Values Report #4
4	Executing entity identification code	{LEI} of Investment Firm X	{LEI} of Investment Firm Y	{LEI} of Investment Firm Z	{LEI} of Firm L
7	Buyer identification code	{LEI} of Investment Firm X	{LEI} of Investment Firm Y	{LEI} of Investment Firm K	{LEI} of Investment Firm K
16	Seller identification code	{LEI} of Investment Firm K	{LEI} of Investment Firm K	{LEI} of Investment Firm Z	{LEI} of Firm L
28	Trading date time	'2018-06-09T16:41:07.123Z'	'2018-06-09T16:41:07.123Z'	'2018-06-09T16:41:07.123Z'	'2018-06-09T16:41:07.123Z'
29	Trading capacity	'DEAL'	'DEAL'	'DEAL'	'DEAL'
30	Quantity	'300'	'100'	'150'	'250'
33	Price	'42.7'	'42.7'	'42.7'	'42.7'
36	Venue	'Segment {MIC} of Firm K/OTF'			
59	Execution within firm	{NATIONAL_ID} of Trader 1	{NATIONAL_ID} of Trader 4	{NATIONAL_ID} of Trader 5	{NATIONAL_ID} of Trader 7
62	Short selling indicator			'SESH'	'SELL'

5.30.3 Firm is aggregating orders from several clients

Where a Firm is aggregating orders for several clients on a Trading Venue and acting on an 'any other capacity' or matched principal basis, the Trading Venue should report the details of each client. This will include reporting of additional details in Fields 8-15 for a buyer and equivalent fields for a seller and the short selling indicator for the client and commodity derivative indicator for the client, where relevant.

3.7 SSR Article 2(1)(b) - Definitions

Short Sale in relation to a share or debt instrument means: any sale of the share or debt instrument which the seller does not own at the time of entering into the agreement to sell including such a sale where, at the time of entering into the agreement to sell, the seller has borrowed or agreed to borrow the share or debt instrument for delivery at settlement.

This does NOT include:

- (i) A sale by either party under a repurchase agreement where one party has agreed to sell the other a security at a specified price with a commitment from the other party to sell the security back at a later date at another specified price.
- (ii) A transfer of securities under a securities lending agreement.
- (iii) Entry into a futures contract or other derivative contract where it is agreed to sell securities at a specified price at a future date.

3.8 SSR Article 12 - Restrictions on uncovered short sales in shares

1. A natural or legal person may enter into a short sale of a share admitted to trading on a trading venue only where one of the following conditions is fulfilled:
 - (a) the natural or legal person has borrowed the share or has made alternative provisions resulting in a similar legal effect;
 - (b) the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;
 - (c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have a reasonable expectation that settlement can be effected when it is due.
2. In order to ensure uniform conditions of application of paragraph 1, ESMA shall develop draft implementing technical standards to determine the types of agreements, arrangements and measures that adequately ensure that the share will be available for settlement.

In determining what measures are necessary to have a reasonable expectation that settlement can be effected when it is due, ESMA shall take into account, inter alia, the intraday trading and the liquidity of the shares.

ESMA shall submit those draft implementing technical standards to the Commission by 31 March 2012.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

3.9 SSR Article 13 - Restrictions on uncovered short sales in sovereign debt

1. A natural or legal person may enter into a short sale of sovereign debt only where one of the following conditions is fulfilled:
 - (a) the natural or legal person has borrowed the sovereign debt or has made alternative provisions resulting in a similar legal effect;
 - (b) the natural or legal person has entered into an agreement to borrow the sovereign debt or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;
 - (c) the natural or legal person has an arrangement with a third party under which that third party has confirmed that the sovereign debt has been located or otherwise has a reasonable expectation that settlement can be effected when it is due.
2. The restrictions in paragraph 1 do not apply if the transaction serves to hedge a long position in debt instruments of an issuer, the pricing of which has a high correlation with the pricing of the given sovereign debt.
3. Where the liquidity of sovereign debt falls below the threshold determined in accordance with the methodology referred to in paragraph 4, the restrictions referred to in paragraph 1 may be temporarily suspended by the relevant competent authority. Before suspending those restrictions, the relevant competent authority shall notify ESMA and the other competent authorities about the proposed suspension.

A suspension shall be valid for an initial period not exceeding 6 months from the date of its publication on the website of the relevant competent authority. The suspension may be renewed for periods not exceeding 6 months if the grounds for the suspension continue to apply. If the suspension is not renewed by the end of the initial period or of any subsequent renewal period it shall automatically expire.

ESMA shall, within 24 hours of notification by the relevant competent authority, issue an opinion based on paragraph 4 on the notified

suspension or renewal of suspension. The opinion shall be published on ESMA's website.

4. The Commission shall adopt delegated acts in accordance with Article 42 specifying the parameters and methods for calculating the threshold of liquidity referred to in paragraph 3 of this Article in relation to issued sovereign debt.

The parameters and methods for Member States to calculate the threshold shall be set in such a way that where it is reached, it represents a significant decline relative to the average level of liquidity for the sovereign debt concerned.

The threshold shall be defined based on objective criteria specific to the relevant sovereign debt market, including the total amount of outstanding issued sovereign debt for each sovereign issuer.

5. In order to ensure uniform conditions of application of paragraph 1, ESMA may develop draft implementing technical standards to determine the types of agreements or arrangements that adequately ensure that the sovereign debt will be available for settlement. ESMA shall, in particular, take into account the need to preserve liquidity of markets, especially sovereign bond and sovereign bond repurchase markets.

ESMA shall submit those draft implementing technical standards to the Commission by 31 March 2012.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

3.10 SSR Article 17 - Exemption for market making activities and primary market operations

1. Articles 5, 6, 7, 12, 13 and 14 shall not apply to transactions performed due to market making activities.
2. The Commission may, in accordance with the procedure referred to in Article 44(2), adopt decisions determining that the legal and supervisory framework of a third country ensures that a market authorised in that third country complies with legally binding requirements which are, for the purpose of the application of the exemption set out in paragraph 1, equivalent to the requirements under Title III of Directive 2004/39/EC, under Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (1) and under Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (2), and which are subject to effective supervision and enforcement in that third country.

The legal and supervisory framework of a third country may be considered equivalent where that third country's:

- (a) markets are subject to authorisation and to effective supervision

- and enforcement on an ongoing basis;
- (b) markets have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;
- (c) security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection; and
- (d) market transparency and integrity are ensured by preventing market abuse in the form of insider dealing and market manipulation.
3. Articles 7, 13 and 14 shall not apply to the activities of a natural or legal person where, acting as an authorised primary dealer pursuant to an agreement with a sovereign issuer, it is dealing as principal in a financial instrument in relation to primary or secondary market operations relating to the sovereign debt.
 4. Articles 5, 6, 12, 13 and 14 of this Regulation shall not apply to a natural or legal person where it enters into a short sale of a security or has a net short position in relation to the carrying out of a stabilisation under Chapter III of Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments (3).
 5. The exemption referred to in paragraph 1 shall apply only where the natural or legal person concerned has notified the competent authority of its home Member State in writing that it intends to make use of the exemption. The notification shall be made not less than 30 calendar days before the natural or legal person first intends to use the exemption.
 6. The exemption referred to in paragraph 3 shall apply only where the authorised primary dealer has notified the relevant competent authority in relation to the sovereign debt concerned in writing that it intends to make use of the exemption. The notification shall be made not less than 30 calendar days before the natural or legal person acting as authorised primary dealer first intends to use the exemption.
 7. The competent authority referred to in paragraphs 5 and 6 may prohibit the use of the exemption if it considers that the natural or legal person does not satisfy the conditions of the exemption. Any prohibition shall be imposed within the 30 calendar day period referred to in paragraph 5 or 6 or subsequently if the competent authority becomes aware that there have been changes in the circumstances of the natural or legal person so that it no longer satisfies the conditions of the exemption.
 8. A third-country entity that is not authorised in the Union shall send the notification referred to in paragraphs 5 and 6 to the competent authority of the main trading venue in the Union in which it trades.
 9. A natural or legal person who has given a notification under paragraph 5 shall as soon as possible notify in writing the competent authority of its home Member State where there are any changes affecting that person's eligibility to use the exemption, or if it no longer wishes to use the exemption.
 10. A natural or legal person who has given a notification under paragraph

6 shall as soon as possible notify in writing the relevant competent authority in relation to sovereign debt concerned where there are any changes affecting that person's eligibility to use the exemption, or if it no longer wishes to use the exemption.

11. The competent authority of the home Member State may request information, in writing, from a natural or legal person operating under the exemptions set out in paragraph 1, 3 or 4 about short positions held or activities conducted under the exemption. The natural or legal person shall provide the information not later than 4 calendar days after the request is made.
12. A competent authority shall notify ESMA within 2 weeks of notification in accordance with paragraph 5 or 9 of any market makers and in accordance with paragraph 6 or 10 of any authorised primary dealers who are making use of the exemption and of any market makers and authorised primary dealers who are no longer making use of the exemption.
13. ESMA shall publish and keep up to date on its website a list of market makers and authorised primary dealers who are using the exemption.
14. A notification under this Article may be made by a person to a competent authority and by a competent authority to ESMA at any time within 60 calendar days before 1 November 2012.

SSR Articles Exempted by Article 17

- Article 5: Notification to competent authorities of significant net short positions in shares
- Article 6: Public disclosure of significant net short positions in shares
- Article 7: Notification to competent authorities of significant net short positions in sovereign debt
- Article 12: Restrictions on uncovered short sales in shares
- Article 13: Restrictions on uncovered short sales in sovereign debt
- Article 14: Restrictions on uncovered sovereign credit default swaps

3.11 Links to references

- REGULATION (EU) No 236/2012: short selling
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:086:0001:0024:en:PDF>
- REGULATION (EU) No 600/2014: MIFIR
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN>
- MiFID II/MiFIR Regulatory technical and implementing standards – Annex I
https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_i_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

- ESMA final report on guidelines on transaction reporting, order record keeping and clock synchronisation under MiFID II

https://www.esma.europa.eu/sites/default/files/library/2016-1451_final_report_on_guidelines_mifid_ii_transaction_reporting.pdf

- ESMA guidelines transaction reporting, order record keeping and clock synchronisation under MiFID II

<https://www.esma.europa.eu/press-news/esma-news/esma-provides-guidance-transaction-reporting-order-record-keeping-and-clock>

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