

Alert Update

France, Spain, Italy, Belgium and Other Jurisdictions Impose Short Sale Restrictions on Financial Companies

August 12, 2011

The European Securities and Markets Authority ("ESMA"), an organization established by the European Union ("EU") as its securities regulatory authority, said in a public statement yesterday that some authorities in the EU have decided to impose or extend existing short-selling bans or restrictions in their respective countries due to recent volatility in the European financial markets. ESMA stated, "While short-selling can be a valid trading strategy, when used in combination with spreading false market rumours this is clearly abusive."

The regulatory authorities in several jurisdictions have announced new bans on short-selling or on the holding of short positions, all of which bans are now in effect. By banning, restricting and requiring the disclosure of short sales, such countries' regulators are seeking to maintain confidence in their own markets and complement the measures taken by other EU regulators.

ESMA's public statement is available at: <http://www.esma.europa.eu/popup2.php?id=7699>.

It would seem, from the wording of the relevant regulators' releases that credit default swaps ("CDS") are not currently covered by the bans — as the bans specifically relate to the "equity shares" or "securities" of the relevant issuer — i.e., equities, and equity-linked derivatives. The bans do not relate to debentures and debenture-linked instruments, meaning that bonds and other debt instruments are not covered. In addition, at the present time, despite discussion in the media and online 'chat,' there does not appear to be any specific EU proposal for any prohibition on the trading of sovereign debt or CDS relating to such debt.

Clients and others who may be affected by the requirements below are encouraged to seek advice from local counsel.

France

The French regulator, the Autorité des Marchés Financiers ("AMF"), has banned the creation of any net short position or the increase of any net short position, including intraday, in the "equity shares" or "securities giving access to the capital" of the following financial companies: April Group, Axa, BNP Paribas, CIC, CNP Assurances, Crédit Agricole, Euler Hermès, Natixis, Paris Ré, Scor, and Société Générale.

The AMF's frequently asked questions ("FAQs") relating to the ban note:

- That the use of derivatives to create a net short position is prohibited and that derivatives may only be used to hedge, create or extend a net long position.

- That existing net short positions are not affected; however, if a net short position increases as a result of the variation in volatility, action must be taken before the end of day to reduce any such exposure. Although it is not completely clear what the AMF means by this statement, the reference to an increase in a net short position as a result of volatility suggests that the AMF had derivative positions in mind (specifically where the derivative instrument's terms result in an increasing net short exposure as the price of the underlying shares decreases); to reduce any such exposure the holder of the position would either have to renegotiate the derivative or otherwise acquire a long position so that overall there is no change to the holder's net short position.
- That any existing orders in the order book that would initiate or increase a net short position, but which are not executed at the current time, must be cancelled to avoid breaching the ban. Again, if the order is unable to be cancelled, the short position holder would have to consider acquiring a long position in order to avoid breaching the ban.
- With regard to index derivatives, investors exposed to the equity market are allowed to hedge their general market risk by trading in index derivatives. However, trading in index derivatives for any purpose other than hedging general market risk is not allowed unless the resulting short positions in the securities concerned are offset by long positions (i.e., there would not be a new net short position). Although the AMF's FAQs regarding index derivatives are not completely clear, it would appear that shorting indices such as the EURO STOXX 50 is permitted by French rules as long as the position holder has a bona fide purpose for hedging general market risk.

The AMF's ban will remain in effect for a period of 15 days from 10:45 p.m. local time on Aug. 11, 2011, but may be extended beyond that date.

The ban has been implemented in parallel with the AMF's existing short selling disclosure regime, which requires that any holder of a net short position exceeding 0.2 percent of the relevant company's capital must report that position to the AMF. The AMF will make the report public where the position exceeds 0.5 percent.

The AMF's news release is available at: http://www.amf-france.org/documents/general/10109_1.pdf, and the FAQs are available at: http://www.amf-france.org/documents/general/10111_1.pdf.

Spain

The Spanish regulator, the Comisión Nacional del Mercado de Valores ("CNMV"), has banned the creation of any new short position or the increase of any pre-existing net short position, including intraday, in the "securities" or "financial instruments" of the following financial companies: Banca Cívica SA, Banco Bilbao Vizcaya Argentaria SA, Banco de Sabadell SA, Banco de Valencia SA, Banco Español de Crédito SA, Banco Pastor SA, Banco Popular Español SA, Banco Santander SA, Bankia SA, Bankinter SA, Caixabank SA, Caja de Ahorros del Mediterráneo, Grupo Catalana de Occidente SA, Mapfre SA, Bolsas y Mercados Españoles SA and Renta 4 Servicios de Inversión SA.

The CNMV's ban specifically applies to "any trade on equities or indices, including cash equities transactions, derivatives in regulated markets or OTC derivatives, that has an effect of creating a net short position or increas[ing] a previous[ly] held net short position], even if on an intraday basis." The CNMV has defined a net short position as meaning "any position resulting in a positive economic exposure to falls in the price of the [relevant] stock."

Spain permits hedging by way of index derivatives for bona fide hedging purposes.

The CNMV's ban will also remain in effect for a period of 15 days and may also be extended beyond that date.

As with the AMF's ban in France, the CNMV's ban has been implemented in parallel with the CNMV's existing short selling disclosure regime, which requires that any holder of a net short position exceeding 0.2 percent of the relevant company's capital must report that position to the CNMV. The CNMV will make the report public where the position exceeds 0.5 percent.

The CNMV's news release is available at: <http://www.cnmv.es/loultimo/short%20ban.pdf>.

Belgium

The Belgian regulator, the Financial Services and Markets Authority ("FSMA"), has extended its pre-existing ban on uncovered transactions (in shares or derivatives) executed on Euronext Brussels to include coverage with borrowed shares, or "covered shorting." Accordingly, the FSMA has prohibited the taking of any net economic short position by any means whatsoever, or the extension of any pre-existing net short position to the shares of the following financial companies: Ageas, Dexia, KBC Group and KBC Ancora.

Pre-existing net economic short positions do *not* fall within the scope of the ban, but such positions may not be increased — although any net short position in excess of 0.25 percent of the relevant company's share capital must be disclosed to the FSMA.

No duration period or termination date has been given for the FSMA's ban on short selling.

The FSMA's news release is available at: http://www.fsma.be/en/OtherNews/Article/press/div/2011-08-11_shortselling.aspx, and its "Questions and answers" sheet is available at: <http://www.fsma.be/en/Article/faqmm/FAQ1.aspx>.

Italy

The Italian regulator, the Commissione Nazionale per le Società e le Borse ("CONSOB"), has banned the creation of any new net short position or the increase of any pre-existing net short position, including intraday, in relation to the capital of the following Italian financial companies: Azimut Holdings, Banca Carige, Banca Finnat, Banca Generali, Banca Ifis, Banca Intermobiliare, Banca Monte Paschi Siena, Banca Popolare Emilia Romagna, Banca Popolare Etruria e Lazio, Banca Popolare Milano, Banca Popolare Sondrio, Banca Profilo, Banco di Desio e Brianza, Banco di Sardegna Risp, Banco Popolare, Cattolica Assicurazioni, Credito Artigiano, Credito Emiliano, Credito Valtellinese, Fondiaria-Sai, Generali, Intesa Sanpaolo, Mediobanca, Mediolanum, Milano Assicurazioni, Ubi Banca, Unicredit, Unipol and Vittoria Assicurazioni.

The CONSOB resolution implementing the ban makes no reference to derivatives or other instruments having a similar economic effect to short selling; however, CONSOB's July 10, 2011 resolution implementing a short selling disclosure regime (whereby disclosure is required to be made by any person who has a net short position of 0.2 percent or greater (with public disclosure by CONSOB of net short positions that exceed 0.5 percent) (see <http://www.consob.it/mainen/documenti/english/resolutions/res17862.htm>)) does specifically note that a "Net short position is the downward position calculated with reference to the number of shares and shall take into account: (i) short positions — i.e., actual sales of shares (not yet settled) and potential sales arising from downward position on derivatives financial instruments; to the net (ii) of long positions — i.e., shares actually held, actual purchases of shares (not yet settled) and potential purchases arising from upward position on derivatives financial instruments, irrespective of the trading venue." Although the English is not perfect, the message from CONSOB is clear: if a person has *any* net short position, whether arising through an unsettled share sale or through the holding of derivative contracts, that position must be reported if it exceeds the 0.2 percent net short disclosure threshold. In light of the fact that CONSOB's resolution relating to the short selling ban is silent as to derivatives, we would suggest that the same principles would have to be applied to CONSOB's prohibition on the creation of new net short positions.

CONSOB's ban will, as for France and Spain, remain in effect for a period of 15 days from 9:00 a.m. local time on Aug. 12, 2011.

The CONSOB resolution is available at: <http://www.consob.it/main/documenti/bollettino2011/d17902.htm>.

Exemptions

Each of the jurisdictions referenced in this *Updated Alert* specifically exempts market makers from the relevant bans, with the AMF and CONSOB rules also exempting intermediaries acting in the execution of a contract (i.e., liquidity providers), and the AMF rules also exempting financial intermediaries when they are acting as counterparty for block trades.

Other Jurisdictions

Greece

On Aug. 8, 2011, the Greek regulator, the Hellenic Capital Market Commission ("HCMC"), announced a temporary ban on the short selling of shares or units in exchange-traded funds listed on the Athens Exchange irrespective of the venue where the transaction is executed; intraday positions are also included within the prohibition. The ban applies to all Greek listed securities, not just financial services companies, and applies to covered shorts and naked shorts as well as all depository receipts (ADRs, GDRs) representing shares listed on the Athens Exchange. However, the HCMC's guidance notes that obtaining or increasing short exposure through listed or OTC derivatives is *not* prohibited. The HCMC's decision took effect on Aug. 9, 2011 and is scheduled to remain in force up to and including Oct. 7, 2011.

The HCMC's announcement is available at:

http://www.hcmc.gr/photos/kefalaiaigora/files/14_593_080811_eng.pdf, and

http://www.hcmc.gr/photos/kefalaiaigora/files/press%20en%20prohibition_open_sales.pdf, and

the HCMC guidance is available at:

http://www.hcmc.gr/photos/kefalaiaigora/files/Guidance%20on%20Short%20Selling%20Ban_090811.pdf.

UK

The UK regulator, the Financial Services Authority, has confirmed that it is not currently proposing to implement a ban on short selling in relation to UK financial sector securities. The FSA already has a disclosure regime for net short positions of 0.25 percent or greater in UK financial sector companies (and UK companies undertaking rights issues). For more information please refer to our August 2010 *Alert*:

http://www.srz.com/080510_FSA_Recasts_and_Revises_UK_Rules_on_Short_Selling/.

Pan European Short Selling Regime Proposals

The bans introduced in the EU in the past week have each been independently implemented by the national regulators of the countries concerned. However, current European Commission proposals would see a harmonized and unified pan-European short selling disclosure regime introduced from July 1, 2012 which would provide market participants with certainty as to the short selling rules in force in each of the countries of the EU. The proposed new rules would still allow national regulators to impose a short-term ban on short selling in domestic markets, but would significantly also give ESMA the power to impose a ban on short selling across the whole of the EU where two conditions were fulfilled: (i) when there was a threat to the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the EU; and (ii) measures were not been taken by EU regulators, or those measures taken were not sufficient, to address the threat.

For more information on the proposed new pan European short selling regime please refer to SRZ's October 2010 *Alert*: http://www.srz.com/102110_proposed_new_pan_european_rules_on_short_selling/.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or the authors.

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