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EFTA SURVEILLANCE AUTHORITY DECISION

of 16 March 2020

to temporarily lower the notification thresholds of net short positions in relation to the issued share capital of companies whose shares are admitted to trading on a regulated market of the EEA EFTA States in accordance with point (a) of Article 28(1) of Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps as incorporated into the Agreement on the European Economic Area

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement on the European Economic Area¹ (the “EEA Agreement”), in particular Annex IX thereof,

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice² (the “SCA”) in particular its Article 25a and Protocol 8 thereof,

Having regard to the Act referred to at point 31i of Annex IX to the EEA Agreement,

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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC³ (“Regulation No 1095/2010”), and in particular Article 9(5), 43(2) and 44(1) thereof,

as amended and adapted to the EEA Agreement,⁴

Having regard to the Act referred to at point 29f of Annex IX to the EEA Agreement,

Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (“Regulation No 236/2012”),⁵ and in particular Article 28 thereof,

as amended and adapted to the EEA Agreement,⁶

¹ OJ L 1, 3.1.1994, p. 3.

² OJ L 344, 31.1.1994, p. 3

³ OJ L 331, 15.12.2010, p. 84.

⁴ Joint Committee Decision No 201/2016 of 30 September 2016.

⁵ OJ L 86, 24.3.2012, p. 1.

⁶ Joint Committee Decision No 204/2016 of 30 September 2016.

Having regard to the Act referred at point 29fc of Annex IX to the EEA Agreement,

Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regards to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events (“Delegated Regulation No 918/2012”)⁷ and in particular Article 24 thereof,

as amended and adapted to the EEA Agreement,⁸

Whereas:

1. Introduction

- (1) This decision by the EFTA Surveillance Authority (the “Authority”) requires natural or legal persons who have net short positions in relation to a share admitted to trading on a regulated market in the EEA EFTA States to notify to a competent authority details of any such position if the position reaches or exceeds 0.1% of the issued share capital.
- (2) The measure imposed by this Decision addresses the necessity for the competent authorities and for the Authority to be aware of the net short positions that market participants have entered into in relation to shares admitted to trading on a regulated market in the EEA EFTA States, given the recent exceptional developments in financial markets.

2. Ability of the measure to address relevant threats and cross-border implications (Article 28(2)(a) of Regulation No 236/2012)

a. Threat to the orderly functioning and integrity of the financial markets of the European Union and of the EEA EFTA States

- (3) The outbreak of the COVID-19 pandemic is having serious adverse effects on the real economy and on the financial markets of the European Union (“EU”) and of the EEA EFTA States. As regards the EU, since 20 February 2020 the stock markets in the EU lost 30% [Figure 1 in Annex I], and all sectors and types of issuers were affected by severe share price falls. Similar figures were noticed in the same time-frame for the stock markets in Norway and Iceland, which respectively lost approximately 30% and 18% [Figure 2 in Annex I], and all sectors and types of issuers were affected by such severe share price falls.

⁷ OJ L 274, 9.10.2012, p. 1.

⁸ Joint Committee Decision No 204/2016 of 30 September 2016.

- (4) The Authority considers that this adverse situation constitutes a serious threat to the orderly functioning and integrity of the financial markets in the EU and in the EEA EFTA States. Namely, the price movements are linked to the spreading of the COVID-19 pandemic in the EEA, which has greatly increased the sensitivity of the financial markets in the EU and in the EEA EFTA States. There is a clear risk that such downward trend will continue in the coming days and weeks. Such severe price falls undermine the price-formation mechanism, thereby threatening the integrity and orderly functioning of the markets.
- (5) At the same time, the severe losses also have the effect of prejudicing market confidence. A decrease of the latter threatens the orderly functioning and integrity of the markets, as it may result in further volatility and downward price spirals.
- (6) In this context, as further explained in Section 3 below, short sales can contribute to further accelerate price volatility and to exacerbate market losses.
- (7) Within the limit of the Authority's mandate, the proposed measure to oblige natural or legal persons who have a net short position in shares admitted to trading on a regulated market in the EEA EFTA States to report to competent authorities at a lower threshold than the one established in Article 5 of Regulation No 236/2012 should improve the capacity of the competent authorities and of the Authority to assess the situation adequately and react if the integrity, orderly functioning and stability of the markets require more stringent actions.

b. Threat to the stability of the whole or part of the financial system in the Union

- (8) As explained by the ECB in its Financial Stability Review⁹, financial stability is a condition in which the financial system – which comprises financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances. Substantial selling pressure and unusual volatility in the price of shares is already ongoing and could continue to occur. In such a situation, market participants may take new short positions in order to profit from further price falls, which may in turn exacerbate the falls experienced in the past weeks. The Authority considers that such circumstances are also substantially threatening the financial stability in the EEA EFTA States.
- (9) Those price declines have left the vast majority if not all shares admitted to trading on a regulated market in the whole EEA in a situation of uncertainty in which further price declines not triggered by additional fundamental information could have highly detrimental consequences.

⁹ <https://www.ecb.europa.eu/pub/financial-stability/fsr/html/ecb.fsr201911~facad0251f.en.html> .

- (10) It is at this stage of the developments, where there is an increasing amount of information flowing to the market in relation to Covid-19, that the measure may be most effective, as it will allow the competent authorities to better monitor the market trends and fine-tune further regulatory responses.
- (11) The Authority considers that lowering the reporting thresholds is a preliminary action that under these exceptional circumstances is essential to monitor developments in markets. This measure can be used to evaluate and potentially gradually implement further regulatory responses if those prove necessary.

c. Cross-border implications

- (12) The threats to market integrity, orderly functioning and financial stability described above have a pan-EU character and concern also the EEA EFTA States. Since 20 February 2020, the EUROSTOXX 50 INDEX, which covers 50 blue-chip issuers from 11¹⁰ Eurozone countries, fell by approximately 30% [Figure 1 in Annex I]. In addition, the effect of the unusual selling pressure was apparent in the main indices of EU markets [Figure 2 in Annex I]. Similar consequences were noticed in the EEA EFTA States' markets.
- (13) Given the fact that the financial markets of each EU Member State and of the EEA EFTA States are affected by the threats, the cross border implications are particularly serious.

3. No competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that do not adequately address the threat (Article 28(2)(b) of Regulation No 236/2012)

- (14) One of the conditions for the Authority to adopt the measure in this Decision is that a competent authority or competent authorities have not taken action to address the threat or the actions that have been taken do not adequately address the threat.
- (15) As of the date of this Decision there are no measures in force taken by the competent authorities pursuant to Regulation No 236/2012.
- (16) At the time of adoption of this Decision, no competent authorities have adopted measures to increase their visibility of the evolution of net short positions activity through the establishment of lower reporting thresholds.
- (17) In light of the abovementioned pan-EEA threats, it has become evident that the information received by the competent authorities is not sufficient under the current stressed market conditions. The Authority considers that lowering the reporting thresholds should ensure that all the competent authorities across the EEA EFTA States and the Authority itself have the best possible data set available to monitor

¹⁰ Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain.

the market trends and enable themselves to take, if necessary, further national or EEA EFTA-wide measures.

(18) In taking this measure, the Authority has also considered that the new notification threshold shall become applicable immediately after its publication on the Authority's website, as foreseen in Article 28(9) of Regulation No 236/2012.

4. Efficiency of the measure (Article 28(3)(a) of Regulation No 236/2012)

(19) The Authority also has to take into account to which extent the measure significantly addresses the threats identified.

(20) The Authority, in cooperation with ESMA, has analysed the circumstances in recent trading days on trading venues, in particular since 9 March 2020, in how far they constitute threats to the integrity of markets and to financial stability in the EEA EFTA States and whether the Authority's measure is efficient in addressing such threats by taking a forward-looking approach.

a. The measure significantly addresses the threat to the orderly functioning and integrity of financial markets in the EEA EFTA States

(21) The Authority considers that despite the extraordinary losses that were incurred in the trading of shares on regulated markets in the EEA EFTA States since 20 February 2020 and particularly since 9 March 2020, markets have functioned in an orderly way and that the integrity of markets has been largely preserved.

(22) On that basis and as of this date the Authority deems this Decision to be proportionate given current circumstances.

(23) However, due to the consistent selling pressure caused by subsequent developments affecting an extremely large range of issuers from all kinds of sectors in the EEA EFTA States, markets are nonetheless in a fragile state.

(24) At times of extreme selling pressure and market volatility, engaging in short selling and the building up of short positions can amplify downward trends already present in financial markets. While short selling at other times may serve positive functions in terms of determining the correct valuation of issuers, in current market circumstances it poses an additional threat to the orderly functioning and integrity of markets.

(25) The Authority considers that, without such a measure being taken at this point in time, the competent authorities and the Authority itself would not have the capacity to monitor adequately the market in the current market environment, where the substantial selling pressure and unusual volatility in the price of EEA EFTA States shares admitted to trading on a regulated market in the EEA EFTA States could further be amplified by the taking of short positions. In particular, given the horizontal impact of the current emergency situation that affects a broad set of shares across

the EEA EFTA States, the fall in share prices may be due to additional selling pressure resulting from short selling activity and increased net short positions that, being below the current thresholds for notification to the national competent authorities, are therefore undetected.

(26) Therefore, the competent authorities and the Authority need to be aware as soon as possible of market participants engaging in short sales and building up significant net short positions to prevent, if necessary, that those positions become signals leading to a cascade of selling orders causing a further significant fall in value. On the same grounds, the Authority considers it adequate to maintain the publication threshold in Article 6 of Regulation No 236/2012, but is monitoring on an ongoing basis the market conditions and will take further measures, in cooperation with ESMA, if the market conditions make it necessary.

b. The measure significantly addresses the threat to the stability of the whole or part of the financial system in the EEA EFTA States

(27) As described above, trading in shares since 20 February 2020 and particularly since 9 March 2020 was characterised by substantial selling pressure and unusual volatility leading to significant downward spirals affecting issuers from all types of sectors.

(28) Unabated selling pressure on the shares of banks and other financial institutions as well as a wide range of issuers from all sectors can put the financial stability of one or several EEA EFTA States and ultimately the financial system in the EEA EFTA States at risk.

(29) In addition, the Authority considers that the significant falls in value and extreme volatility particularly since 9 March 2020 can cause a lack of trust in the functioning of the financial system by market participants and the public at large.

(30) The existence of such risks is also evident by the multiple measures taken across the EEA in the past few days to stabilise the financial system and the economy as a whole.

(31) As evidenced above, engaging in short selling and building up significant net short positions can amplify selling pressure and downward trends which at the present time poses a threat which can have highly detrimental effects on the financial stability of financial institutions and companies from other sectors. In that context, data limitation for competent authorities and the Authority would restrict their capacity to address any potential negative effects on the economy and ultimately the financial stability of the EEA EFTA States as a whole.

(32) The Authority's measure to temporarily lower the reporting thresholds of net short positions to the competent authorities addresses this threat posed to the stability of parts or ultimately the whole of the financial system of the EEA EFTA States.

c. Improvement of the ability of the competent authorities to monitor the threat

- (33) In ordinary market conditions the competent authorities monitor any threat that may derive from short selling and the building up of net short positions with supervisory tools established in the relevant legislation, in particular the reporting obligations concerning net short positions established in Regulation No 236/2012.¹¹
- (34) However, the existing market conditions render it necessary to intensify the monitoring activity of the competent authorities and the Authority of the aggregated net short positions in shares admitted to trading on regulated markets. To that end, it is essential not only to ensure that the competent authorities are getting reports at an earlier stage of the build-up of a net short position and not at the current level of 0.2% but also that such revised reporting obligation enters into effect with immediate effect.
- (35) Therefore, the Authority's measure improves the ability of the competent authorities to deal with the threats identified and to overall monitor and manage threats to the orderly functioning of markets and to financial stability at times of market stress.

5. The measures do not create a risk of regulatory arbitrage (Article 28(3)(b) of Regulation No 236/2012)

- (36) In order to adopt a measure under Article 28 of Regulation No 236/2012, the Authority should take into account whether the measure creates a risk of regulatory arbitrage.
- (37) Since the Authority's measure concerns the reporting obligations of market participants with respect to all shares admitted to trading on regulated markets, it will ensure a unique reporting threshold for all competent authorities, ensuring a level-playing field among market participants from in- and outside of the EEA EFTA States in respect of trading of shares admitted to trading on a regulated market.

6. The Authority's measure does not have a detrimental effect on the efficiency of financial markets, including by reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to its benefits (Article 28(3)(c) of Regulation No 236/2012)

- (38) The Authority has to assess whether the measure has detrimental effects which would be considered disproportionate compared to its benefits.
- (39) The Authority considers it appropriate that the competent authorities closely monitor the evolution of the market and any evolution of net short positions before considering adopting any further measure. The Authority notes that the current

¹¹ Cf. Article 5 of Regulation 236/2012.

reporting thresholds (0.2% of the issued share capital) may not be adequate in the current exceptional market conditions to identify trends in a timely manner.

- (40) Although the enhanced reporting obligation laid down in this decision may add additional burden to reporting entities, it will not limit the capacity of market participants to enter into or increase their short positions in shares. As a result, the efficiency of the market will not be affected.
- (41) The current measure should not affect the liquidity in the market as the increased reporting obligation for a limited set of market participants should not change their trading strategies and therefore, their participation in the market. Additionally, the exception foreseen for market making activities and stabilisation programs is meant not to increase the burden for entities that provide an important service in terms of providing liquidity and reducing volatility, particularly relevant in the current situation.
- (42) The Authority believes that limiting the scope of its measure to one or several sectors or to a subset of issuers may not achieve the desirable outcome. The magnitude of the price declines, the wide range of shares (and sectors) affected and the degree of interconnection between the EEA EFTA States economies and trading venues, suggest that an EEA EFTA-wide measure is likely to be more effective than sectorial national measures.
- (43) In terms of creating market uncertainty, the measure does not introduce new regulatory obligations, as it only modifies the existing reporting obligation that has been in force in the EEA EFTA States since 2017 by lowering the threshold. It applies to all trading in shares admitted to trading on a regulated market and therefore does not create any uncertainty.
- (44) The Authority also highlights that the measure is limited to the reporting of shares that are admitted to trading on a regulated market to capture those positions where additional reporting appears most relevant. The measure only applies if positions reach or exceed the 0.1% threshold after the entry into force.
- (45) Therefore, the Authority does not consider that such enhanced transparency obligation can have a detrimental effect on the efficiency of financial markets or on investors that is disproportionate to its benefits.
- (46) In terms of duration of the measure, the Authority considers that a duration of three months is justified considering the information available at the moment. The Authority is aware of the increasing administrative burden this decision implies for certain market participants and intends to revert to the regular reporting obligation as soon as the situation improves, but at the same time cannot discard the possibility of extending the measure where the situation should worsen.

7. Consultation and notice (Article 28(4),(5) and (6) of Regulation No 236/2012, Protocol 8 to the SCA)

(47) On 15 March 2020, the Authority notified the Financial Supervisory Authorities of Norway, Iceland and Liechtenstein of the intended measure in accordance with Article 28(5) of Regulation 236/2012. Given the urgency of the matter, the Authority considered that the conditions set out in Article 28(6) were met and the notification was therefore issued less than 24 hours before the measure was due to take effect. In addition, the Authority invited the Financial Supervisory Authorities of Norway, Iceland and Liechtenstein to provide technical advice in accordance with Article 4 of Protocol 8 to the SCA. On 16 March 2020, the Financial Supervisory Authorities provided their comments.

(48) The Authority's measure will apply once this decision is published on the Authority's website.

HAS ADOPTED THIS DECISION:

Article 1

Definition

For the purposes of this Decision, a 'regulated market' means a regulated market as referred to in Article 4(1)(21) of Directive 2014/65/EU¹² of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.¹³

Article 2

Temporary additional transparency obligations

1. A natural or legal person who has a net short position in relation to the issued share capital of a company that has its shares admitted to trading on a regulated market shall notify the relevant competent authority, in accordance with Articles 5 and 9 of Regulation No 236/2012 where the position reaches or falls below a relevant notification threshold referred to in paragraph 2 of this Article.
2. A relevant notification threshold is a percentage that equals 0.1% of the issued share capital of the company concerned and each 0.1% above that threshold.

Article 3

Exemptions

1. In accordance with Article 16 of Regulation No 236/2012, the temporary additional transparency obligations referred to in Article 2 shall not apply to shares admitted to

¹² Joint Committee decision no 78/2019 of 29 March 2019, point 31ba of Annex IX to the EEA Agreement.

¹³ OJ L 173, 12.6.2014, p. 349.

trading on a regulated market where the principal venue for the trading of the shares is located in a third country.

2. The temporary additional transparency obligations referred to in Article 2 shall not apply to market making activities.
3. The temporary additional transparency obligations referred to in Article 2 shall not apply to a net short position in relation to the carrying out of a stabilisation under Article 5 of Regulation (EU) No 596/2014 of 16 April 2014 on market abuse.¹⁴

Article 4

Entry into force and application

This Decision enters into force immediately upon its publication on the Authority's website. It shall apply from the date of its entry into force for a period of three months.

Article 5

This decision is only drafted in English.

Done at Brussels on 16 March 2020.

For the EFTA Surveillance Authority

Bente Angell-Hansen
President

Frank J. Büchel
Responsible College Member

Högni Kristjánsson
College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.

¹⁴ Joint Committee Decision 259/2019 of 25 October 2019, pending fulfilment of constitutional requirements.

ANNEX I

FIGURE 1 – ECONOMIC INDICATORS

	Changes since		Level
	1W	20 Feb	
Equity market performance (in %)			
Eurostoxx 50	-17%	-29%	2,495
US S&P500	-9%	-20%	2,711
JP Nikkei	-16%	-26%	17,431
Global	-13%	-23%	179
European banks	-20%	-38%	93
IT financials	-21%	-40%	23
ES financials	-24%	-38%	62
DE financials	-22%	-34%	94
FR financials	-22%	-40%	108
Volatility (in bps, level in %)			
VSTOXX	31	60	74.3
VIX	16	42	57.8
Credit Default Swaps (in bps)			
Europe corporate	36	61	101
Europe high yield	123	303	501
Europe financials	40	87	131
Europe financials subordinate	52	142	240
10Y Government bonds (in bps, level in %)			
DE10Y	14	-14	-0.59
IT10Y	73	89	1.81
US10Y	25	-57	0.95
GB10Y	18	-17	0.41
JP10Y	14	4	0.00

Note: Data as of 15 Mar 20.

Sources: Refinitiv EIKON; ESMA.

FIGURE 2 – EUROPEAN STOCK INDICES PERFORMANCE

	Percentage change since 20 Feb 2020	1W percentage change
Eurostoxx50	-32.36%	-19.99%
AT	-36.96%	-23.50%
BE	-33.65%	-20.44%
BG	-18.26%	-15.47%
CY	-22.47%	-15.33%
CZ	-24.79%	-14.30%
DE	-32.44%	-20.02%
DK	-22.42%	-14.19%
EE	-20.92%	-14.25%
ES	-33.24%	-20.84%
FR	-32.07%	-19.87%
GR	-39.34%	-20.17%
HR	-25.18%	-16.88%
HU	-25.34%	-16.99%
IE	-28.85%	-17.85%
IS	-18.24%	-4.16%
IT	-36.39%	-23.30%
LT	-16.65%	-9.98%
LU	-35.66%	-19.27%
LV	-10.87%	-7.28%
MT	-9.05%	-7.55%
NL	-30.42%	-18.52%
NO	-29.25%	-17.39%
PL	-33.04%	-21.68%
PT	-29.08%	-17.85%
RO	-22.30%	-16.55%
SE	-27.51%	-15.50%
SI	-22.37%	-13.61%
SK	-5.69%	-5.02%

Source: Refinitiv Datastream.

Data as of : 15 March 2020