

**MFSA**

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MALTA FINANCIAL SERVICES AUTHORITY

# Short Selling Regulation

GUIDANCE NOTES

15<sup>th</sup> October 2012

*‘To ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regard to the financial markets, and to ensure a high level of consumer and investor protection, it is therefore appropriate to lay down a common regulatory framework with regard to the requirements and powers relating to short selling and credit default swaps and to ensure greater coordination and consistency between Member States where measures have to be taken in exceptional circumstances.’*

*[Recital 2 Regulation (EU) 236/2012]*

Regulation (EU) N° 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (henceforth referred to as ‘**the Regulation**’) will be applicable from 1<sup>st</sup> November 2012.

The Regulation is supplemented by another four Regulations adopted by the European Commission (henceforth referred to together as ‘**the Commission Regulations**’) as listed hereunder:

- *Commission Delegated Regulation (EU) N° 918/2012 of 5 July 2012 supplementing Regulation (EU) N° 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in financial instruments and adverse events;*
- *Commission Delegated Regulation (EU) N° 919/2012 of 5 July 2012 supplementing Regulation (EU) N° 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to regulatory technical standards for the method of calculation of the fall in value for liquid shares and other financial instruments;*

- *Commission Delegated Regulation (EU) N° 826/2012 of 29 June 2012 of the European Parliament and of the Council supplementing Regulation (EU) N° 236/2012 of the European Parliament and of the Council with regard to regulatory technical standards on notification and disclosure requirements with regard to net short positions, the details of the information to be provided to the European Securities and Markets Authority in relation to net short positions and the method for calculating turnover to determine exempted shares;*
- *Commission Implementing Regulation (EU) N° 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) N° 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps.*

The above legislation can be downloaded from the section of the MFSA web-page <http://www.mfsa.com.mt/pages/viewcontent.aspx?id=336>

The regulation sets three broad categories of requirements:

- [i]** Transparency requirements applicable to short selling in shares and sovereign debt, and transactions in credit default swaps in sovereign debt;
- [ii]** Requirements which set restrictions on uncovered short sales; and
- [iii]** Requirements on intervention in financial markets by financial supervisors in exceptional market circumstances.

In Malta, the Regulation has been implemented through the adoption of Financial Markets Act (Short Selling) Regulations, 2012 [L.N. 344 of 2012]. This Legal Notice appoints the MFSA as competent authority for the purposes of the Regulation, thus

meaning that the MFSA has the function of monitoring compliance with the Regulation in Malta.

These Guidance Notes have the purpose of providing brief guidance on the transparency requirements and the restrictions applicable with regards to the trading in:

- [i] shares which are admitted to trading for the first time on a trading venue licensed by the MFSA;
- [ii] sovereign debt issued by the Government of Malta; and
- [iii] credit default swaps in relation to sovereign debt issued by the Government of Malta.

In preparing these Guidance Notes reference was made to the Regulation, the Commission Regulations, and the various documents issued by ESMA, including:

- [i] the ESMA Q&A which provides responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of the short selling framework [ESMA/2012/666]; and
- [ii] the ESMA Consultation Paper on proposed guidelines on the exemption for market making activities and primary market operations under the Regulation [ESMA/2012/580].

Both ESMA documents and updates to these documents are available on the section of the MFSA web-page <http://www.mfsa.com.mt/pages/viewcontent.aspx?id=336>

These Guidance Notes do not have the purpose of replacing the Regulation, the Commission Regulations, the ESMA guidance and the Financial Markets Act (Short Selling) Regulations, 2012 [L.N. 344 of 2012]. Persons falling within the scope of regulatory framework are encouraged to obtain a proper understanding of the legislation and the afore-indicated ESMA Guidance.

These Guidance Notes contain the following three additional sections:

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2	Uncovered Short Sales	10
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## Section 1 - Transparency Requirements

### [1.1] Notifications of Net Short Position to the MFSA

- A person holding a net short position in relation to shares which are admitted to trading on a trading venue licensed by the MFSA, such as the Malta Stock Exchange, is required to notify the MFSA when the net short position reaches a value equal to 0.2% of the issued share capital of the company concerned and each 0.1% above that.
- The requirement to notify the MFSA only applies where a share has been admitted to trading for the first time on a trading venue which is licensed by the MFSA. Therefore, where the share has been admitted to trading for the first time on a trading venue outside Malta and eventually admitted to trading on a trading venue in Malta the notification should not be made to the MFSA but the relevant competent authority outside Malta.
- The method for the calculation of net short position is provided for in the Regulation and European Commission Regulations.
- The notification of net short position to the MFSA must be made in the format provided for in Appendix I to these Guidance Notes. A copy of the Notification Form for Net Short Positions in excel format is available on the section of the MFSA's web-page dedicated to short selling:  
<http://www.mfsa.com.mt/Files/LegislationRegulation/regulation/securities/Financial%20Markets/Notification%20Form%20Net%20Short%20Positions.xlsx>

- Where a notification referred to above contains an error, a cancellation notice must be submitted to the MFSA by the relevant person. The format of the Cancellation Notice is provided for in Appendix II to these Guidance Notes. A copy of the Cancellation Notice in excel format is available on the section of the MFSA's web-page dedicated to short selling: <http://www.mfsa.com.mt/Files/LegislationRegulation/regulation/securities/Financial%20Markets/Cancellation%20Form%20for%20Erroneous%20Notifications.xlsx>
- A similar transparency requirement applies with regards to shares traded on trading venues located in other Member States. However, in such cases, the notification must be made to the Competent Authority of the relevant Member State and not the MFSA.
- The transparency requirements do not apply to market makers and primary dealers falling within the meaning set in the Regulation, as further defined in guidance which may be issued by ESMA from time to time. The application of this exemption requires a specific authorisation from the MFSA.

### **[1.2] Public Disclosure of Significant Net Short Positions**

- A person holding a net short position in relation to shares which are admitted to trading on a trading venue licensed by the MFSA, such as the Malta Stock Exchange, is required to disclose details of that position to the public when the net short position reaches a value equal to 0.5% of the issued share capital of the company concerned and each 0.1% above that.
- The content of the Notification Form for Public Disclosure is provided for in Appendix III to these Guidance Notes.
- The relevant person is required to submit the Notification Form for Public Disclosure to the MFSA. The Authority would in turn upload the information on

the section of the MFSA web-page dedicated to short selling:

<http://www.mfsa.com.mt/pages/viewcontent.aspx?id=491>

- A similar requirement applies with regards to shares traded on trading venues established in other Member States. However, in such cases the notification must be made to the Competent Authority of the relevant Member State and not the MFSA.
- The transparency requirements do not apply to market makers and primary dealers falling within the meaning of these terms as per the Regulation as further defined in guidance which may be issued by ESMA from time to time. The application of this exemption requires a specific authorisation from the MFSA.

### **[1.3] Notification to the Authority on Significant Net Short Positions in Sovereign Debt issued by the Government of Malta**

- A person holding a net short position in sovereign debt issued by the Government of Malta shall make a notification to the MFSA where such position amounts to 0.1% of the total amount of outstanding issued sovereign debt, and each 0.05% above that.
- The method for the calculation of net short position is provided for in the Regulation and European Commission Regulations.
- The notification of net short positions to the MFSA must be made in the format provided for Appendix I to these Guidance Notes. A copy of the Notification Form for Net Short Positions in excel format is available on the section of the MFSA web-page dedicated to short selling:  
<http://www.mfsa.com.mt/Files/LegislationRegulation/regulation/securities/Financial%20Markets/Notification%20Form%20Net%20Short%20Positions.xlsx>
- Where a notification referred to above contains an error, a cancellation notice must be submitted to the MFSA by the relevant person. The format of the

cancellation notice is provided for in Appendix II to these Guidance Notes. A copy of the Cancellation Notice in excel format is available on the section of the MFSA web-page dedicated to short selling: <http://www.mfsa.com.mt/Files/LegislationRegulation/regulation/securities/Financial%20Markets/Cancellation%20Form%20for%20Erroneous%20Notifications.xlsx>

- A similar requirement applies with regards to sovereign debt of other Member States. However, in such cases the notification must be made to the Competent Authority of the relevant Member State and not the MFSA.
- The transparency requirements do not apply to market makers and primary dealers falling within the meaning of these terms as per the Regulation as further defined in guidance which may be issued by ESMA from time to time. The application of this exemption requires a specific authorisation from the MFSA.

#### **[1.4] Notification to the MFSA on Uncovered Positions in Sovereign Credit Default Swaps**

- The Regulation prohibits uncovered positions in sovereign credit default swaps. However it grants competent authorities the power to suspend the prohibition.
- Where the MFSA decides to suspend restrictions on uncovered positions in credit default swaps in relation to sovereign debt issued by the Government of Malta, a person having an uncovered position is required to notify the MFSA when such a position reaches or falls below the relevant notification thresholds for the sovereign debt issuer explained above.
- The same methodology and notification forms as those applicable to net short positions in sovereign debt also apply to uncovered positions in sovereign credit default swaps.



**[1.5] Timing of calculation and the making of a notification**

- The Regulation requires the calculation of a net short position to be made as at midnight at the end of the trading day on which the relevant position is held.
- The notification or disclosure is required by not later than 15:30hrs on the following trading day.

The following is summary of the transparency requirements applicable in terms of the Regulation.

Instrument	Notification to MFSA	Notification To Other Competent Authority	No Notification?
<u>Shares</u> which were first admitted to trading on a trading venue in <u>Malta</u>	✓	x	x
<u>Shares</u> first admitted to trading on a trading venue in <u>another Member State</u>	x	✓	x
<u>Shares</u> where the principal venue for trading is located in a <u>third country</u>	x	x	✓
<u>Malta Government Stocks</u>	✓	x	x
<u>Sovereign Debt</u> issued by a <u>Member State</u>	x	✓	x
<u>Sovereign Debt</u> issued by a <u>third country</u>	x	x	✓
<u>Credit Default Swaps</u> linked to sovereign debt issued by the Government of <u>Malta</u>	✓	x	x
<u>Credit Default Swaps</u> relating to other <u>Member States</u>	x	✓	x
<u>Credit Default Swaps</u> relating to <u>third countries</u>	x	x	✓

## Section 2 - Uncovered Short Sales

### [2.1] Restrictions on Uncovered Short Sales in Shares or Sovereign Debt

- The Regulation stipulates that short selling in shares or sovereign debt may only take place subject to the satisfaction of one of the following conditions:
  - ✓ When the security is borrowed by the relevant person or when the said person has made alternative provisions resulting in a similar legal effect;
  - ✓ When the relevant person has entered into an agreement to borrow the share or has another enforceable claim under contract or property law to transfer ownership of a corresponding number of securities so that settlement can be effected when it is due;
  - ✓ When the relevant 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 to have a reasonable expectation that settlement can be affected when it is due.
- The technical requirements relating to each of the above conditions which must be satisfied by a person who is short selling a share or sovereign debt are provided for in the Regulation and the Commission Regulations.
- The abovementioned restrictions do not apply if the transaction serves to hedge a long position in debt instruments, the pricing of which is highly correlated with the pricing of the given sovereign debt.
- The restrictions do not apply to market makers and primary dealers falling within the meaning of these terms as per the Regulation as further defined in guidance which may be issued by ESMA from time to time. The application of this exemption requires a specific authorisation from the MFSA.

## [2.2] Restrictions on Uncovered Sovereign Credit Default Swaps

- The Regulation prohibits uncovered positions in sovereign credit default swaps.
- However, the Regulation grants the MFSA the power to temporarily suspend the prohibition in relation credit default swaps linked to sovereign debt of the Government of Malta, in instances where the sovereign debt market is not functioning properly due to the restriction.
- The Regulation stipulates that a suspension may only be valid for an initial period not exceeding 12 months from the date of its publication on the Authority's website and may be renewed for periods not exceeding 6 months if the grounds for suspension continue to apply.
- The restriction does not apply to market makers and primary dealers falling within the meaning of these terms as per the Regulation as further defined in guidance which may be issued by ESMA from time to time. The application of this exemption requires a specific authorisation from the MFSA.

## Section 3 - Penalties

- The MFSA may impose an administrative penalty not exceeding €150,000 on any person engaged in short selling and/or who trades in credit default swaps and who fails to comply with the legislative framework.

## Appendix I

<b>NOTIFICATION FORM FOR NET SHORT POSITIONS</b>			
<i>In terms of the Commission Delegated Regulation (EU) N°826/2012 of 29.06.2012 - Supplementing Regulation (EU) No 236/2012</i>			
<b>POSITION HOLDER</b>	First Name		
	Last Name		
	Full Company Name		
	BIC Code (if applicable)		
	Country		
	Address		
	Contact Person	First Name	
	Last Name		
	Phone Number		
	Fax Number		
	E-Mail Address		
<b>REPORTING PERSON (if different)</b>	First Name		
	Last Name		
	Full Company Name		
	Country		
	Address		
	Contact Person	First Name	
		Last Name	
	Phone Number		
	Fax Number		
	E-Mail Address		
<b>NET SHORT POSITION IN SHARES</b>			
Reporting Date (yyyy-mm-dd)			
Name of the Issuer			
ISIN Code			
Full Name			
Position Date (yyyy-mm-dd)			
Net Short Position After Threshold Crossing			
Number of Equivalent Shares			

<b>% of Issued Share Capital</b>	
<b>Date of Previous Notification</b> <i>(yyyy-mm-dd)</i>	
<b>Comments</b>	
<b>NET SHORT POSITION IN SOVEREIGN DEBT</b>	
<b>Reporting Date</b> <i>(yyyy-mm-dd)</i>	
<b>Name of the Issuer</b>	
<b>Country Code</b>	
<b>Full Name</b>	
<b>Position Date</b> <i>(yyyy-mm-dd)</i>	
<b>Net Short Position After Threshold Crossing</b> <i>(Equivalent Nominal Amount)</i>	
<b>Date of Previous Notification</b> <i>(yyyy-mm-dd)</i>	
<b>Comments</b>	
<b>POSITION IN UNCOVERED SOVEREIGN CREDIT DEFAULT SWAPS</b>	
<b>Reporting Date</b> <i>(yyyy-mm-dd)</i>	
<b>Name of the Issuer</b>	
<b>Country Code</b>	
<b>Full Name</b>	
<b>Position Date</b> <i>(yyyy-mm-dd)</i>	
<b>Net Short Position After Threshold Crossing</b> <i>(Equivalent Nominal Amount)</i>	
<b>Date of Previous Notification</b> <i>(yyyy-mm-dd)</i>	
<b>Comments</b>	

## Appendix II

<b>CANCELLATION FORM FOR ERRONEOUS NOTIFICATIONS</b>			
<i>In terms of the Commission Delegated Regulation (EU) N° 826/2012 of 29.06.2012 - Supplementing Regulation (EU) No 236/2012</i>			
<b>POSITION HOLDER</b>	First Name		
	Last Name		
	Full Company Name		
	BIC Code (if applicable)		
	Country		
	Address		
	Contact Person	First Name	
		Last Name	
Phone Number			
Fax Number			
E-Mail Address			
<b>REPORTING PERSON (if different)</b>	First Name		
	Last Name		
	Full Company Name		
	Country		
	Address		
	Contact Person	First Name	
		Last Name	
		Phone Number	
Fax Number			
E-Mail Address			
<b>CANCELLED NET SHORT POSITION IN SHARES</b>			
Cancellation Date (yyyy-mm-dd)			
Name of the Issuer			
ISIN Code			
Full Name			
Position Date of the notification being cancelled (yyyy-mm-dd)			

<b>Net Short Position After Threshold Crossing Contained at the Notification Being Cancelled</b>	
<b>Number of Equivalent Shares</b>	
<b>% of Issued Share Capital</b>	
<b>Reporting Date of the Notification Being Cancelled (yyyy-mm-dd)</b>	
<b>Comments</b>	
<b>CANCELLED NET SHORT POSITION IN SOVEREIGN DEBT</b>	
<b>Cancellation Date (yyyy-mm-dd)</b>	
<b>Name of the Issuer</b>	
<b>Country Code</b>	
<b>Full Name</b>	
<b>Position Date of the notification being cancelled (yyyy-mm-dd)</b>	
<b>Net Short Position After Threshold Crossing Contained at the Notification Being Cancelled (Equivalent Nominal Amount)</b>	
<b>Reporting Date of the Notification Being Cancelled (yyyy-mm-dd)</b>	
<b>Comments</b>	
<b>CANCELLED POSITION IN UNCOVERED SOVEREIGN CREDIT DEFAULT SWAPS</b>	
<b>Cancellation Date (yyyy-mm-dd)</b>	
<b>Name of the Issuer</b>	
<b>Country Code</b>	
<b>Full Name</b>	
<b>Position Date of the notification being cancelled (yyyy-mm-dd)</b>	



<b>Net Short Position After Threshold Crossing Contained at the Notification Being Cancelled</b> <i>(Equivalent Nominal Amount)</i>	
<b>Reporting Date of the Notification Being Cancelled</b> <i>(yyyy-mm-dd)</i>	
<b>Comments</b>	

**Appendix III - Notification Form for Public Disclosure**

<b>Position Holder</b>	<b>Name of Issuer</b>	<b>ISIN</b>	<b>Net Short Position (%)</b>	<b>Date Position Was Created, Changed or Ceased to be Held (yyyy-mm-dd)</b>