

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 (Text with EEA relevance)

CHAPTER VI

**ROLE OF COMPETENT AUTHORITIES**

*Article 32*

**Competent authorities**

Each Member State shall designate one or more of the competent authorities for the purpose of this Regulation.

Where a Member State designates more than one competent authority, it shall clearly determine their respective roles and it shall designate the authority to be responsible for coordinating the cooperation and the exchange of information with the Commission, ESMA and the competent authorities of the other Member States.

Member States shall inform the Commission, ESMA and the competent authorities of the other Member States of those designations.

*Article 33*

**Powers of competent authorities**

1 In order to fulfil their duties under this Regulation, the competent authorities shall have all the supervisory and investigatory powers that are necessary for the exercise of their functions. They shall exercise their powers in any of the following ways:

- a directly;
- b in collaboration with other authorities;
- c by application to the competent judicial authorities.

2 In order to fulfil their duties under this Regulation, the competent authorities shall, in accordance with national law, have the power:

- a to gain access to any document in any form and to receive or take a copy thereof;
- b to require information from any natural or legal person and if necessary to summon and question a natural or legal person with a view to obtaining information;
- c to carry out on-site inspections with or without prior announcement;
- d to require existing telephone and existing data traffic records;
- e to require the cessation of any practice that is contrary to the provisions in this Regulation;
- f to require the freezing and/or the sequestration of assets.

3 The competent authorities shall, without prejudice to points (a) and (b) of paragraph 2, have the power in individual cases to require a natural or legal person entering into a credit default swap transaction to provide:

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- a an explanation about the purpose of the transaction and whether it is for the purposes of hedging against a risk or otherwise; and
- b information verifying the underlying risk where the transaction is for hedging purposes.

#### Article 34

##### **Professional secrecy**

1 The obligation of professional secrecy shall apply to all natural or legal persons who work or who have worked for the competent authority or for any authority or natural or legal person to whom the competent authority has delegated tasks, including auditors and experts contracted by the competent authority. Confidential information covered by professional secrecy may not be disclosed to any other natural or legal person or authority except where such disclosure is necessary for legal proceedings.

2 All the information exchanged between the competent authorities under this Regulation that concerns business or operational conditions and other economic or personal affairs shall be considered confidential and shall be subject to the requirements of professional secrecy, except where the competent authority states at the time of communication that such information may be disclosed or such disclosure is necessary for legal proceedings.

#### Article 35

##### **Obligation to cooperate**

The competent authorities shall cooperate where necessary or expedient for the purposes of this Regulation. In particular, the competent authorities shall, without undue delay, supply each other with information which is relevant for the purposes of carrying out their duties under this Regulation.

#### Article 36

##### **Cooperation with ESMA**

The competent authorities shall cooperate with ESMA for the purposes of this Regulation in accordance with Regulation (EU) No 1095/2010.

The competent authorities shall provide, without delay, ESMA with all the information necessary to carry out its duties in accordance with Regulation (EU) No 1095/2010.

#### Article 37

##### **Cooperation in case of request for on-site inspections or investigations**

1 The competent authority of one Member State may request assistance from the competent authority of another Member State with regard to on-site inspections or investigations.

The requesting competent authority shall inform ESMA of any request referred to in the first subparagraph. In case of an investigation or an inspection with cross-border effects, ESMA may and if requested shall coordinate the investigation or inspection.

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2 Where a competent authority receives a request from a competent authority of another Member State to carry out an on-site inspection or an investigation, it may:

- a carry out the on-site inspection or investigation itself;
- b allow the competent authority which submitted the request to participate in an on-site inspection or investigation;
- c allow the competent authority which submitted the request to carry out the on-site inspection or investigation itself;
- d appoint auditors or experts to carry out the on-site inspection or investigation;
- e share specific tasks relating to supervisory activities with the other competent authorities.

3 ESMA may request the competent authorities to carry out specific investigatory tasks and on-site inspections where information is reasonably required by ESMA to enable it to exercise a power expressly conferred on it by this Regulation.

### Article 38

#### Cooperation with third countries

1 The competent authorities shall, where possible, conclude cooperation arrangements with supervisory authorities of third countries concerning the exchange of information with supervisory authorities of third countries, the enforcement of obligations arising under this Regulation in third countries and the taking of similar measures in third countries by their supervisory authorities to complement measures taken under Chapter V. These cooperation arrangements shall ensure at least an efficient exchange of information that allows the competent authorities to carry out their duties under this Regulation.

A competent authority shall inform ESMA and the competent authorities of the other Member States where it proposes to enter into such an arrangement.

2 The cooperation arrangement shall contain provisions on the exchange of data and information necessary for the relevant competent authority to comply with the obligation set out in Article 16(2).

3 ESMA shall coordinate the development of cooperation arrangements between the competent authorities and the relevant supervisory authorities of third countries. For that purpose, ESMA shall prepare a template document for cooperation arrangements that may be used by the competent authorities.

ESMA shall also coordinate the exchange between the competent authorities of information obtained from supervisory authorities of third countries that may be relevant to the taking of measures under Chapter V.

4 The competent authorities shall conclude cooperation arrangements on the exchange of information with the supervisory authorities of third countries only where the information disclosed is subject to guarantees of professional secrecy which are at least equivalent to those set out in Article 34. Such exchange of information shall be intended for the performance of the tasks of those competent authorities.

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### Article 39

#### **Transfer and retention of personal data**

With regard to transfer of personal data between Member States or between Member States and a third country, Member States shall apply Directive 95/46/EC. With regard to transfer of personal data by ESMA to Member States or to a third country, ESMA shall comply with Regulation (EC) No 45/2001.

Personal data referred to in the first paragraph shall be retained for a maximum period of 5 years.

### Article 40

#### **Disclosure of information to third countries**

A competent authority may transfer to a supervisory authority of a third country data and the analysis of data where the conditions laid down in Article 25 or 26 of Directive 95/46/EC are fulfilled but such transfer shall be made only on a case-by-case basis. The competent authority shall be satisfied that the transfer is necessary for the purposes of this Regulation. Any such transfer shall be made under agreement that the third country shall not transfer the data to the supervisory authority of another third country without the express written authorisation of the competent authority.

A competent authority shall disclose information which is confidential pursuant to Article 34 and which is received from a competent authority of another Member State to a supervisory authority of a third country only where the competent authority has obtained the express agreement of the competent authority which transmitted the information and, where applicable, the information is disclosed solely for the purposes for which that competent authority gave its agreement.

### Article 41

#### **Penalties**

Member States shall establish rules on penalties and administrative measures, applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. Those penalties and administrative measures shall be effective, proportionate and dissuasive.

In accordance with Regulation (EU) No 1095/2010, ESMA may adopt guidelines to ensure a consistent approach is taken concerning the penalties and administrative measures to be established by Member States.

Member States shall notify the Commission and ESMA of the provisions referred to in the first and second subparagraphs by 1 July 2012 and shall notify them without delay of any subsequent amendment affecting those provisions.

ESMA shall publish on its website and update regularly a list of existing penalties and administrative measures applicable in each Member State.

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Member States shall provide ESMA annually with aggregate information regarding the penalties and administrative measures imposed. If a competent authority discloses to the public the fact that a penalty or an administrative measure has been imposed, it shall, contemporaneously, notify ESMA thereof.

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**Changes and effects yet to be applied to :**

- Regulation power to modify conferred by 2023 c. 29 s. 3Sch. 1 Pt. 1
- Regulation revoked by 2023 c. 29 Sch. 1 Pt. 1

**Changes and effects yet to be applied to the whole legislation item and associated provisions**

- Ch. 5 heading words omitted by S.I. 2018/1321 reg. 11(1)
- Ch. 7 heading substituted by S.I. 2018/1321 reg. 14(1)
- s. 2 heading words substituted by S.I. 2018/1321 reg. 12(1)
- Art. 1(1)(a) words substituted by S.I. 2018/1321 reg. 4(1)(a)
- Art. 1(1)(b)(c) words substituted by S.I. 2018/1321 reg. 4(1)(b)
- Art. 1(1)(c) words substituted by S.I. 2018/1321 reg. 4(2)
- Art. 2(1)(a) words substituted by S.I. 2018/1321 reg. 5(2)(a)
- Art. 2(1)(d) substituted by S.I. 2018/1321 reg. 5(2)(b)
- Art. 2(1)(i)(j) omitted by S.I. 2018/1321 reg. 5(2)(c)
- Art. 2(1)(k) words inserted by S.I. 2018/1321 reg. 5(2)(d)(ii)
- Art. 2(1)(k) words substituted by S.I. 2018/1321 reg. 5(2)(d)(i)
- Art. 2(1)(k) words substituted in earlier amending provision S.I. 2018/1321, reg. 5(2)(d)(ii) by S.I. 2020/1301 reg. 3Sch. para. 9(a)(i)
- Art. 2(1)(l) substituted by S.I. 2018/1321 reg. 5(2)(f)
- Art. 2(1)(p) substituted by S.I. 2018/1321 reg. 5(2)(g)
- Art. 2(1)(q) substituted by S.I. 2018/1321 reg. 5(2)(h)
- Art. 2(1)(r)-(x) inserted by S.I. 2018/1321 reg. 5(2)(i)
- Art. 2(1)(s)(ii)(iii) words substituted in earlier amending provision S.I. 2018/1321, reg. 5(2)(i) by S.I. 2020/1301 reg. 3Sch. para. 9(a)(ii)
- Art. 2(1)(ka) inserted by S.I. 2018/1321 reg. 5(2)(e)
- Art. 7(3)(b) words substituted by S.I. 2018/1321 reg. 8(3)(c)(iii)(aa)
- Art. 7(3)(b) words substituted by S.I. 2018/1321 reg. 8(3)(c)(iii)(bb)
- Art. 7(3)(c) words substituted by S.I. 2018/1321 reg. 8(3)(c)(iv)
- Art. 16(4)(b) omitted by S.I. 2018/1321 reg. 10(1)(d)(i)(bb)
- Art. 16(4)(c) words substituted by S.I. 2018/1321 reg. 10(1)(d)(i)(cc)
- Art. 17(6A) inserted by S.I. 2018/1321 reg. 10(2)(e)
- Art. 17(6A) words substituted in earlier amending provision S.I. 2018/1321, reg. 10(2)(e) by S.I. 2020/1301 reg. 3Sch. para. 9(c)(ii)
- Art. 18(1)(a) words omitted by S.I. 2018/1321 reg. 11(2)(a)(ii)(bb)
- Art. 18(1)(a) words substituted by S.I. 2018/1321 reg. 11(2)(a)(ii)(aa)
- Art. 19(1)(a) words omitted by S.I. 2018/1321 reg. 11(3)(a)(ii)(bb)
- Art. 19(1)(a) words substituted by S.I. 2018/1321 reg. 11(3)(a)(ii)(aa)
- Art. 20(1)(a) words omitted by S.I. 2018/1321 reg. 11(4)(a)(ii)(bb)
- Art. 20(1)(a) words substituted by S.I. 2018/1321 reg. 11(4)(a)(ii)(aa)
- Art. 21(1)(a) words omitted by S.I. 2018/1321 reg. 11(5)(a)(ii)(bb)
- Art. 21(1)(a) words substituted by S.I. 2018/1321 reg. 11(5)(a)(ii)(aa)
- Art. 25(2)(b) words substituted by S.I. 2018/1321 reg. 11(8)(b)