

Law of 12 July 2013 on short selling of financial instruments implementing 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

(Mém. A 2013, No. 126)

Chapter 1 – *Competent authority*

Article 1. The Commission de surveillance du secteur financier, hereafter referred to as the CSSF, is the competent authority for the purposes 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.

Article 2. (1) In order to fulfil its duties pursuant to Regulation (EU) No 236/2012, the CSSF has all the powers of supervision, intervention, inspection and investigation which are necessary to exercise its functions within the limits set in the above-mentioned regulation.

As regards the implementation of Article 33(2)(c) of Regulation (EU) No 236/2012 in Luxembourg:

- (a) The on-site inspections by the CSSF with persons referred to in Regulation (EU) No 236/2012 but not subject to its prudential supervision, may not be carried out without the express consent of the person with whom the inspection shall take place.
- (b) Where this consent is not given, the on-site inspection and seizing of any document, electronic file or other things that seem useful to ascertaining the truth must be subject to a prior authorisation, upon reasoned request (*demande motivée*) by the CSSF, by order of the investigating judge (*juge d'instruction*) with the *Tribunal d'arrondissement* (District Court) of the district in which the inspection shall be carried out. Where there are several investigating judges in a court, the chief investigating judge, or, should the latter not be available, the magistrate replacing him/her shall appoint, for each on-site inspection, the judge who shall be in charge of the inspection.
- (c) The investigating judge shall verify that the reasoned request submitted by the CSSF is justified and proportionate to the aim pursued; the request must include all the information elements that justify the on-site inspection. The investigating judge appoints a criminal investigation police officer (*officier de police judiciaire*) to assist the CSSF agents during the on-site inspection.
- (d) The person concerned by the on-site inspection and his/her counsel may attend the on-site inspection; they receive notification thereof the day before, with the indication, on pain of nullity, of the object and aim of the inspection. Exceptionally, if there is a possibility or probability that elements, whose certification and analysis seem useful to ascertaining the truth, might imminently be concealed, the CSSF agents and the appointed criminal investigation police officer in charge of assisting them shall initiate immediately these operations without prior notification to the persons concerned being required. A report on their operations shall be drawn up. Where the urgency of the request did not require notification to the persons concerned, the reason thereof shall be mentioned in the report.
- (e) The on-site inspections are carried out in all places where objects whose discovery would be useful to ascertaining the truth might be located. The investigating judge shall previously notify the State Prosecutor (*procureur d'Etat*). On-site inspections may not commence before 6.30 a.m. and after 8.00 p.m.; failure to do so shall render the inspection void. The provisions of the Code of Criminal Procedure (*Code d'instruction criminelle*) regarding the rights of defence in the context of searches are applicable to on-site inspections carried out by CSSF agents and the criminal investigation police officer.
- (f) During the on-site inspection, the CSSF agents and the criminal investigation police officer shall ensure the rights of defence, as well as, if necessary, the application of the legal provisions applicable to the instruction and inspection measures as set out in the concerned profession's own law.
- (g) The documents, electronic files and other things seized shall be listed in the report.

If an on-site inventory is difficult to carry out, the documents, files and other things seized shall be sealed off until they are listed in the inventory, in presence of the persons that attended the on-site inspection. The CSSF immediately receives a copy of all the documents and electronic files seized. The original documents, electronic files and other things seized are deposited at the registry (*greffe*) or entrusted to a judicial custodian (*gardien de saisie*). The provisions of the Code of Criminal

Procedure relating to seizures shall apply.

- (h) The on-site inspections report shall be signed by the person with whom the inspection was carried out and by the persons who attended the inspection; any refusal to sign shall be mentioned in the report. A copy of the report shall be provided to them. A copy of the report shall be provided to the investigating judge who delivered the order and to the person concerned by the inspection.

(2) For the purposes of Regulation (EU) No 236/2012, the CSSF shall collaborate and exchange information with foreign competent authorities, the European Commission and the European Securities and Markets Authority within the limits, under the conditions and according to the arrangements defined in that regulation.

Article 3. Unless otherwise provided by the law and without prejudice to the rights of defence, the procedure is secret during the investigation by the CSSF.

Chapter 2 – Obligations of the persons operating or managing a trading venue in Luxembourg

Article 4. Where the price of a financial instrument on a trading venue for which Luxembourg is the home Member State, in accordance with Article 1, item 6 of the law of 13 July 2007 on markets in financial instruments, has fallen significantly, within the meaning of Article 23 of Regulation (EU) No 236/2012, the natural or legal person which operates or manages this trading venue shall immediately inform the CSSF thereof.

Chapter 3 – Sanctions

Article 5. (1) The natural or legal persons subject to the provisions of Regulation (EU) No 236/2012 or to the measures taken for the implementation of the latter as well as the natural or legal persons subject to the provisions of Article 4 of this law, may be sanctioned by the CSSF where:

- (a) they do not comply with the provisions laid down in Articles 5, 6, 7, 8, 9, 12, 13, 14, 15, 17, 18, 19, 20, 21, 23 or 28 of Regulation (EU) No 236/2012 or in the measures taken for the implementation of these articles;
- (b) they do not comply with the deadlines set by Articles 9, 18 or 19 of Regulation (EU) No 236/2012 or by the measures taken by the CSSF for the implementation of these articles as regards the notification and disclosure of information;
- (c) they do not comply with the provisions laid down in Article 4 of this law;
- (d) in the framework of or pursuant to the provisions of Regulation (EU) No 236/2012, they publish information that is incomplete, inaccurate or false;
- (e) in the framework of or pursuant to the provisions of Regulation (EU) No 236/2012, they refuse to provide the requested documents or other information;
- (f) in the framework of or pursuant to the provisions of Regulation (EU) No 236/2012, they provided documents or other information that turn out to be incomplete, inaccurate or false;
- (g) in the framework of or pursuant to the provisions of Regulation (EU) No 236/2012, they impede the exercise of the CSSF's powers of supervision, intervention, inspection and investigation;
- (h) in the framework of or pursuant to the provisions of Regulation (EU) No 236/2012, they fail to act in response to the orders of the CSSF.

(2) The CSSF may issue, in order of gravity:

- (a) a warning;
- (b) a reprimand;
- (c) an administrative fine which amounts to no less than EUR 125 and no more than EUR 1,500,000 or, if the offence has brought direct or indirect pecuniary advantages to the persons referred to above, a fine the amount of which cannot be less than the amount of profit made or more than five times this amount.

When pronouncing the sanction, the CSSF takes into account the nature, the duration and the gravity of the offence, the conduct and background of the natural or legal person to be sanctioned, the damage to third parties and the advantages or profits which could have been or which were made through the offence.

(3) The CSSF may disclose to the public the sanctions pronounced pursuant to this article, unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved. The costs shall be borne by the persons sanctioned.

Article 6. The *Tribunal administratif* (Administrative Court) can undertake a full review of the merits of the decision adopted by the CSSF in implementation of this law.

Chapter 4 – *Final Provision*

Article 7. Reference to this law shall be made in abbreviated form by using the following designation:

"Law of 12 July 2013 on short selling of financial instruments".