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 regard 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 (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) No 918/2012

of 5 July 2012

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[1], and in particular Article 2(2), Article 3(7), Article 4(2), Article 7(3), Article 13(4), Article 23(7) and Article 30 thereof,

Whereas:

(1) Regulation (EU) No 236/2012 imposes certain measures in relation to short selling and credit default swaps. Article 42 of Regulation (EU) No 236/2012 empowers the Commission to adopt delegated acts to supplement the provisions of that Regulation in accordance with Article 290 of the Treaty on the Functioning of the European Union. This delegated act supplements and amends certain non-essential elements.

(2) The provisions in this Regulation are closely linked, since the notification and publication thresholds and the determination of uncovered credit default swaps depend on the definitions and the methods of calculation of short positions while the provisions on significant falls in the value of financial instruments and falls in the liquidity of sovereign debt markets and the determination of adverse events are inextricably linked. To ensure coherence between those provisions on short selling which should enter into force at the same time, it is appropriate to include all the provisions required by Regulation (EU) No 236/2012 in a single Regulation.

(3) Regulation (EU) No 236/2012 contains certain definitions. For further clarity and legal certainty, it is appropriate to provide supplementary provisions in relation to the definitions in Article 2(1), in particular when a natural or legal person is considered to own a financial instrument for the purposes of the definition of a short sale and further

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specification of when a natural or legal person 'holds' a share or debt instrument for the purposes of Regulation (EU) No 236/2012 are required. The specifications are chosen to ensure that Regulation (EU) No 236/2012 has the intended effect in a consistent manner despite the divergent approach of the laws of Member States. The concepts of ownership and holding in Member States concerning securities are currently not harmonised but the provisions of Regulation (EU) No 236/2012 are only intended to apply to short selling and to be without prejudice to any future legal developments such as harmonising legislation.

(4) Regulation (EU) No 236/2012 imposes restrictions and obligations, such as notification and publication requirements, on natural or legal persons holding or entering into net short positions in shares and sovereign debt. Long and short positions in shares and sovereign debt can be held and valued in different ways. In order to ensure a consistent approach and give effect to the intention of the measures on short positions in shares and sovereign debt it is therefore necessary to further specify how net short positions should be calculated. Short sales may occur through single instruments or through baskets of sovereign debt and so it is necessary to specify how short sales through baskets are included in these calculations. In order to ensure a robust approach to the calculation of net short positions, it is necessary to apply a more restrictive approach to specifying long positions than short positions in shares. Because the value of some financial instruments depend on variations in the price of underlying instruments, it is necessary to specify how to account for this. The delta-adjusted methodology is specified since it is a commonly accepted practice.

(5) Net short positions are calculated by reference to the long and short positions held by a natural or legal person. However long and short positions may be held by different entities within a group or in different funds managed by a fund manager. Large net short positions may be concealed by distributing them amongst entities within a group or amongst different funds. To reduce avoidance and ensure that the notifications and reporting of short positions provide an accurate and representative picture, more detailed provisions specifying how the calculation of net short positions should be performed for entities within a group and for fund managers are required. To give effect to these provisions it is necessary to define the meaning of investment strategy in order to clarify which entities' short positions in a group and which funds' short positions should be aggregated. It is also necessary to define management activities to clarify which funds' short positions should be aggregated. In order to ensure that the notifications are made, it is necessary to specify which entities within a group or in different funds are required to perform the calculations and make the notifications.

(6) Regulation (EU) No 236/2012 imposes restrictions on entering into uncovered sovereign credit default swap transactions but permits sovereign covered credit default swaps entered into for legitimate hedging purposes. A wide variety of assets and liabilities may be hedged using sovereign credit default swaps but distinguishing between legitimate hedging and speculation may be difficult in many cases. Detailed and additional specification of the cases in which a sovereign credit default swap can be considered to be covered is therefore required. Where a quantitative measure of correlation needs to be specified on a consistent basis, a simple, widely accepted

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and understood measure such as the Pearson's correlation coefficient should be used, calculated as the covariance of two variables divided by the product of their standard deviations. Matching assets and liabilities to create a perfect hedge is in practice difficult due to the diverse characteristics of different assets and liabilities as well as volatility in their values. Regulation (EU) No 236/2012 requires a proportionate approach to measures and when defining an uncovered credit default swap, it is therefore necessary to specify how a proportionate approach should be applied to assets and liabilities hedged by a covered credit default swap. Whereas Regulation (EU) No 236/2012 does not prescribe a specific degree of correlation necessary for a covered position in a sovereign credit default swap, it is necessary to specify that correlation should be meaningful.

(7) Regulation (EU) No 236/2012 requires that a natural or legal person holding a net short position in sovereign debt in excess of a threshold should notify the relevant competent authority of these positions. An appropriate specification of this threshold is therefore required. Minimal values that would not have any significant impact on the relevant sovereign debt market should not require notification and the threshold should take into account, inter alia, the liquidity of each individual bond market and the stock of outstanding sovereign debt as well as the objectives of this measure.

(8) The data required for the calculation of notification thresholds for net short positions relating to issued sovereign debt will not be available at the date of entry into force of this Regulation. Therefore the two criteria used to set the initial notification thresholds at the date of publication should be firstly the total amount of outstanding issued sovereign debt of the sovereign issuer and secondly the existence of a liquid futures market for that sovereign debt. Revised thresholds should be adopted when the relevant data on all the criteria is available.

(9) Where the liquidity in a sovereign debt market falls below a certain threshold, the restrictions on investors entering into uncovered short sales of sovereign debt may be lifted temporarily for the purpose of stimulating liquidity in that market. Where there is a significant fall in the value of a financial instrument on a trading venue, competent authorities may prohibit, restrict short selling or otherwise limit transactions in that instrument. There are a wide variety of instruments and it is necessary to specify the threshold for each of the different classes of financial instruments taking into account, differences such as those between the instruments and the different volatilities of their respective markets.

(10) No threshold for a significant fall in the value of the unit price of a listed UCITS, except for exchange-traded funds that are UCITS, is specified in this Regulation as although the price may vary freely in the trading venue, it is subject to a rule in Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[(2)] which keeps the prices close to the net asset value of the UCITS. No threshold for a significant fall in the value of derivatives is specified other than those specified in this Regulation.

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(11) This Regulation clarifies the intervention powers of both the relevant competent authorities and the European Securities Markets Authority (ESMA) established and exercising its powers in accordance with Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(3)] as regards adverse events or developments. A list of these events is required to ensure a consistent approach while permitting appropriate action to be taken where unforeseen adverse events or developments occur.

(12) For reasons of legal certainty it is necessary that this Regulation enter into force on the same day as Commission Delegated Regulation (EU) No 919/2012[(4)],

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL

Article 1

Subject matter

This Regulation lays down detailed rules supplementing the following Articles of Regulation (EU) No 236/2012 with regard to:

— Article 2(2) of Regulation (EU) No 236/2012 further specifying the definitions of ownership and short sale,

— Article 3(7) of Regulation (EU) No 236/2012 further specifying cases of and the method for calculating a net short position and the definition of holding,

— Article 4(2) of Regulation (EU) No 236/2012 further specifying uncovered positions in sovereign credit default swaps and the calculation methods for groups and fund management activities,

— Article 7(3) of Regulation (EU) No 236/2012 further specifying the notification threshold for significant short positions in sovereign debt,

— Article 13(4) of Regulation (EU) No 236/2012 further specifying the liquidity threshold for suspending restrictions on short sales of sovereign debt,

— Article 23(7) of Regulation (EU) No 236/2012 further specifying the meaning of significant falls in value of financial instruments other than liquid shares,

— Article 30 of Regulation (EU) No 236/2012 further specifying criteria and factors to be taken into account in determining in which cases the adverse events or developments referred to in Articles 18 to 21 and Article 27 and the threats referred to in point (a) of Article 28(2) of Regulation (EU) No 236/2012 arise.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(a) ‘group’ means those legal entities which are controlled undertakings within the meaning of Article 2(1)(f) of Directive 2004/109/EC of the European Parliament and of the Council[(5)] and the single natural or legal person that controls such undertaking;

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(b) 'supra-national issuer' means an issuer within the meaning of Article 2(1)(d)(i), (iv), (v) and (vi) of Regulation (EU) No 236/2012.

CHAPTER II

SUPPLEMENTARY SPECIFICATION OF DEFINITIONS PURSUANT TO ARTICLE 2(2) AND ARTICLE 3(7)(a)

Article 3

Specification of the term 'ownership' and defining a short sale

1 For the purposes of defining a short sale, the determination, where applicable, of whether a natural or legal person is considered to own a financial instrument when there are legal or beneficial ownerships thereof shall be made in accordance with the law applicable to the relevant short sale of that share or debt instrument. Where natural or legal persons are the beneficial owners of a share or debt instrument, that share or debt instrument shall be deemed to be owned by the ultimate beneficial owner, including where the share or debt instrument is held by a nominee. For the purposes of this Article, the beneficial owner shall be the investor who assumes the economic risk of acquiring a financial instrument.

2 For the purposes of points (i), (ii) and (iii) of Article 2(1)(b) of Regulation (EU) No 236/2012, and a 'short sale' within the meaning of Article 2(1)(b) of Regulation (EU) No 236/2012, does not include:

a the sale of financial instruments that have been transferred under a securities lending or repo agreement, provided that the securities will either be returned or the transferor recalls the securities so that settlement can be effected when it is due;

b the sale of a financial instrument by a natural or legal person who has purchased the financial instrument prior to the sale but has not taken delivery of that financial instrument at the time of the sale provided that the financial instrument will be delivered at such time that the settlement may be effected when due;

c the sale of a financial instrument by a natural or legal person who has exercised an option or a similar claim on that financial instrument, provided that the financial instrument will be delivered at such a time that the settlement may be effected when due.

Article 4

Holding

A natural or legal person is considered to hold a share or debt instrument for the purposes of Article 3(2)(a) of Regulation (EU) No 236/2012 in the following circumstances:

(a) the natural or legal person owns the share or debt instrument in accordance with Article 3(1);

(b) an enforceable claim to be transferred ownership of the share or debt instrument to the natural or legal person in accordance with the law applicable to the relevant sale.