



EUROPEAN COMMISSION

Brussels, 5.7.2012
C(2012) 4530 final

COMMISSION DELEGATED REGULATION (EU) No .../..

of 5.7.2012

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 regulatory technical standards for the method of calculation of the fall in value for liquid shares and other financial instruments

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

Article 23(8) of Regulation (EU) No 236/2012 empowers the Commission to adopt, following submission of draft standards by the European Securities and Markets Authority (ESMA), and in accordance with Article 10 of Regulation (EU) No 1095/2010, delegated acts on regulatory technical standards specifying the method of calculation of the 10% fall in value for liquid shares and of the fall in value specified by the Commission pursuant to Article 23(5) and (7) of Regulation (EU) No 236/2012.

The regulatory technical standards on this issue are closely related to the provisions of the Commission's parallel proposal for a delegated act on certain aspects of Regulation No 236/2012, including the definition of what is a significant fall in value of financial instruments other than liquid shares.

In accordance with Articles 10 to 15 of Regulation (EU) No 1095/2010 establishing ESMA, the Commission shall decide within three months of receipt of the draft standards whether to endorse the drafts submitted. The Commission may also endorse the draft standards in part only, or with amendments, where the Union's interests so require, having regard to the specific procedure laid down in those Articles.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, ESMA has carried out a public consultation on the draft technical standards submitted to the Commission in accordance with Article 23(8) of Regulation (EC) No 236/2012. A consultation paper was published on the ESMA internet site on 15 February 2012, and the consultation closed on 9 March 2012. Moreover, ESMA also consulted the Securities and Markets Stakeholder Group set up in accordance with Article 37 of Regulation (EU) No 1095/2010 and held an opening hearing at ESMA's premises on 29 February 2012.

3. ANALYSIS OF COSTS AND BENEFITS

Together with the draft technical standards, ESMA has submitted an explanation of how the outcome of these consultations has been taken into account in the development of the final draft technical standards submitted to the Commission. This analysis is available at: <http://www.esma.europa.eu/content/ESMAs-Technical-Advice-possible-delegated-acts-short-selling-and-certain-aspects-CDS>

The analysis examines the main benefits and costs that have been identified by ESMA in relation to the draft technical standards. ESMA considers that the overarching benefit of the regulatory technical standards related to the method of calculating significant price falls is of creating an orderly and transparent mechanism for assessing the need to intervene or not — market participants can assess the price changes themselves if they wish to confirm the Competent Authorities' calculations.

ESMA further considers that the consequent harmonisation of regulatory action avoids the discouragement of firms from participating fully in the market. ESMA concludes that the

tailoring of the calculation methodology to individual asset classes (or to segments within asset classes) should aid flexibility. ESMA considers that there will be associated one-off and on-going monitoring costs for the Competent Authorities, but is not able to disaggregate this from the incremental costs implied by the Regulation itself.

4. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 1 defines the subject matter of the delegated act.

Article 2 defines the method of calculation of the fall in value for shares.

Article 3 defines the method of calculation of the fall in value for other non-derivative financial instruments.

Article 4 defines the method of calculation of the significant fall in value for derivatives.

Article 5 provides that the Regulation shall enter into force on the day following that of its publication in the Official Journal and shall apply from 1 November 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 swaps¹, and in particular Article 23(8) thereof,

Whereas:

- (1) The method of calculation of the significant fall in value of financial instruments contained in Section C of Annex I of Directive 2004/39/EC of the European Parliament and Council of 21 April 2004 on markets in financial instruments² should be adapted to the various ways in which that fall is reflected depending on the type of financial instrument concerned. That method can take the form of an actual fall in price of the financial instrument, of an increase in the yield of a debt instrument issued by a corporate issuer or an increase in the yield across the yield curve for debt instruments issued by sovereign issuers.
- (2) This Regulation should be read in conjunction with Commission Delegated Regulation (EU) No XXXX³, which defines thresholds for the significant fall in value of illiquid shares, debt instruments issued by sovereign and corporate issuers, Exchange Traded Funds, money market instruments and derivatives whose sole underlying financial instrument is traded on a trading venue. This Regulation should therefore restrict itself to specifying the method of calculation of the significant fall in value of these instruments.
- (3) In order to ensure consistency and legal certainty for market participants and competent authorities, the date of application of this Regulation should be the same as

¹ OJ L 86, 24.3.2012, p. 1

² OJ L 145, 30.4.2004, p. 1.

³ [P.O. please insert O.J. reference and date of publication of Commission delegated act due to enter into force on the same day]

that of Regulation (EU) No 236/2012 and Commission Delegated Regulation (EU) No XXXX.

- (4) Since Regulation (EU) No 236/2012 recognised that binding technical standards should be adopted before that Regulation can be usefully applied, and as it is essential to specify before 1 November 2012 the required non-essential elements to facilitate compliance by market participants with that Regulation and enforcement by competent authorities, it is necessary that this Regulation should enter into force on the day following its publication.
- (5) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.
- (6) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established in accordance with Article 37 of 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)⁴,

HAS ADOPTED THIS REGULATION:

Article 1
Subject Matter

1. This Regulation specifies the method of calculation of the 10 % fall in value for liquid shares traded on a trading venue as set out in Article 23(5) of Regulation (EU) No 236/2012.
2. This Regulation also specifies the method of calculation of the fall in value for the following financial instruments traded on a trading venue as specified in the Commission delegated Regulation (EU) No XXXX⁵ adopted pursuant to Article 23(7) of Regulation (EU) No 236/2012:
 - (a) illiquid shares;
 - (b) the following non-derivative financial instruments:
 - (i) debt instruments issued by sovereign and corporate issuers;
 - (ii) Exchange Traded Funds;
 - (iii) money market instruments;
 - (c) derivatives whose sole underlying is a financial instrument traded on a trading venue.

⁴ O.J. L331, 15.12.2010, p. 84

⁵ [P.O. please insert O.J. reference and date of publication of Commission delegated act due to enter into force on the same day]

Article 2

Method of calculation of a significant fall in value for liquid and illiquid shares

1. For a share traded on a trading venue, the fall in value shall be calculated from the official closing price of the previous trading day at that trading venue defined according to the applicable rules of that trading venue.
2. That method of calculation shall exclude any downward movement of a price resulting exclusively from a split or any corporate action or similar measures adopted by the issuer on its issued share capital which can result in an adjustment of the price by the relevant trading venue.

Article 3

Method of calculation of a significant fall in value for other non-derivative financial instruments

1. A significant fall in value for financial instruments other than shares and not falling into the categories of derivatives listed in points (4) to (10) of Section C of Annex 1 of Directive 2004/39/EC shall be calculated according to the method in paragraphs 2, 3 and 4.
2. For a financial instrument for which the significant fall in value referred to in Article 23(7) of Regulation (EU) No 236/2012 is measured in relation to a price on the relevant trading venue, that fall shall be calculated from the official closing price at the relevant trading venue defined according to the applicable rules of that trading venue.
3. For a financial debt instrument issued by a sovereign issuer for which the significant fall in value referred to in Article 23(7) of Regulation (EU) No 236/2012 is measured in relation to a yield curve, that fall shall be calculated as an increase across the yield curve in comparison with the yield curve of the sovereign issuer at the close of trading of the previous trading day, as calculated based on data available for the issuer on that trading venue.
4. For a financial instrument for which the significant fall in value referred to in Article 23(7) of Regulation (EU) No 236/2012 is measured in relation to a variation of the yield, that fall shall be calculated as an increase of the current yield as compared to the yield of that instrument at the close of trading of the previous trading day, as calculated based on data available for that instrument on that trading venue.

Article 4

Method of calculation of a significant fall in value for derivatives

A significant fall in value for financial instruments falling under the categories of derivatives listed in points (4) to (10) of section C of Annex 1 of Directive 2004/39/EC and which have a sole underlying financial instrument that is traded on a trading venue and for which a significant fall in value has been specified in accordance with Article 2 or Article 3, shall be calculated by reference to the significant fall in value of the underlying financial instrument.

Article 5
Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 November 2012.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 5.7.2012

For the Commission
The President
José Manuel BARROSO