



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 27 September 2012

**Interinstitutional File:
2010/0251 (COD)**

**13922/2/12
REV 2**

**EF 204
ECOFIN 784
DELECT 44**

“I/A” ITEM NOTE

from: General Secretariat of the Council
to: Coreper/Council

No. Cion doc.: 12316/12 EF 165 ECOFIN 686 DELACT 34

Subject: 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 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
- Intention not to raise objections to a delegated act

1. On 6 July 2012 the Commission submitted the abovementioned delegated act¹ to the Council in accordance with the procedure set out in Article 290 TFEU and Article 42 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 swaps².

¹ Doc. 12316/12.

² OJ L 86, 24 March 2012, p. 1.

2. According to Article 42(5) of Regulation (EU) No 236/2012, the Council may object to a delegated act within a period of three months.
3. During the silence procedure within the framework of Working Party on Financial Services, which ended on 13 September 2012, the DE and UK delegations indicated their intention to object to the delegated act. These delegations have together 58 votes, whereas the requirement for the Council to object to the delegated act is a qualified majority (255 votes).
4. It is therefore suggested that Coreper invites the Council (EPSCO on 4 October 2012) to:
 - confirm that the Council has no intention to object to the delegated act and that the Commission and the European Parliament are to be informed thereof; this implies that, unless the European Parliament objects to it, the delegated act shall be published and enter into force in accordance with Article 42 of Regulation (EU) No 236/2012;
 - enter into its minutes the statements, as set out in the Annex.

Statement by Germany

Germany is concerned about the manner in which the post-Lisbon level two process is being conducted. The Commission's draft Delegated Act for the Short Selling Regulation departs from ESMA's advice in a number of areas, without explanation. ESMA advice is compiled through a transparent and thorough consultation process, and provides expert understanding from Europe's supervisory authorities.

While we recognise the Commission is not obliged to follow ESMA advice, the credibility of the level two process must be ensured. We therefore request that the Commission adopts a more open and consultative approach in future, when drawing up level two proposals, in particular explaining the reasons for any such deviations.

Regarding the content of the Delegated Act we regret especially that the hedging requirements concerning Credit Default Swaps are very narrow and inflexible. This could e.g. hinder investments in Member States with illiquid Credit Default Swaps markets significantly and the hedging against general economic risks which might occur in a Member State.

Statement by Italy

Italy is concerned about the method of calculation of the notification threshold for short position in relation to sovereign debt (0.5 % of the total sovereign debt issued, according to art. 21, par. 7 lett. b) because such method implies notification threshold excessively high for those Member States with a significant amount of sovereign debt issued (the notification threshold for Italy would be around 8.3 billion euros).

During the consultation Italy suggested adjusting the calculation method in order to establish also a threshold in absolute terms, for instance 3 billion euros. Therefore, Italy would encourage the Commission to modify art. 21 of the delegated Regulation in the review procedure (by 30 June 2013).

Statement by the UK, Portugal, Hungary, Finland, Sweden, Belgium, Ireland, Czech Republic, Denmark, Estonia and Austria

The UK, Portugal, Hungary, Finland, Sweden, Belgium, Ireland, Czech Republic, Denmark, Estonia and Austria are concerned about the manner in which the post-Lisbon level two process is being conducted. The Commission's draft Delegated Act for the Short Selling Regulation departs from ESMA's advice in a number of areas, without explanation.

ESMA advice is compiled through a transparent and thorough consultation process, and provides expert understanding from Europe's supervisory authorities. While we recognise the Commission is not obliged to follow ESMA advice, the credibility of the level two process must be ensured. We therefore request that the Commission adopts a more open and consultative approach in future, when drawing up level two proposals, in particular explaining the reasons for any such deviations.

Statement by the UK

Further to the joint statement made by the UK, Portugal, Hungary, Finland, Sweden, Belgium, Ireland, Czech Republic, Denmark, Estonia and Austria expressing concerns on the process followed by the Commission in drawing up the Delegated Acts, the UK would also like to note that the draft Delegated Act deviates in important points from the ESMA advice in a way that is likely to have a material impact on the practical application of these Regulations. We regret especially that the hedging requirements concerning Credit Default Swaps are very narrow and inflexible. This could e.g. hinder investments in Member States with illiquid Credit Default Swaps markets significantly and the hedging against general economic risks which might occur in a Member State.
