
DRAFT STATUTORY INSTRUMENTS

2018 No.

The Short Selling (Amendment) (EU Exit) Regulations 2018

PART 3

Amendments of Regulation (EU) No 236/2012

Introduction to amendments of Regulation (EU) No 236/2012

3. Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14th March 2012 on short selling and certain aspects of credit default swaps (“the Short Selling Regulation”) is amended in accordance with this Part.

Scope

4.—(1) In Article 1.1—

- (a) in point (a), for “Union” substitute “United Kingdom”;
- (b) in point (b) and (c), for “Section C of Annex 1 to [Directive 2004/39/EC](#)” substitute “Part 1 of Schedule 2 to the Regulated Activities Order 2001”;

(2) In Article 1.1(c), for “a Member State or the Union” both times it occurs, substitute “the United Kingdom”.

Interpretation

5.—(1) Article 2 is amended as follows.

(2) In paragraph 1—

- (a) in point (a), for “Section C of Annex I to [Directive 2004/39/EC](#)” substitute “Part 1 of Schedule 2 to the Regulated Activities Order 2001”;

(b) for point (d), substitute—

““sovereign issuer” means the United Kingdom, including any government department, or an agency or a special purpose vehicle of the United Kingdom;”

(c) omit points (i) and (j);

(d) in point (k)—

(i) for “point (l) of Article 2(1) of [Directive 2004/39/EC](#)”, substitute “point (ka);”;

(ii) after “Article 17(2)” insert “as it had effect before exit day, or by the Treasury in accordance with that paragraph as amended;”;

(e) after point (k), insert—

“(ka) for the purposes of point (k), the firms referred to in this point are firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those

markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;”

(f) for point (l), substitute—

““trading venue” means—

- (i) a UK regulated market within the meaning of point (13B) of Article 2(1) of Regulation (EU) No 600/2014⁽¹⁾;
- (ii) a UK multilateral trading facility within the meaning of point (14A) of Article 2(1) of Regulation (EU) No 600/2014;”;

(g) for point (p), substitute—

“(p) “trading day” in relation to a trading venue, means a day during which the trading venue concerned is open for trading;”;

(h) for point (q) substitute—

“(q) “turnover”, in relation to a financial instrument, means the sum of the results of multiplying the number of units of that instrument exchanged between buyers and sellers in a defined period of time, pursuant to transactions taking place on a trading venue or otherwise, by the unit price applicable to each transaction;”;

(i) after point (q), insert—

“(r) “FCA” means the Financial Conduct Authority;

(s) “competent authority” means—

- (i) in relation to the United Kingdom, the FCA;
- (ii) in relation to a Member State of the European Union, the authority which has been designated by that Member State as its competent authority for the purposes of Article 32 of this Regulation as it was in force immediately before exit day; and
- (iii) in relation to a third country which is not a Member State of the European Union, the supervisory authority which exercises functions equivalent to those exercised by competent authorities in Member States under this Regulation as it was in force immediately before exit day;

(t) “credit institution” has the meaning given in Article 2(1)(17) of Regulation (EU) No 600/2014;

(u) “investment firm” has the meaning given in Article 2(1A) of Regulation (EU) No 600/2014;

(v) references to a “third country” (including in expressions including the words “third country”) are to be read as references to a country other than the United Kingdom;

(w) “Regulated Activities Order 2001” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001⁽²⁾;

(x) “PRA” means the Prudential Regulation Authority”.

(3) In paragraph 2—

(i) for “Commission shall be empowered to adopt delegated acts in accordance with Article 42 specifying” substitute “Treasury may by regulations specify”;

(1) References to Regulation 2014/600/EU are to that Regulation as amended by the Markets in Financial Instruments (Amendment)(EU Exit) Regulations.

(2) [S.I. 2001/544](#).

(ii) for “in particular specifying” substitute “and in particular specify”.

Short and long positions

6. In Article 3.7, for the words from the beginning to “specifying”, substitute “The Treasury may by regulations specify”.

Sovereign credit default swap

7. In Article 4.2, for “Commission shall be empowered to adopt delegated acts in accordance with Article 42 specifying” substitute “Treasury may by regulations specify”.

Transparency of Net Short Positions

8.—(1) In Article 5—

- (a) in paragraph 1, for “relevant competent authority” substitute “FCA”;
- (b) omit paragraph 3;
- (c) in paragraph 4, for “Commission shall be empowered to adopt delegated acts in accordance with Article 42 modifying” substitute “Treasury may by regulations modify”.

(2) In Article 6—

- (a) omit paragraph 3;
- (b) in paragraph 4, for “Commission shall be empowered to adopt delegated acts in accordance with Article 42 modifying” substitute “Treasury may by regulations modify”;
- (c) in paragraph 5, for “supervisory authorities appointed by Member States pursuant to Article 4 of [Directive 2004/25/EC](#) of the European Parliament and of the Council of 21 April 2004 on takeover bids” substitute “Panel on Takeovers and Mergers”.

(3) In Article 7—

- (a) in paragraph 1—
 - (i) for “relevant competent authority” substitute “FCA”;
 - (ii) omit “concerned”;
- (b) in paragraph 2—
 - (i) for “each sovereign” substitute “the sovereign”;
 - (ii) after “paragraph 3”, insert “before exit day, or in regulations made by the Treasury in accordance with that paragraph as amended”;
 - (iii) for the final sentence substitute “The FCA shall publish on its website the notification thresholds for the United Kingdom.”;
- (c) in paragraph 3—
 - (i) for “Commission shall be empowered to adopt delegated acts in accordance with Article 42 specifying” substitute “Treasury may by regulations specify”;
 - (ii) for “Commission”, in the second place it occurs, substitute “Treasury”;
 - (iii) in point (b) in the second sub-paragraph—
 - (aa) for “each sovereign” substitute “the sovereign”;
 - (bb) for “that sovereign” substitute “the sovereign”;
 - (iv) in point (c) for “each sovereign” substitute “the sovereign”.

(4) In Article 8—

- (a) for “a competent authority” substitute “the FCA”;
- (b) for “relevant competent authority” substitute “FCA”.
- (5) In Article 9—
 - (a) in paragraph 2, in the final sentence, for the words from “Member State” to the end of the sentence, substitute “United Kingdom”;
 - (b) in paragraph 3, for “a relevant competent authority” substitute “the FCA”;
 - (c) in paragraph 4—
 - (i) for “relevant competent authority” substitute “FCA”;
 - (ii) omit the final sentence;
 - (d) for paragraph 5, substitute—

“5. The FCA may make technical standards specifying the details of the information to be provided for the purposes of paragraph 1.”;
 - (e) for paragraph 6, substitute—

“6. For the purposes of paragraph 4, the FCA may make technical standards specifying the means by which information may be disclosed to the public.”.
- (6) In Article 10, for “Union” substitute “United Kingdom”.
- (7) Omit Article 11.

Uncovered short sales

- 9.—(1) In Article 12(2)—
 - (a) in the first sub-paragraph—
 - (i) in the first sentence, for the words from the beginning to “develop draft” substitute “For the purposes of paragraph 1, the FCA may make”;
 - (ii) in the second sentence, for “ESMA” substitute “the FCA”;
 - (b) omit the second and third sub-paragraphs.
- (2) In Article 13—
 - (a) in paragraph 3—
 - (i) in the first sub-paragraph—
 - (aa) after “referred to in”, the first time it occurs, insert “Commission Delegated Regulation (EU) No 918/2012 or in regulations made by the Treasury under”;
 - (bb) for “relevant competent authority” substitute “FCA”;
 - (cc) omit the final sentence;
 - (ii) in the second sub-paragraph, for “relevant competent authority” substitute “FCA”;
 - (iii) omit the third sub-paragraph;
 - (b) in paragraph 4—
 - (i) in the first sub-paragraph, for “Commission shall adopt delegated acts in accordance with Article 42 specifying” substitute “Treasury may by regulations specify”;
 - (ii) in the second sub-paragraph, omit “for Member States”;
 - (iii) in the third sub-paragraph, for “each sovereign” substitute “the sovereign”;
 - (c) in paragraph 5—

- (i) in the first sub-paragraph—
 - (aa) in the first sentence, for the words from the beginning to “develop draft” substitute “For the purposes of paragraph 1, the FCA may make”;
 - (bb) in the second sentence, for “ESMA”, substitute “The FCA”;
 - (ii) omit the second and third sub-paragraphs.
- (3) In Article 14, in paragraph 2—
- (a) in the first sub-paragraph—
 - (i) for “A competent authority” substitute “The FCA”;
 - (ii) for “sovereign issuers” substitute “the sovereign issuer”;
 - (iii) for “issuers’ ability” substitute “issuer’s ability”;
 - (b) in the second sub-paragraph, for “competent authority” substitute “FCA”;
 - (c) omit the third and fifth sub-paragraphs;
 - (d) in the fourth sub-paragraph, for “relevant competent authority” substitute “FCA”.

Exemptions

- 10.**—(1) In Article 16—
- (a) in paragraph 1—
 - (i) for “Union” substitute “United Kingdom”;
 - (b) in paragraph 2—
 - (i) for the first sub-paragraph, substitute—

“2. Where the shares of a company are traded on a trading venue in the United Kingdom and a venue located in a third country the FCA shall determine, at least every two years, whether the principal trading venue for the trading of those shares is located in a third country.”;
 - (ii) after the first sub-paragraph, insert—

“Where the shares of a company traded on a trading venue in the United Kingdom and a venue located in a third country were included in the most recent list published by ESMA under Article 16.2 of this Regulation as it had effect before exit day, those shares are to be treated as entitled to the exemption provided for in paragraph 1 for a period of two years beginning with exit day.”;
 - (iii) omit the second sub-paragraph;
 - (iv) in the third sub-paragraph, for “ESMA” substitute “the FCA”;
 - (c) in paragraph 3—
 - (i) in the first sub-paragraph for the words from the beginning to “develop draft regulatory”, substitute “For the purposes of this Article, the FCA may make”;
 - (ii) omit the second and third sub-paragraphs;
 - (d) in paragraph 4—
 - (i) in the first sub-paragraph—
 - (aa) for the words from the beginning to “develop draft implementing”, substitute “For the purposes of paragraphs 1 and 2, the FCA may make”;
 - (bb) omit point (b);
 - (cc) in point (c), for “ESMA” substitute “the FCA”;

- (ii) delete the second and third sub-paragraphs.
- (2) In Article 17—
 - (a) in the first sub-paragraph of paragraph 2—
 - (i) for “Commission may, in accordance with the procedure referred to in Article 44(2), adopt decisions determining” substitute “Treasury may by regulations determine”;
 - (ii) for “Title III of Directive 2004/39/EC” substitute “Title III of Directive 2014/65/EU and Articles 3, 4, 6 and 7 of Regulation (EU) No 600/2014”;
 - (iii) for “Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)” substitute “Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April on market abuse”;
 - (b) in paragraph 4, for “Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments” substitute “Commission Delegated Regulation (EU) No 2016/1052 of 8 March 2016 supplementing Regulation (EU) No 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures”;
 - (c) in paragraph 5, for “competent authority of its home Member State” substitute “FCA”;
 - (d) in paragraph 6, for “relevant competent authority” substitute “FCA”;
 - (e) insert after paragraph 6—

“6A. A notification made under paragraph 5 or 6 before exit day to a competent authority other than the FCA is only valid after exit day if a copy of that notification has been provided to the FCA not less than 30 calendar days before the day of exit day.”;
 - (f) in paragraph 7—
 - (i) in the first sentence, for “competent authority referred to in paragraphs 5 and 6” substitute “FCA”;
 - (ii) in the second sentence, for “competent authority” substitute “FCA”;
 - (g) omit paragraph 8;
 - (h) in paragraph 9, for “competent authority of its home Member State” substitute “FCA”;
 - (i) in paragraph 10, for “relevant competent authority” substitute “FCA”;
 - (j) in paragraph 11, for “competent authority of the home Member State” substitute “FCA”;
 - (k) omit paragraph 12;
 - (l) in paragraph 13, for “ESMA” substitute “The FCA”;
 - (m) omit paragraph 14.

Powers of intervention

- 11.—(1) In the heading to Chapter V, omit “and of ESMA”.
- (2) In Article 18—
 - (a) in paragraph (1)—
 - (i) in the words before point (a)—
 - (aa) omit “Subject to Article 22,”;
 - (bb) for “a competent authority” substitute “The FCA”;

- (cc) for “competent authority”, the second time it occurs, substitute “FCA”;
- (ii) in point (a)—
 - (aa) for “Member State concerned” substitute “United Kingdom”;
 - (bb) omit “or in one or more other Member States”.
- (b) in paragraph (2), for “competent authority” substitute “FCA”.
- (3) In Article 19—
 - (a) in paragraph (1)—
 - (i) in the words before point (a)—
 - (aa) omit “Subject to Article 22,”;
 - (bb) for “a competent authority” substitute “The FCA”;
 - (ii) in point (a)—
 - (aa) for “Member State concerned” substitute “United Kingdom”;
 - (bb) omit “or in one or more other Member States”;
 - (b) in paragraph (2), for “A competent authority” substitute “The FCA”.
- (4) In Article 20—
 - (a) in paragraph (1)—
 - (i) in the words before point (a)—
 - (aa) omit “Subject to Article 22,”;
 - (bb) for “a competent authority” substitute “The FCA”;
 - (ii) in point (a)—
 - (aa) for “Member State concerned” substitute “United Kingdom”;
 - (bb) omit “or in one or more other Member States”.
 - (b) in paragraph (2), for “A competent authority” substitute “The FCA”;
 - (c) in paragraph (3), for “competent authority” substitute “FCA”.
- (5) In Article 21—
 - (a) in paragraph (1)—
 - (i) in the words before point (a)—
 - (aa) omit “Subject to Article 22”;
 - (bb) for “a competent authority” substitute “The FCA”;
 - (ii) in point (a)—
 - (aa) for “Member State concerned” substitute “United Kingdom”;
 - (bb) omit “or in one or more other Member States”;
 - (b) in paragraph (2), for “competent authority” substitute “FCA”.
- (6) Omit Article 22.
- (7) In Article 23—
 - (a) for “competent authority” each time it occurs, substitute “FCA”;
 - (b) in paragraph 1, omit “of the home Member State for that venue”;
 - (c) omit paragraph 4;
 - (d) for paragraph 5, substitute—

“5. The fall in value shall be—

- (a) 10% or more in the case of a share which is considered to have a liquid market under Article 1 of Commission Delegated Regulation (EU) No 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions; and
- (b) the amount specified in Commission Delegated Regulation (EU) No 918/2012, or in regulations made by the Treasury under paragraph 7, in the case of any share which is not considered to have a liquid market, or for other classes of financial instruments.”;
- (e) in paragraph 6—
 - (i) omit the first sub-paragraph;
 - (ii) in the second sub-paragraph, for “Commission shall be empowered to adopt delegated acts in accordance with Article 42 modifying” substitute “Treasury may by regulations modify”;
- (f) in paragraph 7, for “Commission shall adopt delegated acts in accordance with Article 42 specifying” substitute “Treasury may by regulations specify”;
- (g) in paragraph 8—
 - (i) in the first sub-paragraph—
 - (aa) for the words from the beginning to “develop draft regulatory”, substitute “For the purposes of this Article, the FCA may make”;
 - (bb) for “Commission” substitute “Treasury”;
 - (ii) omit the second and third sub-paragraphs.
- (8) In Article 25—
 - (a) in paragraph 1, for “A competent authority” substitute “The FCA”;
 - (b) in paragraph 2(b), for “competent authority” substitute “FCA”.
- (9) Omit Article 26.

ESMA

- 12.—(1) In the heading for Section 2, for “ESMA” substitute “the Treasury”.
- (2) Omit Articles 27 to 29.
- (3) For Article 30, substitute—

“Article 30

Further specification of adverse events or developments

The Treasury may by regulations specify the criteria and factors to be taken into account by the FCA in determining in which cases the adverse events or developments referred to in Articles 18 to 21 arise.”

- (4) Omit Article 31.

Competent Authorities

- 13.—(1) Omit Articles 32 and 33.

- (2) In Article 34—
 - (a) in paragraph 1, for “competent authority” in each place it occurs, substitute “FCA”;
 - (b) in paragraph 2—
 - (i) for “exchanged between the competent authorities” substitute “exchanged between the Treasury, the PRA or the FCA, or received by the Treasury, the PRA or the FCA from another authority”;
 - (ii) for “competent authority” substitute “authority from which the information is received”.
- (3) Omit Articles 35, 36 and 37.
- (4) In Article 38—
 - (a) in paragraph 1—
 - (i) for “competent authorities”, the first time it occurs, substitute “FCA”;
 - (ii) for “competent authorities to carry out their” substitute “FCA to carry out its”;
 - (iii) omit the final sentence;
 - (b) in paragraph 2, for “relevant competent authority” substitute “FCA”;
 - (c) omit paragraph 3;
 - (d) in paragraph 4—
 - (i) for “competent authorities shall” substitute “FCA may”;
 - (ii) for “those competent authorities” substitute “the FCA”.
- (5) For Article 39, substitute—

“Article 39

Transfer and retention of personal data

Nothing in this Regulation is to be taken as authorising a disclosure of personal data in contravention of Regulation (EU) No 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data or of the Data Protection Act 2018(3).”

- (6) In Article 40—
 - (a) for the first sentence of the first paragraph, substitute “The FCA may transfer data and the analysis of data to a supervisory authority of another country where the transfer does not contravene Regulation (EU) No 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data or the Data Protection Act 2018, but such transfer may only be made on a case-by-case basis.”;
 - (b) in the second sentence of the first paragraph, for “competent authority shall” substitute “FCA must”;
 - (c) in the last sentence of the first paragraph, for “competent authority” substitute “FCA”;
 - (d) for the second paragraph, substitute—

“The FCA shall disclose information which is confidential pursuant to Article 34 and which is received from a competent authority of a third country to a competent authority of another country only where the FCA 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.”

(7) Omit Article 41.

Regulations

14.—(1) In the heading for Chapter VII, for “delegated acts” substitute “Regulations”.

(2) For Article 42, substitute—

“Article 42

Regulations

1. Any power to make regulations conferred on the Treasury by this Regulation is exercisable by statutory instrument.

2. Such regulations may—

- (a) contain incidental, supplemental, consequential and transitional provision; and
- (b) may make different provision for different purposes.

3. A statutory instrument containing regulations made under this Regulation is subject to annulment in pursuance of a resolution of either House of Parliament.”

(3) Omit Articles 43 to 45.

(4) In Article 46, omit paragraph 1.

(5) Omit Article 47.

(6) In Article 48, omit the fourth sub-paragraph.