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The international experience and the current Russian legislation regarding supervision of marginal crediting

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ABSTRACT

The article analyzes the international Supervisory experience of the European Union in terms of monitoring the implementation of short sales. The analysis was carried out in order to determine further key directions of development of the Russian market of margin lending. In addition, the article also considers the current Russian legislation in terms of supervision of unsecured transactions, regulated by the Decree of the Central Bank of the Russian Federation, which entered into force on July 1, 2019. The obtained results of the analysis allowed to make a comparative characteristic of the regulation of short sales in the European and Russian jurisdictions, as well as to make a forecast regarding the hypothetical transformations of the current Russian legislation.

The analysis of the European experience in part of control of implementation of the short sales established by SSR to disclosure of information on short positions, to restrictions on short sales, to powers and ESMA obligations, etc., allows to come to conclusion that regulation in the Russian jurisdiction can be expanded not only due to complication of a procedure for granting of a marginal loan by inclusion in a portfolio of the client of difficult nonlinear tools, but also due to establishment of requirements for disclosure of information on the high-concentrated short positions and establishment of thus constantly reconsidered threshold size. In article the assumption that the designated directions of development of regulation of short sales regarding expansion of powers of the regulator also will increase transparency of intermediary activity and the financial market is made, having provided thus reliable protection of interests of clients of financial intermediaries.

KEYWORDS:

margin lending, uncovered positions, short sales, unsecured trades.

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1. INTRODUCTION

By concluding transactions in the securities market a customer has an opportunity to use not only his own, but also borrowed funds, which can be provided by the broker. In this case, the borrowed funds are called "margin", and the algorithm for using borrowed funds is called "margin lending" [Ponomaryov, 2008]. Margin transactions appeared in modern brokerage business practice in the early 1990s and gradually became an integral part of it, because they ensured the attraction and retention of the most active customers, and formed a significant share of brokers' income [Mukhametshin, Ryzhikov, 2010].

The market demand and popularity among the customers of margin transaction led to periodic modernization of legal regulation and control of margin lending as the imperfection of regulatory norms forced brokers to adjust their activities to the legal framework established by the regulator. An example of such a transformation was the re-issuance by the Bank of Russia of a regulatory act in 2019 establishing requirements for leveraged trading (hereinafter referred to as Ordinance 4928-U) [Ordinance of the Bank of Russia ..., 2018]. Previously, the approach to regulating margin lending was based on the requirement for a broker to maintain a predetermined ratio of the value of the client's portfolio and the size of the market risk of this portfolio [Bank of Russia Ordinance ..., 2014]. At the same time, the Russian regulation that was in force until July 1, 2019 affected only securities transactions, which created a noticeable bias in risk management models of complex client portfolios, which include currency and derivative financial instruments. The new version of the regulatory act is aimed at expanding the perimeter of trade regulation with leverage, including linear financial instruments (futures) and currency positions. Non-linear derivative financial instruments, such as options and individual types of swaps, have not yet entered the perimeter of trade regulation with leverage, however, these changes are planned in the future.

The improvement in the regulation of margin lending by including complex non-linear instruments in the client's portfolio predetermined the goal of this study - to analyze the international experience to predict possible ways to develop supervisory regulation of short sales in the Russian jurisdiction.

2. THE EUROPEAN EXPERIENCE REGARDING THE SUPERVISION OF MARGIN LENDING

Currently, the world practice does not have a single approach to regulating portfolio margining and providing customers with borrowed funds when trading on the stock market.

The report of the International Organization of Securities Commissions (IOSCO) "The Report on margin by the Technical Committee of IOSCO" [Regulation of Short Selling ..., 2009], formulates the basic principles of margin lending:

- the basis of trading with leverage is the historical and imputed volatility of the trading instrument and the market as a whole;
- margin levels may vary for brokers' clients of different categories;
- regulation should be flexible to quickly increase margin levels while increasing volatility;
- in determining margin levels the correlation of instrument prices should be taken into account;
- competition between markets should not affect margin levels.

For proper understanding of the established requirements for margin lending we will examine different established requirements in detail.

Regulatory Regime of Short Selling

The first steps to ensure a unified approach to the regulation of short selling in the European Economic Zone were taken on March 2, 2010 by the Committee of the European Securities Regulators (CESR) through the publication of a proposal to develop a model for a pan-European regime for disclosing information on short sales. However, the formal establishment of a harmonized regulation of short sales in the European Union took place in 2012 with the entry into force on November 1 of the Regulation of the European Parliament and the Council of the European Union No. 236/2012 of March 14, 2012 [Regulation No. 236/2012, 2012] on short sales and some aspects of credit default swaps (hereinafter referred to as the Short Selling Regulation, SSR).

The SSR establishes basic disclosure requirements for short positions, restrictions on the short selling of shares, sovereign debt instruments and credit default swaps, empowers the European Securities and Markets Authority (ESMA) and the National Competent Authorities (hereinafter referred to as the National Competent Authority, NCA) for the regulation of short sales.

The established SSR provisions regarding the reporting of significant net short positions and restrictions on uncovered short sales do not apply to certain types of activities, for example, market-making.

In addition to the SSR, the European Commission has adopted the following regulations and implemented technical standards that detail and supplement the requirements of the SSR.

1. Delegated Regulation of the Commission of the EU 826/2012 of June 29, 2012 (hereinafter referred to as the Commission Delegated Regulation of 826/2012), supplementing the SSR in terms of regulatory technical standards regarding the requirements for notification and disclosure of information on net short positions, the information provided by ESMA regarding net short positions and the method for calculating the turnover to determine the list of shares exempted from the public disclosure of short positions.
2. The Executive Regulation of the Commission of the EU 827/2012 of June 29, 2012 (hereinafter - the Executive Regulation of the Commission 827/2012) [Commission Implementing Regulation ..., 2012], which defines the technical standards regarding the methods for publicly disclosing information on net short positions in shares, the format of information provided by ESMA on net short positions, types of agreements, procedures and measures aimed at ensuring the availability of shares or state debt instruments for the settlement of transactions, as well as ensuring that the date and period of determining the main trading platform for shares comply with SSR.
3. Delegated Regulation of the Commission of the EU 918/2012 dated 05.07.2012 (hereinafter referred to as the Delegated Regulation 918/2012) [Commission Delegated Regulation 918/2012..., 2012], supplementing the SRR in terms of definitions, calculation of net short positions covered by credit default swaps, thresholds that make it necessary to disclose information, thresholds for removing restrictions, a significant reduction in the value of financial instruments and adverse events.
4. Delegated Regulation of the Commission of the EU 919/2012 dated 05.07.2012 (hereinafter referred to as the Delegated Regulation 919/2012) [Commission Delegated Regulation 919/2012 ..., 2012], supplementing the SSR with regard to regulatory technical standards for the methods of calculating the reduction in the value of liquid shares and other financial instruments.

Disclosure Requirements

Articles 5 and 6 of the SSR establish disclosure requirements for significant net short positions in shares. In accordance with article 5 of the SSR, an individual or legal entity having a net short position in the issued share capital of the company whose shares are admitted to the trading on the trading floor is required to notify the authorized competent authority that such a position has reached the notification threshold. The notification threshold corresponds to a share equal to 0,2% of the issued share capital of the company in question and each 0,1% in excess of the specified share.

The disclosed net short position in accordance with Delegated Regulation 826/2012 [Commission Delegated Regulation 826/2012 ..., 2012] should include:

- address, name and contact details of the person who concluded the short sale transaction;
- information about the representative of the person who concluded the short sale transaction;
- information about the issuer, including his full name and the international identification code of

the security (International Securities Identification Number, ISIN);

- information on the size of the net short position expressed as a percentage of the issued share capital and the total number of shares.

If a physical or legal person reaches a net short position of a threshold value equal to 0,5% of the issued share capital and each 0,1% in excess of this share, it should publicly disclose information about this short position in accordance with Article 6 SRR.

Article 7 of the SRR also establishes requirements for the disclosure of information to the competent authority on the net short position on issued sovereign debt if such a position reaches a threshold for the issuer in question. The corresponding notification threshold includes an initial value and additional rising levels for each sovereign issuer. These thresholds are published by the ESMA for each EU Member State and are reviewed quarterly[1].

In accordance with the Delegated Regulation 918/2012, the initial notification threshold for sovereign issuers is set at the following levels:

- 0,1% of the total outstanding sovereign debt if it is from 0 to 500 billion euros;
- 0,5% of the total outstanding sovereign debt if it exceeds 500 billion euros and there is a liquid futures market for this sovereign debt.

Restrictions on short selling

SSR establishes a ban on uncovered short sales of shares admitted to trading on the trading floor. A person has the right to open a short position in accordance with article 12 of the SSR if one of the following conditions is met:

- the person holds borrowed shares or has taken alternative measures having similar legal consequences;
- a person has entered into an agreement on the borrowing of shares or has another requirement to be enforced in accordance with a contract or property law, according to which the ownership of an appropriate amount of securities of the same type must be transferred to ensure timely settlements of transactions;
- a person has entered into an agreement with a third party, according to which the third party confirms the placement of shares, and also takes the necessary measures in relation to third parties so that it would be possible to make settlements as they fall due.

A similar ban on uncovered short sales is set for sovereign debt instruments. However, it is not valid if short sale transactions of these instruments are concluded with the aim of hedging a long position on the issuer's debt instruments, the pricing of which has a high correlation with the price of a sovereign debt instrument.

Concerning sovereign credit default swaps, there is also a prohibition on the conclusion of uncovered transactions in accordance with article 14 of the SSR, since these operations are considered speculative and are not a legal means of protection against risks in relation to sovereign debt. However, this SSR article establishes that the competent authority has the right to temporarily suspend this restriction if there are objective reasons to believe that the sovereign debt market is not functioning properly or that such a restriction negatively affects the sovereign credit default swap market, for example, increasing the cost of a loan for sovereign issuers or affecting their ability to issue new debt instruments.

These grounds are formed taking into account the following indicators:

- high or increasing interest rate on sovereign debt obligations;
- widening of the spread of interest rates on sovereign debt obligations in relation to sovereign debt obligations of other sovereign issuers;
- expansion of the spread on sovereign credit default swaps in relation to its own curve, as well as in relation to other sovereign issuers;
- the rate of return of the value of sovereign debt obligations to their original equilibrium state after major trading;
- volume of sovereign debt instruments that may be traded.

Requirements to central counterparty relating to short sales

Article 15 of the SSR establishes requirements for a central counterparty located in an EU Member State that provides clearing services for shares in terms of procedures to ensure that if a person selling shares cannot transfer them for settlement by the time they fall due, such a person must make daily payments for each day of

[1] Net short position notification thresholds for sovereign issuers. URL: https://www.esma.europa.eu/net-short-position-notification-thresholds-sovereign-issuers (дата обращения: 19.11.2019).

failure to fulfill this obligation. The size of these daily payments should be large enough to have a restraining effect on individuals or legal entities and prevent them from fulfilling their obligations.

Powers and Obligations of ESMA

In accordance with the provisions of the SSR ESMA must provide open access to information regarding short sales, including:

- thresholds that necessitate notification of net short positions established for each sovereign issuer[2];
- links to national websites explaining the procedures for notifying net short positions[3];
- links to websites operated and controlled by the competent authorities, which publish information on net short positions for shares[4];
- a list of shares exempted from the requirements for which the main trading floor is in a third country[5];
- a list of market makers and authorized primary dealers[6];
- a list of existing fines and administrative measures against EU member states for violation of the SSR[7].

At the same time, according to the SSR, ESMA has the right to intervene in exceptional circumstances and demand the provision of information on net short positions, as well as prohibit or impose restrictions on the conclusion of short sale transactions in financial instruments, provided there is a threat to the consistent functioning and integrity of financial markets or the stability of the financial system.

Powers of national authorities

The SSR vests the NCA with a series of powers and obligations regarding short sales. In accordance with Article 11, the SSR NCA must provide quarterly information to the ESMA about net short positions on the issued equity and issued sovereign debt obligations, as well as about uncovered positions on sovereign credit default swaps.

In case of adverse events or the existence of factors that pose a serious threat to financial stability or market confidence in one or more EU member states, the NCA may:

- require from investors with net short positions in any financial instrument to notify the NCA or publicly disclose information about short positions;
- prohibit a physical or legal entity to enter into a short sale transaction of any financial instruments;
- establish restrictions on the conclusion of transactions with credit default swaps or on the value of positions on sovereign credit default swaps that persons are allowed to hold;
- prohibit or restrict investor's activity in concluding short sale transactions in financial instruments if the price of a financial instrument on the trading floor during one exchange day has significantly decreased[8] in relation to the closing price of trading on this trading floor of the previous trading day.

The list of events that pose a serious threat to financial stability or market confidence is established in Article 24 of the Delegated Regulation 918/2012[9] and includes, in particular, damage to the physical structure of market systems, which could adversely affect markets, disrupt payment systems or lower credit ratings of the EU member state or financial institution, which leads to serious uncertainty about their solvency.

[2] In same place. URL: https://www.esma.europa.eu/net-short-position-notification-thresholds-sovereign-issuers.
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[7] List of administrative measures and sanctions applicable in Member States to infringements of Regulation on short selling and credit default swaps. URL: https://www.esma.europa.eu/sites/default/files/library/list_of_administrative_measures_and_sanctions.pdf (Date of access 18.11.2019).
[8] In accordance with article 23 of the SSR for liquid shares a reduction in value of 10% is considered significant.
[9] The Delegated Commission Regulation (EU) No 919/2012 of 07/05/2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on Short Selling and Certain Aspects of Credit Default Swaps regarding technical regulatory standards for the method of calculating a decrease in the value of liquid shares and other financial instruments.

3. THE CURRENT RUSSIAN LEGISLATION IN RELATION TO THE SUPERVISION OF MARGINAL LENDING

On July 1, 2019, the Bank of Russia Directive No. 4928-U of 08.10.2018 "On requirements to brokering activities when a broker makes certain transactions with securities and concludes contracts that are derivative financial instruments, the criteria for the liquidity of securities provided as a collateral of the client's obligations to the broker, when the broker makes such transactions and concludes such agreements, as well as on the mandatory standards of brokers making such transactions and concluding such agreements" [Bank of Russia Directive ..., 2018]. At the same time, in view of the concern of the professional community over the insufficient time to bring brokers into compliance with the requirements of the Directive, the Bank of Russia decided to put in place a six-month "grace" period for not applying administrative penalties for identified violations: in the event that the Bank of Russia detects violations by the supervised organizations regarding their compliance with the requirements established by the Directive, for the period from July 1, 2019 to January 1, 2020, if the supervised organization has a plan to bring the activities in line with the provisions of the Directive and confirm its execution, the Bank of Russia does not plan to send instructions to eliminate the identified violations and impose fines for these violations.

The changes in margin lending rules were aimed primarily at improving the previously established mechanism. The scope of regulation regarding the unified margining of client portfolios has been expanded: in the new edition of client portfolios, certain futures contracts have been added in addition to spot market instruments.

The new Bank of Russia Directive on the rules of margin lending allows retail investors to conclude open positions with less collateral in the spot market, the markets of derivatives and foreign exchange. Also, the new Instruction took into account the effect of currency risks on the margin required from the client for uncovered positions. In addition, thanks to the improved formulas for calculating portfolio value and margin indicators the approaches to risk assessment for different financial instruments have become standardized and uniform. The list of liquid securities for which the formation of an uncovered position is allowed is also supplemented with a list of liquid currencies in case the foreign currency meets the criteria specified in the new version of Directive 4928-U.

The draft normative act was developed at an initiative of market participants: the working group on development included representatives of most of the largest companies that provide their clients with services on uncovered positions. The project was implemented in two stages: the first to come into effect were the changes regarding the inclusion of swap agreements in the regulation area and the ability to close bonds positions at non-anonymous trading with an indication of the source of price or quotation information; and from July 1, other provisions of re-issuance of the previously effective Directive on margin lending [Directive of the Bank of Russia ..., 2014] came into force.

The project regulation does not apply to client option portfolios or portfolios consisting only of futures and options. The regulation of such portfolios is planned to be implemented at the next stage, after testing the regulation of client portfolios consisting of futures and spot instruments (linear instruments).

At present, both brokers and their clients can provide loans for margin transactions. That is, a broker can use clients' funds in order to lend it to other clients. A normative act is currently in force that establishes requirements for calculating maximum sizes of uncovered client positions, that is, margin positions, positions opened "with leverage". When calculating uncovered positions, the initial and minimum margin indicators are calculated based on the risks inherent in each instrument that is part of the portfolio. Previously, if the initial or minimum margin (i.e., the total risk level for open positions) exceeded the total value of the portfolio, the broker should either prevent further increase in uncovered positions or customer debt, or take actions to force the positions to be closed, that is, buy off a short sale or sell assets bought on credit.

Directive 4928-U clarifies the rules for opening and transferring uncovered positions in case of exhaustion of the limit on the initial margin, as well as the rules for closing customer positions. The procedure for calculating the size of the minimum margin has been simplified: the size of the minimum margin is equal to half the size of the initial margin. The size of the initial margin, as in the previous regulation, can be determined in two ways: on a gross or net basis. The determination of the size of the initial gross margin on a gross basis has not changed: as before, it is carried out by summing the risks for all positions, regardless of their direction or correlation. In contrast, the procedure for determining the initial margin

on a net basis has changed significantly. Based on the previous regulation, in order to offset the risk of counter positions, it is necessary to have a close relationship between their price fluctuations (correlation). In the absence of such closeness, the risks of these positions are aggregated on a gross basis. As practice has shown, the correlation between different positions is unstable, especially in a stable market, which often leads to spasmodic changes in the parameters for calculating the initial margin. In this regard, the method was not claimed by the industry for determining the size of the initial margin on a net basis.

The new approach made it possible to detect risks even in those counter positions that do not have a close connection between their price fluctuations. However, in this case, another variable is introduced into the calculation of the initial margin, reflecting the risk of deviation of price fluctuation of the position from the fluctuation of the axial parameter – the "base indicator". The base indicator (futures contract, security, currency, index, etc.) has its own price fluctuation, which is recognized as axial, and it is believed that all other instruments included with it in a single set with dependent prices have the same fluctuation, but with a deviation in 99% of cases not exceeding a given value of d. Therefore, when offsetting the risk of multidirectional positions, the lower the closeness of the relationship between them, the stronger the risk pressure of the deviation of their price fluctuations from fluctuations in the base indicator. The described model makes it possible to smooth out changes in the size of the initial margin under conditions of unstable correlation between counter positions. It also makes it possible to identify the risks of temporary, inter-contract and inter-calendar spreads of futures contracts. If, in a series of futures contracts of the same specification with the same base asset, the futures contract with the closest execution date is taken as the base indicator, and for all other futures contracts of the series the risk of price fluctuation deviation is calculated with respect to it, the resulting parameter will express the risks of temporary, inter-contract and inter-calendar spreads of each futures contract in the series with respect to the futures contract with the nearest execution date.

The rules for closing customer positions in Directive 4928-U are supplemented by new provisions allowing for the ability to temporarily increase the risk of a client's portfolio when closing positions for subsequent reduction. The peculiarity of the risk of deviation of price fluctuation of the position from the fluctuation of the base indicator is that it can be eliminated only by closing two opposite positions at once. A successive closure of two opposing positions may increase the risk of the client's portfolio between the closing of his first and second positions. Such phenomenon will inevitably occur due to the release of the market risk in the second position, which had previously been offset by the opposite direction of the first one. Despite the complex nature of the risk of deviation of price fluctuations in the position, a conservative model of its calculation is able to absorb the consequences of its occurrence. It should be noted that the greatest weight of this risk is usually observed when the market is stable, where the correlation between the instruments is unstable. In a crisis the correlation between instruments intensifies, and the weight of this risk decreases.

In addition, Directive 4928-U introduced some ratios of the value of the client's portfolio and the size of the initial and minimum margins, respectively, which are presented in the form of financial standards for covering risks - Risk coverage ratio1 and Risk coverage ratio 2. The presentation of the indicated ratios in the form of financial standards made it possible to most accurately formulate the rights and obligations of the broker when the indicators reached critical values.

The new regulation makes it possible for the broker to expand the list of liquid assets, for which, in accordance with the legislation of the Russian Federation on currency regulation and currency control, it is allowed to open uncovered positions by including foreign currencies if they comply with the requirements of the Directive. This will allow the broker automatically not to include foreign currency, which he considers illiquid in order to cover the client's risk.

As mentioned earlier, the new Directive allows clients to enter uncovered positions with less collateral in the segments of the spot market, the markets of derivatives and foreign exchange due to the uniform margin of client portfolios, with the exception of non-linear financial instruments such as option contracts. Currently, brokers take clients' positions on option contracts separately from spot positions, since it is very difficult to determine the margin level for them together with the margin level for spot instruments. In addition, customer risk control and management for option positions are significantly different from risk control and management for other linear instruments. This is due to the difficulty of re-pricing of options, assessing their risks and insufficient liquidity. Uniform requirements for portfolio margining of both linear and non-linear instruments will be developed based on the results of summarizing the practice of enforcement of margin requirements of the Bank of Russia and self-regulatory organizations.

4. HYPOTHETIC TRANSFORMATION OF THE EXISTING RUSSIAN LEGISLATION

Based on the above-mentioned requirements established by the SSR and taking into account the transformation of the current Russian regulation of margin lending, in particular, the entry into force of Directive 4928-U, the following areas can be distinguished for the development of regulation of leverage transactions.

1. 1. Disclosure requirements. In order to mitigate the risk of concentration and to increase the transparency of information on transactions with incomplete collateral, it can be assumed that it is advisable to include into the current regulation a notification of the supervising authority about the achievement of a threshold value in the broker's aggregate position. Perhaps, such requirements would help increase investor confidence in the Russian financial market and reduce the number of unfair practices by financial intermediaries that increase credit risks concentrating significant positions on one issuer or counterparty.
2. Based on Articles 6 and 7 of the SSR it might be necessary to expand the regulatory field by including in the current Directive the requirement for public disclosure of information on reaching a threshold value by short position or by the financial intermediary or directly by the regulatory body that collects this information . This kind of practices would help to create conditions for building confidence in the institution of financial intermediation and, therefore, for the sustainable development of intermediation in the financial market. In addition, the establishment of a threshold value, the periodic review of the threshold value and the disclosure of this value for stock market participants should also possibly be assigned directly to the regulator.
3. Given the provisions of the SSR for ESMA in regard to ensuring open access to information on short sales, giving the Russian regulator the obligation to disclose information about short sales and the authority in exceptional circumstances to intervene and require the provision of information on net short positions, as well as to prohibit or establish restrictions in relation to concluding short sale transactions of financial instruments under certain conditions, it would presumably make it possible to increase the degree of openness, completeness and reliability of information about the traded instruments and the related costs and risks, which would also affect the growth of confidence in the financial market

5. CONCLUSION

An analysis of the European experience in terms of monitoring the implementation of short sales established by the SSR to disclose information on short positions, restrictions on short sales, the powers and obligations of ESMA, etc., makes it possible to conclude that the regulation in Russian jurisdiction may be expanded not only by complicating the mechanism for providing a margin loan by including complex non-linear tools in the client's portfolio, but also by establishing requirements for disclosing information about highly concentrated short positions and setting a constantly revised threshold value. In addition, it can be assumed that the indicated directions for the development of short sales regulation in terms of expanding the powers of the regulator will also increase the transparency of intermediary activities and the financial market while ensuring the reliable protection of the interests of clients of financial intermediaries.

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