Response to the Short Selling Consultation (ESMA 70-145-127)

The Swedish Securities Dealers Association

Lars Afrell

Summary of questions

Exemption for market making activities

Q1: Taking into account the different regulatory approaches and purposes of MiFID II and SSR, what are your views on the absence of alignment between the definition of 'market making activities' in each of the capacities specified in Article 2(1)(k) of SSR and that of 'market maker' in Article 4(1)(7) of MiFID II ? Do you consider that this absence of alignment is not appropriate, and if so what would you suggest?

From a general point of view we would favor a harmonization of definitions in the financial market legislation of the EU. However, in this case we are rather skeptical mainly because of the risk of unintended consequences. Since the purposes of the regulations differ it will be difficult to find a common definition that serves both regulations. The market making definition in SSR is used to define the scope of an exemption while the scope and application of the MiFID II definition of market maker is far from clear. Hence, we do not support such alignment.

We would like to stress the importance of the membership requirement, see our response in question 2.

Q2: Considering the new regulatory framework under the MiFID II/MiFIR, how do you suggest addressing the issue of the membership requirement in relation to those instruments that will remain pure OTC instruments despite the MiFID II/MiFIR framework? Should the membership requirement not apply to those pure OTC instruments? Please provide justifications.

In our firm opinion there is no legal ground in the Short Selling Regulation (SSR) for the membership requirement and the narrow interpretation in the ESMA's Guidelines. The limitation introduced by that requirement have clear negative impacts on the markets. In particular, it limits the possibility to hedge positions in a totally unnecessary way. It limit market making activity in such way that the exemption cannot be used in relation to trading in OTC derivative transactions. There is no legal base in level 1 for such limitation. See also the Guidelines compliance table (ESMA/2013/765).

We would support an amendment to the SSR text to make it clearer that the market making exemption only requires a firm to be member to single trading venue and furthermore, also make it clear that the exemption is available in relation to market making in any financial instruments.

Q3: Where market making activities on exchange-traded instruments are carried out OTC only, should they be able to benefit from the exemptions? Do you consider that the application of the exemptions in those cases can be detrimental to the interest of investor and consumers? Please provide justifications.

We agree that an application of the exemption as stated in the question could be detrimental as bilateral and multilateral trading often are interlinked.

As stated in question 2 there should be no membership requirements. We have difficulties to find any reasons for the interpretation of ESMA, for example regarding any negative impacts of Short Selling for investors and markets.

Q4: Do you think that the membership requirement should be deleted where the market making activity in relation to exchange-traded instruments is carried out OTC as well as on a trading venue? Please explain.

As state in question 2 there should be no membership requirement.

Q5: Do you have proposals in relation to the improvement of the transparency of market making activities conducted OTC and exempted under the SSR? Do you think that requiring a firm willing to benefit from the exemption for its market making activities conducted OTC to qualify as systematic internaliser is a viable option that would improve the transparency of their activity? Please provide justifications.

Additional transparency requirements are definitely not needed. Adding the requirement to first become an SI in order to make use of the market making exemption for a particular instrument will hurt smaller market makers and force other market makers to withdraw liquidity from instruments they seldom trade. Therefore, in our opinion the market maker exemption should not be linked to the SI regime.

Q6: Do you think it would be appropriate to enlarge the set of financial instruments eligible for the exemption for market making activities? If so, which financial instrument(s) would you suggest? Please provide justifications.

As stated above we are of the opinion the ESMA's Guidelines restrict the scope unduly. We are of the opinion that the scope of the exemption could include a wider range of instruments such as corporate bonds, convertible bonds and subscriptions rights.

Q7: Do you think that market makers should be able to notify the list of financial instruments by using indices, as long as they are market making in all the financial instruments included in the used indices? Besides indices, which other sectoral categories / classification could be used by market makers to indicate a group of financial instruments for which the market maker is seeking exemption? Please provide justifications.

We could agree to the suggestion to notify indices. In general we would support a broader base without requirement to be market maker in all instruments in the base.

Q8: Do you think that the 30-day period mentioned in Article 17(5) of the SSR should not apply when the notification refer to instrument admitted to trading for the first time on an EU trading venue? Please provide justifications.

We strongly support that the 30-day period should not apply when the notification refers to instrument admitted to trading the first time. It is quite important with market making activities in case of an introduction to a trading venue.

Q9: What would you suggest to reduce the 30-day period mentioned in Article 17(5) of the SSR to provide for a faster process? What are your views on a quicker procedure for market makers that have already entered into a market making agreement/scheme with a trading venue or the issuer to classify as market maker in such venue? Please explain.

No opinion.

Short term restrictions on short selling in case of a significant decline in prices: Article 23 of SSR

Q10: What are your views on the proposal to change the procedure to adopt short term bans under Article 23 of the SSR? Please elaborate.

The members of the SSDA do not support the proposal to change the procedure to adopt the short term ban. In principal we are very skeptical to the ban.

Q11: What are your views on the proposal to change the scope of short term bans under Article 23 of the SSR? Please elaborate.

The members of the SSDA do not support the proposal to change the procedure to adopt the short term ban.

Transparency of net short positions and reporting requirements

Q12: Do you see any reasons to change the current levels of the thresholds regarding the notification to competent authorities and the public disclosure of significant net short positions in shares? Please elaborate.

We do not support a change. Such change would only bring cost to the market without any proven benefits.

Q13: Do you see benefits in the introduction of a new requirement to publish anonymised aggregated net short positions by issuer on a regular basis? Can you provide a quantification of the benefit of such new requirement to your activity? Please elaborate.

Q14: Do you agree that the notification time should be kept at no later than 15:30 on the following trading day? If not, please explain.

Q15: Do you agree that the publication time should be changed at no later than 17:30 on the following trading day? Please elaborate.

No opinion.

Q16: What are your views on a centralised notification and publication system at Union level? Can you provide a quantification of the benefit of such centralised notification to your activity? What are your views on levying a fee on position holders to have access to and report through such a centralised system? Please elaborate.

To be able to analyze this issue in depth we would need more detailed information about the idea such a description of consequences, costs and benefits.

Q17: Which other amendments, if any, would you suggest to make the notification less burdensome?

We would as stated above support an amendment to the SSR text to make it clearer that the market making exemption only requires a firm to be member to single trading venue and furthermore make it clearer that the exemption is available in relation to market making in any financial instruments. Furthermore, we would support further harmonization of the processes of national regulators in the EU.

Q18: Do you agree that the identification code of the position holder should be the LEI and that such code should be mandatory for legal entities? Please elaborate.

We support the use of LEI.

Q19: What are your views on the method that should be favoured, the nominal method or the duration-adjusted method as described above? In the latter case, do you think that the thresholds should be changed? Please elaborate.