European Securities and Markets Authority

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ESMA/2013/765

Guidelines compliance table

Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps

Based on information supplied by them, the following competent authorities comply or intend to comply with ESMA's guidelines on exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps.

Member State		Competent authority	Complies or intends to comply
BE	Belgium	FSMA	**Yes**
BG	Bulgaria	Financial Supervision Commission	**Yes**
		Ministry of Finance	**Yes**
CZ	Czech Republic	Czech National Bank	**Yes**
DK	Denmark	Danish Financial Supervisory Authority	**No**
DE	Germany	BaFin	**No**
EE	Estonia	Estonian Financial Supervision Authority	**Yes**
IE	Ireland	Central Bank of Ireland	**Yes**
EL	Greece	Hellenic Capital Market Commission	**Yes**
ES	Spain	CNMV	**Yes**
FR	France	Autorité des marchés financiers	**No**
IT	Italy	Banca d'Italia	**Yes**
		Consob	**Yes**
CY	Cyprus	Cyprus Securities & Exchange Commission	**Yes**
LV	Latvia	Financial and Capital Market Commission	**Yes**
LT	Lithuania	Bank of Lithuania	**Yes**
LU	Luxembourg	Commission de Surveillance du Secteur Financier	**Yes**
HU	Hungary	Hungarian Financial Supervisory Authority	**Yes**

MT	Malta	Malta Financial Services Authority	**Yes**
NL	Netherlands	AFM	**Yes**
AT	Austria	Financial Market Authority	**Yes**
PL	Poland	KNF	**Yes**
PT	Portugal	CMVM	**Yes**
RO	Romania	Financial Supervisory Authority	**Yes**[1]
SI	Slovenia	Securities Market Agency	**Yes**
SK	Slovakia	National Bank of Slovakia	**Yes**
FI	Finland	Finanssivalvonta (FIN-FSA)	**Yes**
SE	Sweden	Finansinspektionen	**No**
UK	United Kingdom	Financial Conduct Authority	**No**

Where individual competent authorities indicated not to comply with the Guidelines, ESMA decided to publish their reasons.

Financial Supervisory Authority (Denmark)

Danish FSA intends to comply with the majority of the Guidelines, however Denmark intends not to comply with parts of the guidelines since the guidelines on one area appears to have an impact detrimental to the purpose of the exemption on market making activities. On another area Denmark will due to national legislation not be able to comply with the guidelines.

The areas where Danish FSA intends not to comply with the guidelines are the following:

I: Para 35 – 36: Market membership, and

II: Para 75 – 76: Transitory Measures

Danish FSA decision not to comply with these parts of the guidelines are based on the following considerations:

Ad. I: Market Membership

According to recital 26 of the Regulation; "*Market making activities plays a crucial role in providing liquidity to markets within the Union and market makers need to take short positions to perform that role. Imposing requirements on such activities could severely inhibit their ability to provide liquidity and have significant adverse impact on the efficiency of the*

[1] "Please note that the Romanian Financial Supervisory Authority is the competent authority under Regulation (EU) No 236/2012 responsible for supervising the application of the provisions of Regulation (EU) No 236/2012 in the case of shares admitted to trading on a trading venue in Romania. Therefore, we confirm that we intend to implement the Guidelines with regard to shares admitted to trading on a trading venue in Romania"

Union markets. Furthermore market makers would not be expected to take significant short positions except for very brief periods. It is therefore appropriate to exempt natural or legal persons involved in such activities from requirements which could impair their ability to perform such a function and therefore adversely affect the Union markets. In order for such requirements to capture equivalent third-country entities a procedure is necessary to assess the equivalence of third-country markets. The exemption should apply to the different types of market-making activity but not to proprietary trading. It is also appropriate to exempt certain primary market operations such as those relating to sovereign debt and stabilisation schemes as they are important activities that assist the efficient functioning of markets. Competent authorities should be notified of the use of exemptions and should have the power to prohibit a natural or legal person from using an exemption if they do not fulfil the relevant criteria in the exemption. Competent authorities should also be able to request information from the natural or legal person to monitor their use of the exemption."

In Denmark banks offer in their capacity as investment firms services such as immediate trades and request for quotes. In these cases the investor contacts the investment firm either through an online trading system, in person or by phone and requests a price on a given amount of a specific security. If the price the investment firm offers is attractive the investor will accept the price, and the sale is made. This transaction could potentially be conducted as a short sale since the investment firm may not have the requested share on stock. The market maker will after the sale to the customer, buy the shares on the market in order to deliver these to the client in time. Especially small and medium size investors use these types of services, which give these investors access to trading in financial instruments admitted to trading on a number of trading venues.

The Guidelines introduction of a membership requirement regarding the financial instrument for which the exemption is used may potentially limit the type of trade and thus go against the objective of the exemption as stated in recital 26, and actually limit liquidity as the application of the membership requirement may force some market makers to stop these services and thus remove liquidity from the market, which will be contrary to the objective of the exemption. The present interpretation of the exemption will furthermore force a concentration towards larger entities with multiple memberships, which will inhibit competition in this area.

Further Danish FSA notes that the ESMA Regulation (1095/2010) Article 16 does not include the power to require or provide for definitions, which rightfully belong in level 1 or level 2 legislation. The requirement in the guidelines that the exemption for market making activities are only applicable for instruments traded on the trading venue which the market maker is a member is not to be found in the Danish version of the Regulation. According to the guidelines, the word "where", in the English version of the Regulation should be read as referring to the market making entities market membership for each financial instrument for which the exemption has been notified. The Danish version does not support such a reading, on the contrary, the Danish version sets as a requirement, that the entity claiming the exemption should be a member of a trading venue, however the referral to instruments in the second limb of article 2 (1) (k) refers to a financial instrument traded on or outside a trading venue.

If the Regulation should require a membership of the market, where the financial instrument for which the exemption is notified is traded, it would be require a reference to the trading venue of which the notifying entity is a member.

Ad. II: Transitory Measures

According to Danish legislation on governance a Danish government agency may not once a permission is granted withdraw this permission if there is no new information in relation to the permitted entity. A change in interpretation of the legislation for which the exemption is given cannot under Danish law be considered as new information for which an already given permission may be withdrawn.

On this basis Danish FSA will due to national legislation not be able to comply with the guidelines in relation to the transitory measures.

BaFin (Germany)

After having re-assessed the legal arguments the competent authority of Germany, BaFin intends to comply with all requirements of the ESMA-Guidelines on exemption for market making activities and primary market operations under the Short Selling Regulation - ESMA/2013/158 (ESMA-Guidelines) with the exception of the following:

- trading venue membership requirement (paragraphs 19-22; 35-36; 43 first bullet and last bullet, to the extent that it relates to those parts of the guidelines BaFin is not complying with)

and

- product scope regarding the exemption on a per instrument basis - regarding instruments different from a share or a sovereign debt instrument, that creates long or short positions as defined in Articles 3 and 4 of the Regulation (paragraphs 30; 32).

BaFin's reasons for not complying with these provisions are as follows:

Trading venue membership (paragraphs 19-22; 35-36; 43 first bullet and last bullet, to the extent that it relates to those parts of the guidelines BaFin is not complying with)

The Short Selling Regulation provides an exemption for market makers activities in financial instruments whether traded on or outside a trading venue.

Recital 26 generally states that "Market making activities play a crucial role in providing liquidity to markets within the Union and market makers need to take short positions to perform that role. Imposing requirements on such activities could severely inhibit their ability to provide liquidity and have a significant adverse impact on the efficiency of the Union markets. [...] It is therefore appropriate to exempt natural or legal persons involved in such activities from requirements which could impair their ability to perform such a function and therefore adversely affect the Union markets [...]". With this clear statement the Short Selling Regulation recognises the benefits of market making.

BaFin considers that the Guidelines go beyond the requirements of Article 2(1)(k) of the Short Selling Regulation by making it a condition for the exemption that the market maker must be a member of a trading venue where the financial instrument in question is admitted to trading or traded and in which it conducts a market making activity in that instrument.

- The requirement to be a member of a trading venue or third country market is related only to the first limb of the definition of Article 2(1)(k), i.e. the type of firm that can be carrying out the market making activities, and not to the types of activities carried out that are specified in the second limb.

- The second limb of Article 2(1) (k) does not state that the financial instrument must be traded on that trading venue. It is rather saying that the financial instrument may be traded outside a trading venue. The definition specifically states that, as long as the firm is dealing as principal in one of the specified capacities, it can be dealing on or outside a trading venue. There is no requirement that the firm must trade on any venue at all, not even the venue of which it is a member. In particular, the reference in the second limb of the definition is to "a trading venue" and not to "the trading venue", which would be expected if the term were intended to refer to the first-mentioned trading venue.

- Third, the term "where it deals as principal in a financial instrument" belongs with the second limb of the definition – describing the activities which the market maker conducts – otherwise that second limb is missing some crucial words which are needed for it to make sense.

- Although the English language text of the Short Selling Regulation uses the word "where", this must not be interpreted as imposing a location requirement. The word used in other equally authentic language versions of the Regulation -"wenn" ("if") in the German text and "que" ("that") in the French text " - does not support such an interpretation. The word "where" is used in the English version of the Regulation in the sense of "the circumstances in which" in a number of other places in the Short Selling Regulation, e.g. Articles 2(1)(b), 2(1)(e), 3(1)(b) and 4(1) of the Short Selling Regulation. There are no indications that a different meaning of "where" is intended in Article 2(1)(k) of the Short Selling Regulation.

Furthermore the Short Selling Regulation specifically envisages an exemption of sovereign CDS market making activities in article 17(1), by virtue of referring to article 14. This would be rendered meaningless if the definition of market making activities was read in such a way as to exclude sovereign CDS activities, given that these instruments are not traded on any venue. The picture is similar for sovereign debt instruments which often are not traded on any venue.

If market makers in OTC-instruments are not able to qualify for the exemption they are subject to all the requirements of the Short Selling Regulation, in particular the requirements to cover short sales by locate arrangements, other enforceable claims etc., they will face extra barriers and costs to conducting their market making activities. This will adversely affect market liquidity and efficiency to the detriment of end users of those markets.

Product Scope (paragraphs 30; 32).

The scope of products eligible for the market maker exemption given by the Guidelines restricts the meaning of the Short Selling Regulation.

According to the Guidelines the market making exemption is available for instruments which must be taken into account when calculating a net short position in shares or sovereign debt. These instruments are listed exclusively in part 1 (for shares) and part 2 (for sovereign debt) of Annex 1 of Commission Delegated Regulation (EU) No 918/2012. Namely for shares these instruments are options, covered warrants, futures, index-related instruments, contracts for

difference, shares/units of exchange-traded funds, swaps, spread bets, packaged retail or professional investment products, complex derivatives, certificates linked to shares and global depository receipts. For sovereign debt the instruments listed are options, futures, index-related instruments, contracts for difference, swaps, spread bets, complex derivatives and certificates linked to sovereign debt. For example corporate bonds are not included in the scope of the exemption.

Article 2(1)(k) Short Selling Regulation names market making activities as activities where the person deals as principal in a financial instrument, whether traded on or outside a trading venue. According to Article 1(1) of the Short Selling Regulation the scope covers financial instruments that are defined in Art. 2 (1)(a) of the Short Selling Regulation. This definition refers to the instruments listed in Section C of Annex I to Directive 2004/39/EC. According to Section C (I) of Annex I, Article 4(1)(18) of the Directive 2004/39/EC corporate bonds are financial instruments.

This is also not contradicted by the list of instruments of part 1 and part 2 of Annex 1 of Commission Delegated Regulation (EU) No 918/2012 as its sole purpose is to list instruments that must be taken into account when calculating a net short position in shares or sovereign debt. There is no basis in the Short Selling Regulation for such a restriction of the instruments eligible for the market maker exemption.

Moreover it is a common strategy for market makers in corporate bonds and an accepted market practice to hedge their market making risks by trading in the relevant sovereign debt. This practice not only hedges against changes in sovereign credit risk embedded in the corporate bond but also the general level of interest rates in the economy. It is therefore a necessary and legitimate part of the market making activity. Without the exemption, the market maker would need to meet all the conditions for undertaking a short sale in sovereign debt which would impair the market making function, increase costs to the market maker and end users and decrease liquidity in the market.

Besides the legal aspects market issues also have to be taken into account.

Autorité des marchés financiers (France)

The AMF declared to ESMA that it intends to comply with the full provisions of the guidelines though the said guidelines shall only enter into force as soon as they are fully applied by all National Competent Authorities throughout the EU. This is in order to avoid competition distortion between the French financial industry and that of any EU Member States partially or not applying the Guidelines. Hence, a common level playing field based on converging supervisory and market practices across the EU shall be achieved, as mentioned in paragraph 10 of the guidelines.

Finansinspektionen (Sweden)

Finansinspektionen will in accordance with article 16.3 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC comply with Esma's guidelines except for the membership per financial instrument criteria in paragraph 20-22, 35-36 and 43 (the first indent) of the guidelines, and the reassessment requirement in paragraph 75 of the guidelines.

<u>The membership per financial instrument requirement (paragraph 20-22, 35-36 and 43)</u>

The function of market makers is essential for a well-functioning financial market. The positive effect of market making is recognized in recital 26 of Regulation (EU) No 236/2012 of the European Parliament and the Council of 14 March 2012 on short selling and certain aspects of Credit Default Swaps (the Regulation) which states that:

"*Market making activities play a crucial role in providing liquidity to markets within the Union and market makers need to take short positions to perform that role. Imposing requirements on such activities could severely inhibit their ability to provide liquidity and have a significant adverse impact on the efficiency of the Union markets. It is therefore appropriate to exempt natural or legal persons involved in such activities from requirements which could impair their ability to perform such a function and therefore adversely affect the Union markets.*"

In light of the purpose of the exemption for market makers in the Regulation, Finansinspektionen considers that the requirements expressed in paragraph 20-22, 35-36 and 43 (the first indent) of the guidelines go beyond what is demanded by article 2(1)(k) of the Regulation and imposes requirements that could inhibit market makers from providing liquidity to the market. Finansinspektionen's interpretation of article 2(1)(k) of the Regulation is that it is sufficient for a market maker to be a member of any trading venue in the Union and not all venues where it acts as a principal. This interpretation is in accordance with the purpose of the exemption and it also fulfils the purpose of the membership requirement in article 2(1)(k) of the Regulation, which intend to secure that the rules concerning trading venues in the Union are applicable to the market maker and enables an efficient supervision for the competent authorities.

Finansinspektionen does consequently not intend to comply with the requirements expressed in paragraph 20-22, 35-36 and 43 (the first indent) of the guidelines that a market maker must be a member on each trading venue for each individual financial instrument.

Reassessment of previously approved exemptions (paragraph 75)

According to paragraph 75 of the guidelines the competent authorities shall review and assess notifications that were approved before the guidelines entered into force. However, article 17.6 and 17.7 of the Regulation states that a competent authority only may prohibit a notifying party from using the exemption within a 30 day period from the date the notification was received by the competent authority or if the competent authority becomes aware that there have been changes in the circumstances of the natural or legal person so that it no longer satisfies the requirements for an exemption. Finansinspektionen considers that it would violate article 17.6 and 17.7 of the Regulation to reassess a previously approved notification if the only reason for such reassessment is the entry into force of the guidelines. Furthermore, Swedish law prohibits Finansinspektionen from conducting a reassessment of a previously approved notification under the circumstances stated in paragraph 75 of the guidelines. Finansinspektionen is, therefore, not able to comply with paragraph 75 of the guidelines.

Financial Conduct Authority (United Kingdom)

The FCA will comply with all the Guidelines with the exception of the provisions concerning the requirement to be a member of a trading venue and the scope of the products eligible for the exemption i.e. paragraphs: 19-22; 30; 32; 35-36; 43 (first indent only and last indent, to the extent that it relates to those parts of the guidelines the UK is not complying with); 65 (xi); and 75. The FCA's reasons for not complying with these provisions are as follows.

Trading venue membership requirement

Recital 26 to the Regulation states that "*Market making activities play a crucial role in providing liquidity to markets within the Union and market makers need to take short positions to perform that role. Imposing requirements on such activities could severely inhibit their ability to provide liquidity and have a significant adverse impact on the efficiency of the Union markets… It is therefore appropriate to exempt natural or legal persons involved in such activities from requirements which could impair their ability to perform such a function and therefore adversely affect the Union markets…*"

The rationale for providing the exemption applies as much to market makers in financial instruments which are traded OTC as to those traded on a trading venue. For example, a market maker in OTC equity derivatives may need to hedge their market making positions in these products by trading in the underlying equities. If they are subject to all the requirements of the Regulation, in particular the requirement to obtain the necessary 'locate' and other confirmations before they conduct a short sale in an equity, they will face extra barriers and costs to conducting their market making operations. This will adversely affect market liquidity and efficiency to the detriment of end users of those markets. If market makers in sovereign CDS or using sovereign CDS to hedge market making positions in other financial instruments are not able to qualify for the exemption, they may face more serious constraints on their market making ability given that the Regulation prohibits non-market makers from entering into uncovered sovereign CDS transactions. There is no good reason why market makers in OTC financial instruments subject to the Regulation should not be able to use the exemption when those market making financial instruments on a trading venue of which they are a member can do so.

The FCA considers that the Guidelines go beyond what is required in the Regulation by making it a condition for the exemption that the market maker must be a member of a trading venue where the financial instrument in question is admitted to trading or traded and in which it conducts a market making activity on that instrument.

a. First, although the first limb of Article 2(1)(k) of the Regulation states that the market maker must be a member of a trading venue or third country equivalent market, it does not say in the second limb that the financial instrument for which notification is sought must be traded on that market.

b. Second, Article 2(1)(k) says that the financial instrument may be traded outside a trading venue. It is unclear how those words can be reconciled with the condition in the Guidelines.

c. Third, the words "where it deals as principal in a financial instrument" must belong with the second limb of the definition – describing the activities which the market maker conducts – otherwise that second limb is missing some crucial words which are needed for it to make sense. The Guidelines require those words to do double-service in both the first and second limbs of the definition.

d. Fourth, although the English language text of the Regulation uses the word "where", this should not be interpreted as imposing a location requirement. The word used in other equally authentic language versions of the Regulation does not support such an interpretation. Furthermore, the word "where" is used in the English version of the Regulation in the sense of "the circumstances in which" in a number of other places in

the Regulation, e.g. recitals (15) and (21) (two uses in (21)) and Articles 2(1)(b), 2(1)(e), 3(1)(b) and 4(1). There is nothing to indicate that a different meaning of "where" is intended in Article 2(1)(k).

Scope of products eligible for the market maker exemption

The Guidelines assert that, in addition to shares and sovereign debt instruments, the exemption is only available for market making in those listed financial instruments positions in which must be taken into account when calculating a net short position in shares or sovereign debt. Hence they are limited to the lists of financial instruments in Part 1 (for shares) and Part 2 (for sovereign debt) of Annex 1 of Commission Delegated Regulation (EU) No 918/2012. However, the rationale for having a market maker exemption also applies to financial instruments other than equities, sovereign debt and equity/sovereign debt derivatives. For example, it is a common strategy for market makers in corporate bonds to hedge their market making risks by trading in the relevant sovereign debt: this not only hedges against changes in sovereign credit risk embedded in the corporate bond but also the general level of interest rates in the economy. It is therefore a necessary and legitimate part of the market making activity. Without the exemption, the market maker would need to meet all the conditions for undertaking a short sale in sovereign debt which would impair the market making function, increase costs to the market maker and end users and decrease liquidity in the market.

The FCA recognises that an exemption included in a European legal text should be interpreted narrowly. But it should also be interpreted in accordance with the terms of the Regulation. In this case the Guidelines apply a much narrower scope than that provided for in the Regulation. In this context the FCA notes that Article 2(1)(a) of the Regulation contains a straightforward definition of financial instrument for the purposes of the Short Selling Regulation (i.e. those financial instruments listed in Section C of Annex I to MiFID). There is no reason to depart from that definition. Nor is there any reason why the interpretation of the word "position" in Article 3 of the Regulation should be read so as to limit the meaning of the instruments which may be the subject of the activities referred to Article 2(1)(k). 'Position' means the market commitment a person has, either as the owner or seller of financial instruments. It does not include within it any notion of the types of instrument held as part of the position. The FCA agrees that Commission Delegated Regulation (EU) No. 918/2012 further specifies the definitions of ownership and short sale, in accordance with the power given in Article 2(2) of the Short Selling Regulation. But there is no further definition of financial instrument. It is also the case that the list of instruments in Annex I to Regulation 918/2012 is made for different and specific purposes and is not a general limitation on the types of financial instruments which may benefit from the market making exemption.

Notes

Article 16(3) of the ESMA Regulation requires national competent authorities to inform us whether they comply or intend to comply with each guideline or recommendation we issue. If a competent authority does not comply or does not intend to comply it must inform us of the reasons. We decide on a case by case basis whether to publish reasons.

Although we try to ensure the accuracy of this document, we rely on information provided by the competent authorities and therefore cannot accept responsibility for its contents or any reliance placed on it.

For further information on the current position of any competent authority, please contact that competent authority.

Contact details can be obtained from ESMA's website.