ABI Associazione Bancaria Italiana

ESMA consultation paper on the evaluation of certain elements of the Short Selling Regulation

4 September 2017

POSITION PAPER

2017

Introduction

The Italian Banking Association (ABI) welcomes the opportunity to provide the views of its members on the proposals presented by ESMA in the consultation paper on the evaluation of certain elements of the Short Selling Regulation.

Please, note that the present document - with the exception of the answer to Q11 - was drafted in cooperation with the Italian Association of financial intermediaries (ASSOSIM) who has also submitted a response to the present consultation.

Answers

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?

In general, we think that an alignment between the aforementioned definitions would be useful in order to provide clarity and simplification. Nevertheless, we believe that a proper application of the SSR regime requires an ad hoc definition of market making activities because of the need of limiting the exemption to those entities which regularly contribute to financial instruments liquidity so promoting orderly market conditions.

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.

We believe that the membership requirement should apply in all cases with the exception of sovereign CDS whose liquidity has positive effects on sovereign debt market. For pure OTC instruments different from sovereign CDS the membership requirement should continue to be applied for the reasons mentioned under our Q1 answer (need of granting the exemption only to those entities which regularly contribute to financial instruments liquidity and assume specific obligations in this sense).

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.

With reference to exchange-traded instruments, we believe that market making activities carried out OTC only should benefit from the exemption solely upon condition that such activities are performed by entities acting as Systematic Internalisers, since they are subject to a transparency regime aiming at safeguarding market efficiency (thus not jeopardising the interests of investors and consumers) in line with the trading venue framework.

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.

In this respect, we think that the membership requirement should continue to be required for the reasons explained under our Q2 answer.

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.

Please, see our answer under Q3.

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.

In general, we think that enlarging the set of eligible financial instruments could have positive effects (i.e. with respect to corporate bonds). Nevertheless, we strongly suggest the provision of specific guidelines in order to define -on an asset class basis- the correlation requirement.

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.

As regards indices, please consider that Consob already allows notification referred to indices when the market maker carries out its activity on all the shares included in the relevant index.

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 are in favour of not applying the aforementioned period for instruments admitted to trading for the first time on an EU TV provided that market rules often require the presence of a market maker since the first trade date.

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.

In general, we are in favour of reducing the 30-day period. We believe that such reduction would be even more advisable for market makers that already have market making agreements in place.

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.

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

As a preliminary point, it is important to emphasize that, if it is used for speculative purposes and in a phase of bearish markets, short selling may exacerbate drop in the price falls. For this reason, it should be recognized that it is fundamental that competent authorities have short-term instruments to intervene by setting restrictions on short selling in the event of a strong price depression (such as during the most critical period of the recent financial crisis). In view of the quantitative and qualitative analysis presented in the consultation document, it is important to reiterate the exceptionality of the short-term ban on short selling under Article 23 of the SSR and, above all, to define a procedure which ensures uniform implementation across Member States. This is to ensure level playing field among all European market operators.

On the other hand, it should also be considered the role of short selling as a tool for intermediaries and investors in defining their investment strategies and ensuring market efficiency. For this purpose, we consider that the best tool to avoid any short-selling distorting effects mainly lies in transparency requirements. Hence, we appreciate the disclosure obligation of the net short positions provided for in the Chapter II of Short Selling Regulation.

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 are not in favour of changing the notification/disclosure thresholds because such change would have a burdensome impact on investment firms' systems.

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.

We think that the disclosure of anonymised aggregated net short positions could have positive effects on market efficiency.

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.

We believe that the notification time should be delayed to 17:30 (2 hours later) in order to grant investment firms a further period of time for calculations and monitoring.

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

Yes. The timeframe should be delayed to 17:30 as it should be coherent with the notification time schedule (see our answer to Q14).

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.

We are in favour of a centralise notification and publication system because it would be useful for investors holding net short positions in different Member States. Nevertheless, we think that the access to such system should not entail the payment of a fee.

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.

Yes, considering that LEI should become a unique identification code for legal entities.

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.

We would favour the application of the nominal method which offers greater simplicity and lower impacts than those relating to the duration-adjusted method.