

ADVICE TO ESMA

Own initiative report on Measures relating to the Covid 19 Crisis

I. Executive Summary

The enormous impact of the current health crisis on the financial markets is of great concern to the SMSG. The SMSG therefore urges ESMA to take the following measures.

1. In order to allow markets, market participants and consumer organisations to funnel as many resources as possible towards coping with the current crisis and contributing to market stability and investor protection, ESMA should (i) postpone deadlines for consultations; (ii) postpone deadlines or coordinate regulatory forbearance for the implementation of new rules; and (iii) postpone deadlines or coordinate regulatory forbearance for certain reporting obligations.
2. In order to preserve a level playing field in the current circumstances and ensure a coordinated approach that is necessary to simplify the operational implementation of EU rules and regulations, ESMA should use its powers to coordinate (i) the diverging national measures in regard of short selling, beyond the increased disclosure obligations already put in place; (ii) the efficient functioning of all markets; and (iii) reliefs on full traceability and time stamping when Work From Home is activated.
3. To ensure easy access and full transparency, ESMA should create one dedicated web-page with all measures and decisions ESMA is taking relating to the current crisis.

II. Advice

1. Postponing Deadlines / Regulatory Forbearance

In view of the impact of the Covid 19 crisis on financial markets, financial market participants and consumer organisations are currently funnelling as many resources as possible towards coping with the crisis and contributing to market stability and investor protection. The SMSG therefore urges ESMA to take action to postpone three different types of deadlines.

1.1. In respect of consultations

Whereas markets, market participants and consumer organisations are usually fully dedicated to providing qualitative input to ESMA, many of them will in the current circumstances not be able to do so. This would mean that ESMA would not receive sufficient qualitative responses to construct well thought through and well implemented regulation.

Therefore the SMSG urges ESMA to postpone the deadlines for the current consultations, and to defer upcoming consultations to a time when the current crisis will have been abated.

1.2. In respect of implementation deadlines

The SMSG notes ESMA's recent action regarding the implementation date of the SFTR and believes that this is a positive step.

The SMSG recommends that ESMA reviews all implementation deadlines for regulations and directives falling due within the next 12 months and assesses whether, and if so when and for how long, these should be postponed or subject to supervisory forbearance given the ongoing crisis and the uncertainty as to how long it will last.

This is particularly the case where new regulations or directives require significant IT resources for successful implementation, since much of that resource has been redirected to deal with the activation and resilience of multi-location business continuity arrangements as market participants struggle to fulfil client requests and maintain as orderly a market as possible. Moreover, even where ESMA will have postponed implementation deadlines, the situation remains dynamic and we would recommend that ESMA keeps these timeframes under review, continually assessing the readiness of market participants.

1.3. In respect of reporting obligations

Many issuers are deeply concerned by ESMA's recommendations on disclosing information regarding COVID 19 under the MAR regime and in the 2019 annual reports, as they put an additional burden on companies in this already very difficult period, where companies are using all their resources to securing their employees, securing their operations and surviving the crisis. An additional problem in this respect is that auditors and issuers often cannot (or should not) organize in-person visits during the auditing process.

Certain NCAs have already taken action in this regard, which creates an unlevel playing field.

The SMSG acknowledges that delayed publication of annual reports might create side effects as analysts/investors/creditors look for this information to update their recommendations, credit analysis and internal/external ratings and outlooks; similarly the lack of updated information may be seen as hampering a sound price formation.

The SMSG therefore recommends that:

- ESMA should urge all NCAs to postpone the deadline of annual reporting by three months, or, at least refrain from fining companies that are not able to achieve the deadline;
- ESMA coordinates with the EBA, EIOPA and the ECB/SSM to ensure that this approach does not have unwanted side effects on ratings, credit exposures and capital allocated to the in-scope entities.

2. Coordination and supervisory convergence

2.1. Coordination of short selling measures

Several Member States have taken action to restrict short selling. This uncoordinated approach undermines the internal market.

The SMSG therefore strongly advises ESMA to use its powers to coordinate the diverging Member State measures and publish what measures NCAs have taken in this respect on a dedicated web-page.

2.2. Coordination to ensure that markets remain open

The SMSG would recommend for ESMA to closely coordinate with NCAs to ensure that European markets will remain open and continue to operate efficiently in this challenging environment.

EU capital markets are a critical infrastructure for the financial system and the real economy, especially issuers, investors and banks in their dealing capacity. They are right now serving the needs of market participants to manage investments, access cash and hedge risk. Markets continue to function in an orderly and transparent manner despite the extreme trading conditions triggered by the Covid-19 crisis. Closing the markets would undermine financial stability in the context of an economy already hard-hit by the current crisis, and should be avoided.

So far, the controls and circuit-breakers in place work normally and with the necessary flexibility to meet market demand. In addition, Article 3 of MIFID 2 delegated regulation (2017/578) provides a list of exceptional circumstances under which the obligation of investment firms to provide liquidity on a regular and predictable basis to the trading venue is not required, such provision, should need be, would also provide the adequate basis to avoid dealers taking undue/ not manageable risks.

2.3. Impact of “Work From Home” (WFH) on voice recording and time stamping.

In order to maintain liquidity and dealing activities, firms have implemented continuity plans that rely on various solutions: rotation of teams, split sites and WFH. WFH means that a firm gives remote access on its computers and servers for front office systems to certain traders and sales persons in specific conditions and controls. Indeed, WFH raises several types of risks: operational, latencies, cyber-risk, confidentiality, conduct/ conflict of interest/ market integrity, traceability in a context where the global political, economic and sanitary environment is difficult.

As time goes by, the number of people who work from home increases on the market place and more widely in Europe. It seems that the internet networks/ infrastructures are challenged/ under stress because of this more extensive and intensive use of the internet. Accordingly, i) latencies can increase and ii) firms are not sure that conversations that are in principle recorded are effectively recorded in case of stress on these networks; similarly temporary disruptions of services cannot be excluded.

From this perspective, the SMSG recalls the need for traceability but acknowledges that policies can be amended in order to address potential temporary disruptions or similar issues, as the BaFIN, the FCA or the CFTC did in explicit reliefs. As no action letters are not per se available to ESMA, some supervisory convergence communication on this subject is strongly recommended.

3. Dedicated web-page

Different measures have been taken the last couple of days to deal with the consequences of the Covid 19 crisis on the financial markets. To ensure easy access and full transparency, the SMSG advises ESMA to

create one dedicated web-page with all measures and decisions ESMA is taking relating to the current crisis.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's web-site.

Adopted on 20 March 2020

[signed]

Veerle Colaert

Chair
Securities and Markets Stakeholder Group