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ESMA Consultation Paper

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 CDS
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Comments by AMAFI

1. Association française des marchés financiers (AMAFI) has more than 120 members representing over 10,000 professionals who operate in the cash and derivatives markets for equities, fixed-income products and commodities. Nearly one-third of members are subsidiaries or branches of non-French institutions.

2. The Association welcomes the opportunity to comment on the Consultation paper on the "*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*" (hereafter referred to as the CP) issued by the European Securities and Market Authority (ESMA). Before answering the questions of the CP and proposing some amendments to it (B.), some more general comments are set out (A.). Please note that the proposed amendments are evidenced as follows: additions are in bold and underlined and suppressions are in bold and crossed out.

A. General Comments

- **The exemption regarding market making is not a door to circumventing the regulation but a recognition of the conditions needed to carry out this activity**

3. Market making is primarily seen in the CP as a way to avoid the obligations of the Regulation and particularly as a tool to hide short positions. AMAFI would like to remind that the usefulness of market making is at the root of the exemption granted by the Regulation (*see Recital (26) of the Regulation*) and such contribution to the smooth functioning of markets goes hand in hand with the ability to hold short positions.

The Association understands that ESMA and competent authorities want to avoid that a "market making" label may be used to circumvent the Regulation and it supports the proposal to set up rigorous safeguards. However, these safeguards should be adapted to the two aspects of market making considered by the Regulation (*Regulation, Art. 2.1. (k)*) : the posting of two-way quotes with the result of providing liquidity on a continuous and regular basis and the fulfillment of clients' orders as part of a usual business (see in particular our comment below § 14).

Similarly, these safeguards should not result in situations where an institution whose usual business is to carry out one or all of these activities and has been known for doing so for years, may see its activity becoming not eligible to the exemption because of disproportionate requirements.

This is especially so since competent authorities have the possibility at all times to verify that the conditions for carrying out market making activities are met and that the benefit of the exemption is justified (*Regulation, art. 17(7)*).

- **Market making and being a member of a trading venue : an interpretation that exceeds the requirements of the Regulation**

4. The guidelines examine the definition of market making activities in Art. 2.1.(k) of the Regulation and provide an interpretation of the statement "*which is a member of a trading venue*" that restricts the definition of market making activities to financial instruments admitted or traded on a trading venue.

The consequence of this position is that market making in OTC derivatives and CDS are not recognised as market making activities for the purpose of this Regulation, as these financial instruments are not admitted to trading on trading venues. The inability to make use of the exemption means that these activities will be subject, not only to the notification requirements but more importantly to the locate rules, which requires a "market" or "service" that does not exist at this stage. As far as market making in CDS is concerned, no uncovered short position on CDS would be allowed as a result. These restrict the mere ability to conduct these activities. ESMA's interpretation of the level 1 text narrows the definition of market making activities and in practice, restricts the conduct of these activities.

5. One may consider that clarifying the scope of market making activities is an important matter for European financial markets and AMAFI has stressed in the past the importance of harmonising the differing views of regulators on this matter (*see notably AMAFI's answer to the European Commission consultation on short selling, AMAFI / 10-37, § 17, 9 July 2010*).

However, such determination is not an objective of this Regulation on short selling and rightly so since defining market making has many more impacts beyond short-selling. It is so decisive in terms of market structure[1] that it would necessitate a co-decision by the European legislators, and could not rest on an interpretation at level 3, nor at the level of the European Commission. This is all the more important that the rationale for ESMA's interpretation (or even the European Commission's one, as mentioned during the Open hearing of the 1st of October 2012) has not been made public, so that it is not possible at this stage to understand why conditioning the definition of market making to being a member of a trading venue is relevant. All the more that it contradicts the principle that has driven the European legislator so far in designing the European markets structure, which is to create equal conditions of competition between regulated markets, MTFs, systematic internalisers and OTC, resulting in a flexible market structure and on the recognition that market making can be performed on any of these. This principle still holds true in the context of the revision of MiFID.

6. Conditioning the possibility to use the exemption to this criterion of membership seems therefore disproportionate and merely technical without an articulated rationale. Why would then ESMA

[1] The conduct of market making activities triggers the application of MiFID's provisions.

make such a narrow interpretation of Article 2, resulting in stiffening the conditions of competition between trading venues?

The result is that market making activities that fall out of this scope are made non viable, in contradiction with the legislators' intention with the Regulation. The critical objective of the Regulation was to make sure that anyone who agreed to settle at a date would do so. This is the reason why locate rules were designed. However, the legislator realised that these rules, rightly stringent, created a risk that market making activities would be prevented. For this reason, the exemption was inserted and Recital (26) added to the Regulation to recognise the role of market making activities to the economy.

From this point of view, ESMA's position seems to exceed its mandate. There is no foundation for ESMA to interpret "narrowly" the exemption (as stated in § 23 of the CP). The Regulation is immediately enforceable in Member States: ESMA may add to it in terms of setting technical details but not in terms of further restrictions.

This narrow interpretation is all the more unwarranted that Article 2 itself is not prescriptive on the subject.

7. Article 2 is indeed not written very clearly and as such, can be read with a different view, consistent with the overall logic of current market structure regulation. Article 2 does provide for the firm to be a member of "*a trading venue*" but it does not link this membership to the financial instrument that the firm deals in, nor to the place of the transaction. So, literally, being a member of any trading venue is enough to claim for the benefit of the exemption, wherever the transaction is taking place and whatever financial instrument in scope of the Regulation is concerned...

This poor wording should be interpreted in the light of the lack of rationale of this condition, both from a policy point of view (*see above §§ 5*) and from a technical point of view. It is indeed surprising that it could be seen as relevant even only for bond markets that trade OTC (why would a market maker in sovereign debt need to be a member of a trading venue to be recognised as such?).

There is a political will to transfer much of OTC trading on organised platforms in the near future but, at present, the regulations and infrastructure are not ready and are still being actively discussed.

At best, this interpretation of Article 2 is well ahead of the regulation envisaged to organise the OTC derivatives and CDS markets, at worst it has not considered these markets. But in the meantime, it creates an important mismatch.

8. AMAFI therefore suggests that the condition of being a member of a trading venue be interpreted less restrictively to allow market making in CDS and OTC derivatives. One solution could be to consider the trading venue of the reference bond of a CDS or of the underlying of a derivative instead of the trading venue of the CDS or the derivative themselves.

- **The legal uncertainty accompanying the entry into force of the Regulation on short selling and certain aspects of the Credit Default Swaps (hereafter referred to as the Regulation)**

9. The implementation difficulties arising from the complexity of the Regulation and the absence of important details both at levels 1 and 2 require an astounding amount of additional work from ESMA. Because of the tight implementation timeframe and the limited resources of the Authority, decisive pieces of the regulation are still missing less than 1 month before its entry into force, leaving firms to develop IT infrastructure and adjust their businesses with important and inter-connected uncertainties still pending. It should be noted that current national provisions on short selling do not help in terms of having the appropriate arrangements in place since the ones required by the Regulation are significantly different in nature and in scope.

10. Such a situation creates a heightened risk of non-compliance with the final set of regulation that will be in force on the 1st of November. Considering that this Regulation is one of the first ESMA had to deal with, AMAFI trusts that it will serve as a valuable experience for European authorities, from which lessons could be drawn to avoid such situation in the future.

11. As regards particularly this CP, it regrettably comes too late in the implementation process of the Regulation. As it will be applicable from November 1st, 2012, investment firms carrying out market making activities and intending to make use of the exemption provided by Article 17 of the Regulation have to notify their intent at the latest on October 1st, 2012 but at the time of this notification they will have no definitive guidelines on which to rely. This creates a state of legal uncertainty, putting firms at risk of being notified later on by their competent authority to stop using the exemptions or even of being sanctioned for non compliance.

12. It should be further noted that these Guidelines will not end the state of uncertainty surrounding this Regulation since some important details are still missing:

- The unit that should be used to measure positions in sovereign debt is still undefined and may require firms to adjust they IT infrastructure with no timelapse depending on the choice finally made;

- The methodology to calculate correlation with a sovereign debt (*Regulation, art. 3.5*) is undefined, which hinders the calculation of net positions in sovereign debt. One option could be to identify a benchmark bond for any issuer on which correlation calculations could be based. AMAFI would be pleased to discuss in detail such possible solution with ESMA.

13. Finally, AMAFI highlights that the short timeframe in which these Guidelines are drawn up were a real hindrance to designing alternate proposals. A way forward for ESMA could be to operate during a short period based on an interim solution, which would provide sufficient time for designing solutions workable for all.

- **Market making as per Article 2(1)(k)(ii) is a client driven activity, subject to highs and downs**

14. The CP usefully distinguishes market making activities which are performed according to Article 2(1)(k)(i) and Article 2(1)(k)(ii) of the Regulation. However, as far as market making as per Article 2(1)(k)(ii) is concerned (i.e. client facilitation), the draft guidelines interpret the terms "*usual business*" as dealings on a frequent and systemic basis in a precise financial instrument, whereas the Regulation considers the activity of fulfilling clients' orders itself that must be a "*usual business*".

The proposed interpretation is not consistent with the regulation that considers the business as a whole nor is it adapted to the nature of this activity that is client driven. The consequence is that many firms providing client facilitation on less liquid instruments will fail to pass the test of frequent and systematic trading. If firms make a choice as to the types of instruments they are ready to provide such service on for their clients, they have however no control on the frequency with which its clients will post orders on these. This is the essence of commerce, where the shopkeeper proposes a range of products on the shelves and waits until clients come in and make a purchase.

Accordingly, we suggest in some of our answers (see Q5 and Q13) to amend parts of the CP where there seems to be a confusion between these two different categories of market making activities.

B. Questions

Q1: Do you agree with the above approach regarding the definition and scope of the exemption for market making activities? Please explain.

15. No, AMAFI does not, especially as regards the condition of being a member of a trading venue (*see § 4 above*).

16. ESMA's interpretation of market making should in any case be limited to these particular Guidelines: it should be mentioned that it is not applicable in any other situation outside the scope of this Regulation.

17. In addition, some clarifications are needed about the notion of '*significant short positions*' that a notifying person is not supposed to hold for more than brief periods. If this notion refers to the notification thresholds set in Articles 5, 6 and 7 of the Regulation, such reference should be added for clarity purpose. Otherwise, the notion should be explained so that it is measurable. It should also be added that the notion of "brief periods" is quite ambiguous. Market makers may need to hold inventories, long or short, over several days, to perform their activities. In addition, if "significant" does not refer to the thresholds set in Articles 5, 6 and 7 of the Regulation, its interpretation is all the more important that hedging activity is rarely made transaction by transaction and rarely results in totally flat positions, hence resulting potentially in short positions for a period of time. In this regard, the statement in § 17 of the CP that "the person should be able to justify upon request from the competent authority why an exact match was not possible" is particularly demanding on firms.

18. Consistent with § 69 (b) (vi) of the CP, It would be useful to add that notifying entities can also provide for a clear specification of the instruments concerned by the exemption, such as shares composing an index. Indeed, paragraph 69 (b) (vi) states that a notifying entity has to provide information concerning:

"*the financial instrument(s) for which the intent to use the exemption is notified. It can take the form of (...) a clear specification of the instruments concerned provided that it results in a closed list of specific instruments (...)*".

Such clarification would be welcome for harmonisation purpose. We note for e.g. that the FSA Guidelines concerning the UK notification process provide[2], in paragraph 25, that:

"*Any notification submitted should refer to a particular share <u>or shares</u> or sovereign issuer. The market-making activities which could be subject to the exemption should therefore be in relation to:*

i. shares of an issuer subject to the Regulation;
ii. sovereign debt issued by a sovereign issuer as defined by the Regulation; or

[2] "The UK notification process for market-making activities and primary market operations", FSA Guidelines, September 2012, p.8

iii. *CDS on sovereign debt of a sovereign issuer as defined by the Regulation*"

The use of the plural "shares" seems to imply that notification of a group of shares is possible. A common position on this aspect should be made clear in the final Guidelines.

19. Notification instrument per instrument is indeed a very cumbersome process, requiring daily updates and whose value-added is not justified in the CP. It is simply not feasible for some types of activities, such as :

- for listed derivatives, for which it should be possible to notify a class of options or all the maturities of a future contract;
- for new sovereign bond issuance (i.e. the 30-day notification period would prevent the market making activity itself) for which a notification per sovereign issuer should suffice.

Q2: Do you agree that when determining the RCA for notification purpose the third country entity should be assessing the turnover in relation to its market making activities as defined in Article 2(1)(k) of the Regulation? Please, explain.

20. AMAFI supports the proposal that there should be only one RCA to notify for a third country entity intending to use to exemption for market making activities. However we consider that it will be quite difficult to determine which is this RCA by using the turnover related to the market making activities of that third country entity.

Q3: Do you agree with general principles applicable to persons intending to make use of the exemption under Article 17(1) of the Regulation? Please, explain.

21. Please see our comments above §§ 4 to 8 regarding the condition to be a member of a trading venue where the financial instrument is admitted or traded.

22. In addition, the second condition on complying with the rules and requirements imposed by the trading venue for market making activities must be qualified for two reasons :

- such rules may not exist at all trading venues and trading may take place outside of a trading venue, as provided for by the Regulation and explained in § 26 of the CP.
- this condition is not applicable to client facilitation (market making activities as per Art. 2 (1)(k)(ii)).

It should therefore be added that such compliance is expected "*when applicable*".

23. As regards the third condition, AMAFI understands that firms should be able to clearly identify their market making activities benefitting from the exemption. However, the condition based on separate arrangements for the middle and back-offices seems to imply that staff in charge of control and booking of market making activities should be separated physically or be subject to different internal rules, which does not make sense. If the objective, as explained during the open hearing, is really to be able to identify quickly, on request, market making activities, the Guidelines already impose such requirement in the fourth condition (to "*maintain its records of orders and transactions (...) separately from its records of proprietary trading*"). If it is not explicit enough then it should be amended to require prompt identification of orders and trades on request. There is no need in this respect to create another requirement on members of staff, which does not contribute to this ability to distinguish orders and transactions: maintaining an audit trail and organisational arrangements are two different matters.

As regards the fourth condition that refers to "its proprietary trading" in contrast with market making activities, since market making activities are part of proprietary trading, the condition should read: "its other proprietary trading". This distinction is an important one conceptually.

24. The sixth condition on compliance resources and monitoring seems to create a subset of compliance requirements specific to market making activities. Like any other investment activities the firm carries out, market making needs to abide by specific rules, including the Regulation. And like any other rules, compliance with these rules needs to be monitored by the firm. Like any other new regulation, the provisions of the Regulation will need to be added to the compliance work plan. There is however no justification to require the dedication of specific resources or the set up of specific monitoring programme for this activity.

25. The last condition refers to the "principles and criteria in the Guidelines", instead of referring to the Regulation itself (each competent authority will decide whether it complies with the Guidelines and makes it applicable to its constituents).

Q4: Do you agree with principles applicable to persons carrying out market making activities in accordance with Article 2(1)(k)(i) of the Regulation? In your view which of the two options in paragraph 45 should apply to quotes entered when carrying out market making activities? Do you see another alternative to the two options pro-posed? Please, provide explanations.

26. Yes, AMAFI agrees with principles applicable to persons carrying out market making activities in accordance with Article 2(1)(k)(i) of the Regulation as set up in the Guidelines.

As regards quotes entered when carrying out market making activities, AMAFI is in favour of Option 1, because the notion of "*maximum acceptable spread*" mentioned in Option 2 is not defined and difficult to interpret for certain types of instruments, which would create some legal uncertainty. It would also set a limit that may not be adjustable depending on the lifecycle of the instrument or the market conditions, which could cause compliance issues in case of fast markets. Another option could be for the quotes to be in proportion of a normal spread for the considered instrument and competitive enough, both concepts that can be assessed according to the liquidly actually provided to the market.

Q5: Do you agree with the principles applicable to persons carrying out market making activities in accordance with Article 2(1)(k)(ii) of the Regulation? Please, explain.

27. As stated in § 14 above, market making activities performed in accordance with Article 2(1)(k)(ii) are different from market making activities defined by Article 2(1)(k)(i). They depend on clients' orders and requests so that the trading frequency of each financial instrument will vary according to clients' orders and may not be regular. Hence, the notifying entity should not be required to trade on a regular basis on a specific financial instrument.

Furthermore, Article 2(1)(k)(ii) of the Regulation imposes on the notifying entity to perform this activity as part of its usual business, which does not require a frequent and systemic trading as interpreted in the CP.

28. Similarly, concerning the third dash of paragraph 47 of the CP, as the activity of the notifying entity depends on its clients' orders, it cannot assess in advance the frequency at which it will trade each financial instrument. Requiring such assessment is of little use anyway since the competent authority has the ability to check ex-post that the activity notified is indeed taking place as it should.

Q6: Do you agree with the qualifying criteria for the comparable size of orders? Please explain.

29. The notion of comparable sizes of orders is included in Article 2(1)(k)(i) of the Regulation but it does not apply to the size of the orders of the market maker compared to the market : it applies to the sizes of the bid and ask quotes that must be comparable ("*by posting simultaneous two-way quotes of comparable size*"). The notion of comparable size as envisaged by ESMA goes therefore beyond the Regulation, i.e. it is not part of the qualifying criteria set by the Regulation, and it should therefore be deleted.

In addition, requiring a minimum quote size would fail to address the liquidity issue since liquidity is best reflected by market depth and hence by the market share of the market maker in the instrument, rather than by the size of its quotes.

One could argue that this notion may be applicable to trading in shares and that, for these, the Average Trading Size (ATS) could be considered as a benchmark. Nevertheless, entities should be granted some leeway when performing market making activities, and therefore be able to post orders of a smaller size than this ATS when it is necessary.

Q7: Do you agree with the qualifying criteria for competitive price of orders? Please explain.

30. AMAFI disagrees with the measure in paragraph 52 of the CP concerning highly liquid instruments. Imposing more demanding requirements on entities operating on liquid markets to benefit from the exemption is assuming that these entities do not perform market making but are only aiming at circumventing the Regulation. It is also implying that some market making activities are more acceptable or more useful than others. Such two-pronged approach is absolutely not provided for by the Regulation. As long as a notifying entity complies with the general criteria set up by the CP to be a market maker and aims at providing more liquidity to the market, it should be granted the right to use the exemption without additional requirements.

As a consequence, paragraph 52 of the CP should be deleted.

Q8: Which option do you favour? Please, justify.

31. Again, AMAFI's answer depends on the types of instruments concerned. For listed derivatives, AMAFI favours option 2 (assessment in proportion to the price of the instrument) because for these instruments, the price is a more accurate measure and in any case spreads are based on prices.

For other instruments, AMAFI is of the view that Option 1 is more adequate with the caveat that the average spread may not be observable on a platform since some instruments like many bonds exclusively trade OTC and the platform is not a benchmark to rely on to assess the market in this instrument.

Q9: Do you agree with the qualifying criteria for ongoing presence on the market? Do you think different criteria should apply when conducting market making activities in sovereign debt? Please explain.

32. AMAFI is of the opinion that as regards market making activities on shares and sovereign bonds as per Article 2(1)(k)(i) of the Regulation, the percentage of 90% is justified most of the time but may be difficult to abide by depending on market conditions. As stated in paragraph 43 of the CP, the presence of a notifying entity on a financial instrument may vary under certain circumstances and "*Time presence should be expressed as a percentage of the total duration of the trading session, but may vary according to both the trading venue or an "equivalent" market in a third country and the financial instrument in question*".

This attenuation should also be mentioned in this section.

33. Besides that, AMAFI would like to stress the difference between market making activities on cash markets and listed derivative markets. The characteristic of listed derivative markets is that for a given underlying stock or a given index (for e.g. CAC 40), there are many contracts listed depending on maturity, exercise price, and direction (call and put). For example, for BNP Paribas there are 331 options listed on Euronext LIFFE and 630 options for the CAC 40 index.

Listed derivatives market operators that manage options markets set up contracts with the objective of ensuring market liquidity. In exchange, intermediaries who meet the criteria set by the market operator have substantial pricing advantage over other market participants. For the operator, the challenge is to find the right balance between providing liquidity to promote the proper functioning of the market and assuming the cost of liquidity resulting from advantageous tariffs. This balance is particularly difficult to establish to the extent that the liquidity needs vary considerably depending on the characteristics of the option (liquidity and price change of the underlying, the maturity of the option, the price difference between current price and the exercise price ...).

In this context, market operators (e.g. EUREX and NYSE LIFFE) have developed complex market making contracts that take into account these different elements. Generally, those market operators require market makers, on a monthly basis, a presence on the market between 80% and 85 % of the time for a given number of contracts.

To be consistent with this type of market making activity, the Regulations should define ongoing presence on the market as being present 80% of the time, on a monthly basis, for a given number (between 7 and 10) of in-the-money and out-of-the money contracts with a maturity of less than 13 months.

Q10: Do you agree with the ESMA approach towards assessment of notification of intent to make use of the exemption? Please explain.

34. Yes, AMAFI agrees with ESMA approach towards assessment of notification as an entity that is already party to a market making or liquidity provision contract or programme with a trading venue, or an issuer, must be presumed to meet all the conditions to be granted the right to use the exemption for market making activities.

Q11: Would you agree that frequency and systemic basis of the activities exempted under Article 2(1)(k)(ii) capacity should be assessed against the same qualifying criteria as applicable to systemic internalisers under Article 21(1) of the Commission Regulation (EU) No 1287/2006? Please, provide explanations.

35. AMAFI agrees that the frequency and systemic basis of the activities exempted under Article 2(1)(k)(ii) could be assessed against some of the principles contained in the qualifying criteria of systematic internalisation as per Article 21(1) of the Regulation (EU) No 1287/2006.

In principle however, systematic internalisation and client facilitation are very different activities (there is no posting of bid and offer quotes for the latter) and AMAFI is therefore not keen on blurring their differences by applying the same conditions.

In particular, the notion of "*regular or continuous basis*" used in the Regulation No 1287/2006 does not have the same meaning as the "*usual business*" required from entities carrying out market making activities in accordance with Article 2(1)(k)(ii) (*see § 14above*).

Also, the second condition in Article 21(1) b) which requires an automated system is not adapted to client facilitation, that can be performed by voice or other manual means.

Q12: In your opinion, what would be the most appropriate qualifying criteria in terms of percentage to assess scale of activity eligible for exemption under Article 2(1)(k)(ii) capacity in comparison to overall proprietary trading?

36. AMAFI does not see why activity carried out in accordance with Article 2(1)(k)(ii) should be compared to the firm's overall proprietary trading, even if it is considered by ESMA as a way to circumvent the Regulation. Some brokerage firms may have minimal proprietary trading while still offering client facilitation, while large firms may have a sizeable proprietary trading activity. Hence it is unclear what value can be given to such ratio without proper analysis of the firm's situation. In addition the criterion of scale is not part of the Regulation: as long as a firm fulfils orders initiated by its clients as part of its usual business, as stated at Article 2(1)(k)(ii), it qualifies for the of the exemption provided by Article 17, no matter how important this activity is in comparison with its proprietary trading.

Q13: Do you agree that the above information needs to be provided in the notification form? Should historical data be also provided with the notification form? Please, provide justifications.

37. As regards the content of the notification for Authorised Primary Dealers, it should be noted that in some countries, for instance in Germany, there is no agreement signed with the sovereign issuer to be recognised as an Authorised Primary Dealer. As a result, notifying entities are not always able to provide a copy of an agreement signed with the sovereign issuer. Point iii. of paragraph 69 should therefore be qualified with the terms "*when applicable*".

38. Concerning market making activities performed in accordance with Article 2(1)(k)(ii) of the Regulation:

- As stated in our answer to Q5, the entity performing this activity cannot assess in advance the volume of its market making activities in a financial instrument, as this volume will depend on its clients' orders and requests. As a consequence, paragraph 69(b)(ix)(2) should be deleted.

- The distinction between 2.a (fulfilling orders) and 2.b (responding to clients' requests) is not relevant as firms operating under Article 2(1)(k)(ii) do both and do not distinguish between the two.

39. Finally, as regards the provision of historical data by the notifying entity at the time of the notification, our experience of such request made by the French competent authority showed how onerous this process can be, both for firms and the competent authority. More fundamentally, this data will not provide greater security to competent authorities as to the characterisation of the activity carried out by firms. The stringent conditions applicable to the exemption, the competent authorities' ability to forbid the use of the exemption and their power to request additional data, all constitute strong enough safeguards.

Q14: Do you agree with 6 months after application of the Guidelines period for revising and assessing notifications made before entry into force of the Guidelines? Please explain.

40. Emergency measures regarding exempted activities, as provided for by the Regulation, raise concerns as to their scope of application, as they will only apply to entities who have notified the competent authority of their intent to use the exemption. Other entities with market making activities on the same instrument, including on a trading venue regulated by this competent authority, will remain unconcerned.

It would be useful that the Guidelines provide some clarifications on this aspect.

41. Concerning the reassessment of notifications within 6 months after the application of the Guidelines, one should note that if it were to result in the withdrawal of the exemption, the entity would need to adapt its systems and businesses accordingly to comply with the disclosure requirements, the locate rules and the ban on short CDS. These require some IT developments, business adjustments, and potentially entering into contractual agreements with third parties. It is therefore important that sufficient time be left to entities for this purpose in case of a withdrawal. This could take the form of a pre-notification process by the competent authorities, as planned by the FSA.

The Guidelines should consider this matter.

Q15: Do you agree that a list of market makers and authorised primary dealers published on the ESMA website according to Article 17(13) should at least include the above information? What additional information should be included? Please justify.

42. AMAFI does not think that additional information should be included in the list of market makers and authorised primary dealers published by ESMA on its website. Information to the public need not include the same extent of information as the one provided to competent authorities who are in charge of supervision and enforcement.

In this respect, the list of financial instruments for which the exemption is used may be useful information for the public as regards the activity of primary dealer but is of very low informational value for market making activities : it will be extremely dense (if the instruments are to be indentified on an individual basis), hence offering poor legibility.

One should note that such detail is not provided for by Article 17(13) of the Regulation which only provides for a list of markets makers and authorized primary dealers.

43. Finally, the question as to whether this information should be provided at a group level or at an entity level should be dealt with. The answer to this question should be considered to define the extent of the content of this publication.