

Revised note on the UK notification process for market makers and authorised primary dealers under the UK SSR

Overview

Following the end of the transition period, the [Short Selling Regulation \(EU\) 236/2012](#) and the Level 2 regulation ([regulation EU 918/2012](#)) were converted into domestic law as amended by the [Short Selling \(Amendment\) \(EU Exit\) Regulations 2018](#).

Binding Technical Standards adopted under the EU SSR as at the end of the transition period have also been converted into UK law and apply as amended by the [Technical Standards \(Short Selling\) \(EU Exit\) Instrument 2019](#).

Guidelines issued by the European Securities and Markets Authority (ESMA) on the exemption¹ ([ESMA Guidelines](#)) have not been incorporated into UK law. However, as set out in our Policy Statement PS19/5², we expect that market makers and authorised primary dealers continue to apply ESMA Guidelines to the extent that they remain relevant³, interpreting them in light of the UK's withdrawal from the EU and the legislative changes made to ensure that the regulatory framework operates appropriately.

Why are we issuing this document?

1. We are setting out the process for making notifications to us – the Financial Conduct Authority (FCA) - after the end of the transition period as required under the UK SSR⁴.

Background

2. The UK SSR requires investors to provide notifications to the FCA when net short positions that they hold in shares admitted to trading on a UK trading venue reach or fall below

¹ Guidelines 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| ESMA/2013/74 of 2 April 2013

² Please see page 97 of PS19/5: <https://www.fca.org.uk/publication/policy/ps19-05.pdf>

³ The FCA has notified ESMA that it is complying with all of the ESMA Guidelines with the exception of paragraphs 19-22; 30; 32; 35-36; 43 (first and last indent only, to the extent that it relates to those parts of the guidelines the UK is not complying with); 65 (xi); and 75.

⁴ Guidance on our procedures relating to the market making exemption and the authorised primary dealer exemption is set out in the Financial Stability and Markets Confidence Sourcebook (FINMAR) 2.6G: <https://www.handbook.fca.org.uk/handbook/FINMAR/2/6.html>

0.2% of the issued share capital of the company concerned and disclose to the public any net short positions in shares once they breach a higher threshold of 0.5%⁵. There are also notification requirements for significant net short positions in UK sovereign debt and, in certain circumstances, for UK sovereign credit default swaps (CDS)⁶. It also places certain obligations on investors when entering into uncovered short positions in shares admitted to trading on a UK trading venue and UK sovereign debt regarding locating the stock in question and prohibits uncovered UK sovereign CDS transactions⁷.

3. Under Article 17 of the UK SSR, there are certain exemptions for market-making activities and primary market operations from these requirements. These exemptions can be used by persons that have made a legitimate notification to the FCA at least 30 days before the exemption is intended to be employed and where the FCA has not prohibited its use.
4. The notification procedure is not an authorisation or licensing process by the FCA.
5. The FCA can prohibit the use of the exemption at any time, either during the 30 calendar days from when we receive the notification, or subsequently if the person can no longer satisfy the conditions of the exemption.
6. The exemptions apply only to the transactions carried out in performance of market making activities and as authorised primary dealers; they do not apply to the entire scope of activities the notifying person carries out.
7. To benefit from the exemption under UK SSR after the end of the transition period, any UK or third country (including any country in the EU) market makers will be required to join a UK trading venue (unless an equivalence decision has been made) and submit a notification to us in writing at least 30 days before they intend to use it.
8. Under UK SSR, any notifications UK and third country market makers (including those registered in the EU) made to the FCA for instruments admitted to trading in the UK before the end of the transition period will remain valid.
9. However, notifications made to us for instruments admitted to trading in the EU will no longer be valid.
10. Treasury has made equivalence decision as referred to in Article 17(2) of the UK SSR in respect of the European Economic Area (EEA) states for the purpose of the exemption for market making activities under Article 17(1) of the UK SSR. This means that EEA firms that have not previously submitted a notification for a market maker exemption under UK SSR can now do so without needing to be a member of a UK trading venue provided they are a member of an EEA trading venue.
11. EEA firms that joined a UK trading venue and notified the FCA 30 calendar days before the end of the transition period previously do not need to take any further action.
12. If you have already notified the FCA, you do not need to notify us again that you intend to continue using the exemption under the UK SSR. But you must notify us if you wish to vary the financial instruments you want to use it for. Article 17(9) and 17(10) of the UK SSR requires the FCA to be notified, by a person who has previously given a notification, should any changes occur that affect their eligibility, or intention, to use the exemption.

⁵ See Articles 5 and 6 of the UK SSR

⁶ See Articles 7 and 8 of the UK SSR

⁷ See Articles 12 and 13 of the UK SSR

This continues to be the case. The FCA will then assess whether the relevant activities still qualify for the exemption.

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1 Definitions

Market-making activities

10. Under Article 2(1)(k) of the UK SSR 'market making activities' are the activities of an investment firm, a credit institution, a third-country entity, or a firm as referred to in Article 2(1)(ka) of the UK SSR, which is a member of a UK trading venue or of a market in a third country, the legal and supervisory framework of which has been declared equivalent by the Treasury under Article 17(2) of the UK SSR, where it deals as principal in a financial instrument, whether traded on or outside a UK trading venue, in any of the following capacities:
 - i. by posting firm, simultaneous two-way quotes of comparable size and at competitive prices, with the result of providing liquidity on a regular and ongoing basis to the market;

- ii. as part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade;
- iii. by hedging positions arising from the fulfilment of tasks under points (i) and (ii).

Authorised primary dealers

- 11. An 'authorised primary dealer'⁸ is a natural or legal person who has signed an agreement with a sovereign issuer⁹ or who has been formally recognised as a primary dealer by or on behalf of a sovereign issuer and who, in accordance with that agreement or recognition, has committed to dealing as principal in connection with primary and secondary market operations relating to debt issued by the UK.

Competent authority: FCA

- 12. A person whether registered in the UK or in a third country wishing to use the market maker exemption in relation to instruments admitted to trading in the UK must notify the FCA.
- 13. Authorised primary dealers whether registered in the UK or in a third country must notify the FCA if they want to use the exemption in relation to UK sovereign debt. Those entities notifying their intention to use the exemption as an authorised primary dealer must give evidence of their agreement with the UK sovereign issuer or provide a record of their formal recognition as a primary dealer on behalf of the UK sovereign issuer.

2 Exemptions

- 14. The provisions of Article 17(1) of the UK SSR exempt transactions performed due to market making activities from net short position transparency requirements (Articles 5, 6 and 7), the restrictions on uncovered short sales in shares and sovereign debt (Articles 12 and 13) and the prohibition to enter into uncovered sovereign CDS positions (Article 14).
- 15. According to Article 17(3) of the UK SSR, persons acting as authorised primary dealers are not required to notify net short positions in UK sovereign debt, are not subject to the restrictions on uncovered short sales in UK sovereign debt instruments and are not prohibited from entering into a UK sovereign CDS transaction that results in an uncovered position as referred to in Article 4 of the UK SSR.
- 16. **The exemptions apply only to the transactions carried out in performance of market-making activities or as authorised primary dealers; they do not apply to the entire scope of activities the notifying person carries out.**
- 17. You can only use the exemptions under Articles 17(1) and 17(3) where previous notifications of intent to use the exemption has been made in writing to us at least 30 calendar days before the intended first use of the exemption. We aim to process all notifications as soon as possible and, in particular, will be prepared to consider urgent notifications (e.g. in respect of shares which are being admitted to trading on a trading venue imminently) that are made less than 30 days before the intended use of the exemption.

⁸ As defined in Article 2 (1)(n) of the UK SSR

⁹ 'Sovereign issuer' within the meaning of Article 2(1)(d) of the UK SSR.

18. We can prohibit the notifying person using the exemption if we consider that the person does not satisfy the conditions of the exemption. Notice of the prohibition together with the reasons for the prohibition will be communicated in writing within 30 calendar days from having received a fully completed notification.
19. In addition, we can, at any time, decide to prohibit use of the exemption where there have been changes in the circumstances of the notifying person so that it no longer satisfies the conditions of the exemption. This may result from our own assessment or from a subsequent notification received from the notifying person indicating a change affecting its ability to use the exemption¹⁰. The FCA Handbook (FINMAR 2.6.2G and 2.6.3G) sets out the process we will follow if we decide to prohibit someone using the market maker or authorised primary dealer exemptions, including the procedure for reviews of any decisions to impose prohibitions.

Scope of the market making exemption

20. To qualify for the exemption market making activities must be undertaken, whether on or outside a trading venue, by the following entities¹¹:
 - i. an investment firm which is a member of a UK trading venue where it deals as principal in a financial instrument in any of the two capacities and related hedging activities specified in Article 2(1)(k); or
 - ii. a credit institution which is a member of a UK trading venue where it deals as principal in a financial instrument in any of the two capacities and related hedging activities specified in Article 2(1)(k); or
 - iii. a third country entity which is a member of a UK trading venue where it deals as principal in a financial instrument in any of the two capacities and related hedging activities specified in Article 2(1)(k); or
 - iv. a third-country entity which is a member of a market in a third country, the legal and supervisory framework of which has been declared equivalent by the Treasury under Article 17(2) of the UK SSR¹², where it deals as principal in a financial instrument in any of the two capacities and related hedging activities specified in Article 2(1)(k); or
 - v. a firm as referred to in Article 2(1)(ka) of UK SSR¹³, which is a member of a UK trading venue where it deals as principal in a financial instrument in any of the two capacities and related hedging activities specified in Article 2(1)(k).

¹⁰ Under Articles 17(9) or 17(10) of the UK SSR

¹¹ Article 2(1)(k) of the UK SSR

¹² As of 31 December 2020, Treasury has made equivalence decision in respect of the European Economic Area (EEA) states for the purpose of the exemption for market making activities under Article 17(1) of the UK SSR

¹³ Firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets

21. An entity as defined above can notify its intention to use the exemption if:
 - vi. it is a member of a UK trading venue¹⁴ (or a market in a third country with declared equivalent regime);
 - vii. where it deals (whether on the UK trading venue or OTC) as principal in one of the capacities set out in paragraph 10 above;
 - viii. in a financial instrument for which it claims the exemption.
22. If these conditions are satisfied then the market making activities of the notifying entity in or related to that particular instrument may be exempted from Articles 5, 6, 7, 12, 13 and 14 (depending on the class of instrument in question) of the UK SSR.
23. All persons considering use of the market making exemption should note the exemption applies with the conditions set out in paragraphs 23-25 and 27 of the ESMA Guidelines.

Financial instrument approach

24. Article 17(1) of the UK SSR states that provisions of Article 5, 6, 7, 12, 13 and 14 shall not apply to transactions performed due to market making activities. Those market making activities are defined in Article 2(1)(k) as dealing as principal in a **financial instrument** (emphasis added). Consequently, the exemption under Article 17(1) applies to activities in a financial instrument admitted to trading on a UK trading venue, i.e. on an instrument by instrument basis and should not be considered as a global exemption for market making activities in all financial instruments.
25. Any notification submitted should therefore identify for shares, the individual instrument, and for sovereign debt and sovereign CDS, the sovereign issuer in the debt of which market making activities are notified for the purpose of the exemption.
26. However, market making activities as defined in Article 2(1)(k) of the UK SSR might be carried out in financial instruments different from a share or a sovereign debt instrument e.g. (but not limited to) derivatives. To qualify for the exemption, the financial instrument must be within the scope of the UK SSR as defined in Article 1.
27. When notifying the intention to use the exemption for market making activities in these other instruments, the notifying entity should also provide information regarding the category of the financial instrument under Part 1 of Schedule 2 to the Regulated Activities Order 2001/544 in which the market making activity is carried out.

UK trading venue membership requirement

28. Any person, whether registered in the UK or in a third country, who wishes to notify us that they intend to use the exemption for market making activities will need to be a member of a UK trading venue or of a market in a third country whose legal and

¹⁴ As defined in Article 2(1)(l) of the UK SSR. The trading venue of which the entity must be a member of has to be within a UK regulated market or a UK multilateral trading facility.

supervisory framework has been declared equivalent by the Treasury pursuant to Article 17(2) of the UK SSR¹⁵.

29. Where an entity is a market maker for financial instruments which are admitted to trading on a UK trading venue, the notifying person is not required to conduct its market making activities on that venue or market or to be recognised as a market maker or liquidity provider under the rules of that trading venue or market. Neither is there a requirement to have a separate contractual obligation to carry out market making activities.

3 General principles and criteria of market making activities

30. A person that intends to use the exemption set out in Article 17(1) of the UK SSR must:
- i. be a member of a UK trading venue or of an 'equivalent' market in a third country;
 - ii. comply with the principles set out in bullet points 2 – 5 of paragraph 43 of the ESMA Guidelines; and
 - iii. be able to demonstrate at any time to the competent authority that its market making activity meets those principles and the criteria outlined below.
31. Entities notifying their intention to use the exemption under Article 2(1)(k)(i) of the UK SSR ('posting firm, simultaneous two-way quotes of comparable size and at competitive prices, with the result of providing liquidity on a regular and ongoing basis to the market') must meet the principle set out in paragraph 44 of the ESMA Guidelines. Market makers in equities and in equity derivatives traded on a trading venue must meet the qualifying criteria set out in paragraphs 46 to 52 of the ESMA Guidelines.
32. Entities notifying us that they intend to use the exemption under Article 2(1)(k)(ii) of the UK SSR (when dealing "as part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade") must comply with the principles and criteria set out in paragraphs 53 – 55 of the ESMA Guidelines.
33. An entity undertaking anticipatory hedging under Article 2(1)(k) of the UK SSR must comply with the conditions set out in paragraphs 56 and 57 of the ESMA Guidelines.

4 Notifications

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34. Paragraph 65 of the ESMA Guidelines sets out the information which notifying entities should provide when submitting their notifications. Notifications should be provided in electronic format in English using the forms on our website¹⁶.

¹⁵ As of 31 December 2020, Treasury has made equivalence decision in respect of the European Economic Area (EEA) states for the purpose of the exemption for market making activities under Article 17(1) of the UK SSR.

¹⁶ <https://www.fca.org.uk/markets/short-selling/exemptions-requirements>

Timings

35. For an exemption to be used a person must notify us at least 30 days before he or she intends to first make use of it. The 30-day period is the maximum period and in certain cases we may notify the person within in a shorter timeframe either that we are minded to prohibit, or that we do not intend to prohibit, the use of the exemption.

Contact

36. You can send us your notifications by email to SSRMarketMaker@fca.org.uk .