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| Response Form to the Consultation Paper on the review of certain aspects of the Short Selling Regulation |
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**Responding to this paper**

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions. Comments are most helpful if they:

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **19 November 2021.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**Instructions**

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. use this form and send your responses in Word format (**pdf documents will not be considered except for annexes**);
3. Please do not remove tags of the type <ESMA\_QUESTION \_SSRR\_1>. **Your response to each question has to be framed by the two tags corresponding to the question.**
4. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
5. When you have drafted your response, name your response form according to the following convention: ESMA\_SSRR\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_SSRR\_ABCD\_RESPONSEFORM.
6. Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open Consultations” -> Consultation Paper on Review of MAR Guidelines on delay in the disclosure of inside information and interactions with prudential supervision”).

**Publication of responses**

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

**Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/legal-notice).

**Who should read this paper**

# All interested stakeholders are invited to respond to this consultation paper. This consultation paper is primarily of interest to issuers of financial instruments admitted to trading or traded on a trading venue, investment firms, market makers, primary dealers, persons who engage in short sales or transactions resulting in net short positions. Responses are also sought from any other market participant including trade associations and industry bodies, institutional and retail investors, consultants and academics.

**General information about respondent**

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| --- | --- |
| Name of the company / organisation | Optiver V.O.F |
| Activity | Investment Services |
| Are you representing an association? |[ ]
| Country/Region | Netherlands |

Please make your introductory comments below, if any.

<ESMA\_QUESTION\_SSRR\_0>

Optiver welcomes the opportunity to provide feedback to ESMA on a possible review of the EU”s Short Selling Regulation. As non-directional, non-bank market makers we support simple, transparent, and liquid capital markets. As such, we continue to question the value of short-selling bans for financial markets due to their significant, negative consequences on markets including interfering with efficient price formation, reducing market makers’ ability to provide liquidity and dampen volatility, and introducing technical and regulatory complexities.This view is overwhelmingly supported by academic and industry research. Short-selling bans are ineffective in achieving their stated aim of reducing asset price declines and instead come at a cost to the market and therefore investors as a whole.

**Interference with Asset Price Formation**

Imposing short-selling bans results in fewer parties being able to sell than those that are willing to buy, which interferes with efficient price formation. By artificially removing the chance for some market participants to sell, asset price formation will become less accurate, preventing the financial market from reflecting the real economy. The additional uncertainty that this creates will result in increased volatility, which in turn results in wider spreads and reduced liquidity. Short-selling bans not only fail to achieve the goal to stabilise asset prices, they also cause a decline in order book quality which results in higher tradingcosts at the expense of the end investor, which is clearly detrimental to the market.

Hampering efficient price formation, which short-selling bans have been proven to cause, has an additional risk: it increases the likelihood for an asset price bubble to form. For example, the period before the collapse of Wirecard AG saw the imposition of short-selling bans, which prevent the market from accurately adjusting the price of Wirecard securities in line with the evolving discovery of fraudulent behaviour at Wirecard. A fundamental and necessary characteristic of healthy markets is its ability to correct overpriced assets. Theoretically, if short-selling bans were to achieve their goal of increasing the price of affected assets, the increased price would be due to a deficiency in the market and would not reflect truly higher values of the underlying asset. Short-selling bans increase the probability of investors overpaying for assets, which especially effects those using automatic contributions to invest, particularly retail investors and retirement funds.

**Interference with Market Making and Hedging**

A key characteristic of healthy markets is high levels of liquidity. Liquidity is defined as the presence of many parties willing to buy and sell an instrument at any given time and is often associated with robust, “thick” order books with many quotes present in the book. This liquidity has a dampening effect on the volatility of a stock, therefore, market makers play an important role during turbulent conditions, in that they provide the liquidity needed to temper volatility. If anything, market makers’ ability to be effective should be strengthened during a period of volatility and short-selling bans achieves the opposite by hampering market makers’ ability to provide liquidity.

While EU short-selling restrictions do exempt market makers, thereby lessening the above negative effects, meaningful liquidity is often also provided to the market by participants who are not registered as market makers. This can for example be in the form of a large order being worked passively by an algorithm or by (foreign) participants who are not (locally) able to register as investment firms. Additionally, it is often not obvious what constitutes sanctioned (and thereby exempted) market making activities. Therefore, the shortsale bans, even when containing a market maker exemption, reduce available liquidity and contribute to unequal access to the markets. At the same time, they contribute toward market participants no longer being able to meet their MiFID II mandated market making obligations.

Instead of imposing short-selling bans that will have a negative effect on the markets, Optiver believes that stock exchanges have the tools required to mitigate declines in stock market prices and to curb market volatility in extreme conditions.

In highly stressed markets, liquidity provision (which results in healthy, liquid order books) is key to managing price volatility. To facilitate this, exchanges could introduce simple liquidity protection mechanisms that aid market makers in volatile conditions and stimulate further liquidity. Exchanges can also be pro-active in introducing market making programs that further incentivise liquidity provision. This is especially true for liquidity provision programmes that provide financial incentives, but can also benefit unofficial liquidity provision if such programmes exempt liquidity provision to from possible restrictions.

Besides measures that add to the health of the order book, exchanges could also have coordinated circuit breakers or trading limits in place that trigger in bursts of extreme volatility. These mechanics allow all market participants time to digest the news that might have triggered the sudden move. If well-implemented, these mechanisms add to the stability of markets and keep them behaving in a fair and orderly manner, despite extreme conditions.

<ESMA\_QUESTION\_SSRR\_0>

1. Does ESMA’s analysis confirm the observation that you made in your perimeter of competency? Please provide data to support your views?

<ESMA\_QUESTION\_SSRR\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_1>

1. What are your views on the proposed clarifications?

<ESMA\_QUESTION\_SSRR\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_2>

1. Do you agree with the proposed clarification?

<ESMA\_QUESTION\_SSRR\_3>

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<ESMA\_QUESTION\_SSRR\_3>

1. What are your views regarding the exclusion or, alternatively, a percentage–based weighting approach, for indices, baskets and ETFs in the context of long – term bans?

<ESMA\_QUESTION\_SSRR\_4>

Optiver fully supports the proposed clarification that ETFs, indices, and baskets that contain a stock that is under short-selling ban should be excluded from the scope of long-term bans. In the absence of this clarification, there is a risk of recurring uncertainty by market participants whether baskets, ETFs, and indices as well as index-products are tradeable in periods of high volatility/market uncertainty. Likewise, removing them from the scope of long-term bans would preserve liquidity and price formation in these instruments. Maket participants do not gain short exposures to indices, baskets, and ETFs to sell one underlying component security short. In the absence of a clarification that short-selling bans do not impact those products, situations like the one with regard to the BaFin short-sale ban of the stock of Wirecard AG are at risk of being repeated. In that context, there was significant ambiguity and lack of clarity for market participants as to whether products that contained the securities of Wirecard AG were also in scope of the ban. More broadly, we feel that short-selling bans can in specific circumstances – such as the case of Wirecard – result in an outcome where the ban artificially sustains an issuer who has lost the confidence of the market. <ESMA\_QUESTION\_SSRR\_4>

1. Do you agree with the proposed alignment of the conditions to adopt measures under Article 20 and Article 28 of SSR?

<ESMA\_QUESTION\_SSRR\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_5>

1. Do you agree with the proposed amendments to Article 24 of Delegated Regulation 918/2012?

<ESMA\_QUESTION\_SSRR\_6>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_6>

1. Do you agree with the proposed amendments to the SSR and, more specifically, the mediation procedure under Article 23 of SSR?

<ESMA\_QUESTION\_SSRR\_7>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_7>

1. What are your views on ESMA’s proposal to include subscription rights in the calculation of NSPs in shares?

<ESMA\_QUESTION\_SSRR\_8>

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<ESMA\_QUESTION\_SSRR\_8>

1. Do you agree with this proposal to reinforce the third-party’s commitment? If not, please elaborate. If yes, would you either (A) keep the three types of locate arrangements, but increase the level of commitment of the third party to a firm commitment for all types of arrangements, or (B) simplify the regime to keep only one type of firm locate arrangement?

<ESMA\_QUESTION\_SSRR\_9>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_9>

1. Do you agree with this introducing a five-year-long record-keeping obligation for locate arrangements? If not, please justify your answer.

<ESMA\_QUESTION\_SSRR\_10>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_10>

1. Do you agree with reinforcing and harmonising sanctions for “naked short selling” along the proposed lines? If not, please justify your answer.

<ESMA\_QUESTION\_SSRR\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_11>

1. Do you consider that shares with only 40% of their turnover traded in a EU trading venue should remain subject to the full set of SSR obligations?

<ESMA\_QUESTION\_SSRR\_12>

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<ESMA\_QUESTION\_SSRR\_12>

1. Do you consider that NCAs should take any other qualitative but specific parameter into account in the identification of the shares subject to the full set of SSR obligations even if they are more heavily traded in a third-country venue? If yes, please elaborate

<ESMA\_QUESTION\_SSRR\_13>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_13>

1. Would you modify the threshold for the public disclosure of significant NSPs in shares? If yes, at which level would you set it out? Please justify your answer, if possible, with quantitative data.

<ESMA\_QUESTION\_SSRR\_14>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_14>

1. Would you agree with the publication of anonymised aggregated NSPs by issuer on a regular basis? If yes, which would be the adequate periodicity for that publication?

<ESMA\_QUESTION\_SSRR\_15>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SSRR\_15>

1. Have you detected problems in the identification of the issued share capital to fulfil the SSR notification/publication obligations? If yes, please describe and indicate how would you solve those issues.

<ESMA\_QUESTION\_SSRR\_16>

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<ESMA\_QUESTION\_SSRR\_16>

1. Do you agree with the establishment of a centralised notification and publication system for natural and legal persons to communicate their NSPs? In your view, which would be the benefits or shortcomings this system would bring? Please explain.

<ESMA\_QUESTION\_SSRR\_17>

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<ESMA\_QUESTION\_SSRR\_17>