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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**

|  |  |
| --- | --- |
| Name of the company / organisation | ASSOGESTIONI |
| Activity | Investment Services |
| Are you representing an association? |[x]
| Country/Region | Italy |

Please make your introductory comments below, if any.

<ESMA\_QUESTION\_SSRR\_0>

Assogestioni[[1]](#footnote-2) appreciates the opportunity to present its views on the ESMA’s Consultation paper on review of certain aspects of the Short Selling Regulation.

Based on the experience during the COVID-19 turmoil, several NCAs proceed with market-wide bans on the creation of [net short positions](https://funds-axis.com/short-selling-disclosure-monitoring-software/) and on the increase of existing [net short positions](https://funds-axis.com/short-selling-disclosure-monitoring-software/) on all the shares on a market. Such emergency measures have created substantial uncertainty about their concrete application for all market player, including management company of UCITS and UCITS like funds that have long strategies and use short positions for hedging purposes.

Therefore, a clear and harmonised guide and review of the Short Selling Regulation on several important issues that limit legal risks and compliance costs for market participants is more than welcome.

We support improving clarification on the definition of the RCA for the purpose of adoption of emergency measures and on the shares and/or the financial instruments subject to the ban, together with the certainty of being able to hedge market exposure through short derivatives representing suitable benchmark for the relevant market with an outright exclusion of indices from the scope of both long- and short-term bans.

Furthermore, it would be helpful if the information available to market participants might be enhanced. To improve transparency to the markets, the issued share capital to fulfil the SSR notification/publication obligation should be available in a (EU) centralised and standardised manner and in a machine-readable format. Along the same lines, we also see merits in the establishment of a single pan-European approach for a centralised notification and publication of the net short selling positions (NSP), although a fully assessment of the proposal would require knowledge the full details. In addition, we see merit in publishing anonymised aggregated NSPs by issuer on a regular basis, however, this should not penalize market participants. An appropriate time lag should be foreseen.

Our following comments focus on selected aspects of the consultation paper which are of particular relevance to our members.

<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>

Based on the experience during the COVID-19 turmoil, several NCAs proceed with market-wide bans on the creation of [net short positions](https://funds-axis.com/short-selling-disclosure-monitoring-software/) and on the increase of existing [net short positions](https://funds-axis.com/short-selling-disclosure-monitoring-software/) on all the shares on a market. Such emergency measures have created substantial uncertainty about their concrete application for all market player, including also UCITS and UCITS like funds that have long strategies and use short position for hedging purposes.

Since, it was extremely challenging for asset managers to track and comply with the bans, a clear and harmonised guide on several important issues, such as the definition of the RCA for the purpose of adoption of emergency measures and the shares and/or the financial instruments subject to the ban, together with the certainty of being able to hedge market exposure through short derivatives representing suitable benchmark for the relevant market, is more than welcome.

The proposed shared base approach, whereby the RCA is to be determined only in relation to the share on which the ban on a NSP is adopted with effects on all the instruments used in the calculation of the NSP for that target instruments, extends the financial instruments which might be included in the ban (in case the RCA adopting the ban is not the RCA for other instruments included in the calculation of the NSP for that share).

We support the proposed approach which seems to overcome the current uncertainty on the instruments in scope of the ban which should also be complemented with an outright exclusion in relation to indices, baskets of instruments and ETFs (see also our response to Q4).

<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>

We advocate an outright exclusion of indices, basket and ETF from the scope of both long- and short-term bans.

It is quite common for UCITS and UCITS like funds to be hedged by acquiring short derivatives on indices representing suitable benchmarks for the relevant markets. In the event of market turmoil, asset managers must be able to increase hedging strategies for portfolio exposed on banned shares/market, as well as to efficiently manage redemptions from investors even if this could technically involve the creation or the increase of a NSP.

Therefore, we strongly share the opinion expressed by ESMA in the consultation paper that there would be little merit in including criterion used for calculating (and monitoring) NSP within the scope of emergency measure. Even in our members’ experience, indices, baskets of instruments and ETF are less likely to be used to take a NSP in a single share and, in any case, such strategy could not be considered as hedging arrangements under the UCITS frameworks.

From a practical point of view, the simplest way to avoid banning the shorting of an index (baskets of instruments, ETF), if it has only one or more banned shares, is an outright exclusion of such instruments, rather than using a percentage-based weighting approach, along with the clarification that any trading in indices, baskets, and ETFs in a manner that clearly demonstrate that it is intending to circumvent the ban, should be prohibited at all times, as ESMA also suggests.

It is also worth noting practical problems related to the methods of calculation and monitoring NSP. Management companies must perform ongoing monitoring of short positions across all funds, even though only a handful of them may hold short positions to an extent that creates a NSP. Index components are subject to rebalancing and the actual composition is disclosed on free basis ex-post after a certain time lag. In the event of a ban, it is unlikely that position holders can accurately monitor the threshold on a daily basis without purchasing data and information relating to the composition of the index. This would go beyond Article 3(3) of the Regulation and Annex II Part 1.3 & 2.4 of the Delegated Regulations and its understanding by ESMA (Q&A 6.9)[[2]](#footnote-3).

Should at outright exclusion of indices (baskets of instruments, ETFs) not be possible, we recommend identifying a common harmonized threshold, at least, consistent with the eligible investments limit by UCITS funds (Article 53 of Directive 2009/65/EC).

<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>

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<ESMA\_QUESTION\_SSRR\_5>

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

<ESMA\_QUESTION\_SSRR\_6>

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<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>

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<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>

While we consider the issue to include or not subscription rights in the calculation of the NSP relevant, we invite ESMA to maintain the position taken up to now that foresees an improvement in the disclosure of instruments related to unissued shares, rather than changing the methodology.

In any case, should the proposal to include subscription rights in the calculation of NSPs shares be made, it should be clarified whether the issued share capital should also be increased to include subscription rights. Without changing the issued share capital, the numerator and denominator are not consistent and a notified NSP could be higher than the real one if the short leg of the position (subscriptions rights) is not offset by a long one (shares). It should also be clarified whether the change in methodology is limited to the subscriptions rights or will also include other instruments related to unissued shares, such as convertible bonds.

<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>

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<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>

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<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>

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<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>

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<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>

We see no need to change the actual threshold for the public disclosure.

<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>

We see merit in publishing anonymised aggregated NSP by issuer on a regular basis.

However, this should not penalize market participants: it is essential to provide for an adequate time lag in the publication to avoid a possible herding effect and copy-cat strategy that might exacerbates the negative impact on price of short selling.

<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>

It was pointed out that the source used in identify the issued share capital, the denominator in the net short position calculation, may not be updated at all times, especially in case of corporate actions. The issued share capital is usually checked between different data sources (including with the information made available on the issuer’s website) to avoid calculation errors as much as possible.

This lack of a single reliable source creates additional administrative burdens and costs for position holders and potentially misleading or inaccurate notification on NSP.

The identification of the “issued share capital” should be based on an accurate, timely and reliable source and a central EU repository of issuer information could be the best solution for finding those information in a centralised and standardised manner and in a machine-readable format.

We invite therefore ESMA to address also this issue as much as possible.

<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>

Although a fully assessment of the proposal would require knowing the full details, we believe that the establishment of a single pan-European approach may have more benefits than shortcomings.

It would improve the reporting mechanism and reduce unnecessary operational difficulties for position holders that are active on shares across several countries, even if they are already registered in the reporting system of different Member States. In addition, the single system may also publish the possible bans, without having to monitor every RCA.

In addition, with the lower of the new reporting threshold (from 0,2% to 0,1%) is expected an increase on the number of notifications and the use of an centralised system may make the notification less burdensome (for example with automated reporting system). An EU repository on NPSs may further benefit all investors and ultimately the European markets itself as enabling them to access all the information in a centralised and standardised manner.

As a possible shortcoming, we see a reduction of the interaction with the NCA to overcome any question and problem connected with the NSP notification or the infrastructure to be used.

<ESMA\_QUESTION\_SSRR\_17>

1. Assogestioni is the trade body for Italian asset management industry and represents the interests of members who manage funds and discretionary mandates around € 2,540 billion (as of September 2021). [↑](#footnote-ref-2)
2. Questions and Answers on the Regulation on short selling and certain aspects of credit default swaps (SSR) ESMA70-145-408. Q6.9 Under Article 3(3) of the Regulation and Annex II Part 1.3 & 2.4 of the DR, firms need only to look-through indices, baskets and ETFs to the extent that doing so is reasonable having regard to publicly available information. How should this condition be understood? A6.9 ESMA understands “publicly available information” on an index, basket of securities or ETF composition as information which is easy to access on the market operator’s or issuer’s website and which is obtainable free of charge. Such information, notably on indices, is generally available free of charge when provided with a certain delay. ESMA is aware that the provision of a real time index, basket or ETF’s composition is likely to be charged. However, it should be recalled that there is no requirement under the Regulation to obtain information on the composition of the above on a real time basis. ESMA considers that market participants should strive to use the most recent publicly available information for look-through purposes. ESMA would like to specify that “acting reasonably” relates only to obtaining information about the composition and not to how investors process that information for conducting the calculation of the net short position. The Regulation is straightforward and requires that the index weighting, the composition of the basket of securities and the interests held in ETFs are considered and used in this calculation including when such information could not be integrated as such in the firm’s monitoring system. [↑](#footnote-ref-3)