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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 | European Fund and Asset Management Association (EFAMA) |
| Activity | Investment Services |
| Are you representing an association? |  |
| Country/Region | Belgium |

Please make your introductory comments below, if any.

<ESMA\_QUESTION\_SSRR\_0>

EFAMA welcomes this opportunity to comment on the review of the provisions within the Short Selling Regulation. We have limited our responses to those questions of most relevance to our membership <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>

A clear and harmonised guide with relevant references to the MiFID II text, including 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 would be greatly welcome. This should come ideally with the certainty of being able to hedge market exposure through short derivatives representing suitable benchmarks for the relevant market.<ESMA\_QUESTION\_SSRR\_2>

1. Do you agree with the proposed clarification?

<ESMA\_QUESTION\_SSRR\_3>

We agree with this clarification and would further welcome clarification on who is the owner of the ban. Historically the RCA would release this, though ESMA did not systematically publicise this information. It would be useful to have a single register to check all bans, without having to consult every RCA. <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 support an outright exclusion of indices, baskets and ETFs 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.

From a practical point of view, the simplest way to avoid banning the shorting of an index, if it has only one or more banned shares, is an outright exclusion of those instruments, rather than using a percentage-based weighting approachrequiring asset managers to obtain the exact composition of licensed indices, very often coming with heavy license fees. We would also welcome the removal of the disclosure obligation for these instruments for the same reason. The disclosures are difficult to implement and costly, due to the sourcing of the components of licensed indices while these do not add particular value to the global market picture since the securing of large net short exposures via indexes is not an economical way to short a given issuer.

<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>

We believe that including subscription rights in the calculation of NSP shares adds a layer of complexity without any tangible benefit.

In any event, should the proposal to include subscription rights in the calculation of NSPs shares be taken up, 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, though more harmonization across RCAs would be welcome.

<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>

As the ESMA consultation recognizes, the source used to identify the issued share capital, the denominator in the net short position calculation, is not always up to date, especially in case of corporate actions. The issued share capital therefore usually has to be checked between different data sources (including with the information made available on the issuer’s website) to avoid calculation errors. This is costly and time-consuming.

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. A central EU repository of issuer information could be the best solution for finding relevant information in a centralised and standardised manner and in a machine-readable format. <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 full 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. Currently, we are faced with different processes, some via web portal, others via email, with different authentication requirements.

In addition, with the reduction of the new reporting threshold (from 0,2% to 0,1%) there will be an increase on the number of notifications and the use of a 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 market itself by enabling them to access all the information in a centralised and standardised manner. <ESMA\_QUESTION\_SSRR\_17>