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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 | FIA European Principal Traders Assocation (FIA EPTA) |
| Activity | Other Financial service providers |
| Are you representing an association? |[x]
| Country/Region | Europe |

Please make your introductory comments below, if any.

<ESMA\_QUESTION\_SSRR\_0>

The FIA European Principal Traders Association (FIA EPTA) appreciates the opportunity to provide feedback to the European Securities and Markets Authority (ESMA) on the consultation on the review of certain aspects of the Short Selling Regulation.

FIA EPTA represents 30 independent European Principal Trading Firms (PTFs) which deal on own account, using their own money for their own risk, to provide liquidity and immediate risk-transfer in exchange-traded and centrally-cleared markets for a wide range of financial instruments, including shares, options, futures, bonds and ETFs.

Our members are independent market makers and providers of liquidity and risk transfer on trading venues and end-investors across Europe. Market making and liquidity provision (also referred to as principal trading or dealing on own account) is a distinct activity that is undertaken by non-systemic investment firms rather than banks, in a highly dispersed and varied ecosystem of independent Principal Trading Firms. These firms operate in an innovative and competitive fashion leading to a vibrant, dynamic and diverse ecosystem which massively reduces interconnectedness and increases substitutability. This fundamentally reduces systemic risk whilst improving market quality and lowering costs for retail and institutional investors alike.

FIA EPTA members appreciate ESMA’s consideration of our comments and stand ready to provide any further input as required.

<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>

FIA EPTA is of the view that short selling bans are harmful to the orderly functioning of markets.[[1]](#footnote-2) We note the unnecessary operational risks that were a consequence of short selling bans implemented inconsistently and with limited lead-time last year. Moreover, we recall that the potential of bans, associated with its impact on liquidity and hedging, is likely to reduce attractiveness of EU financial markets.[[2]](#footnote-3)

FIA EPTA consider that there is no convincing evidence supporting the argument that short selling bans prevent equity price slides. In fact, there is clear evidence pointing to the contrary, suggesting that short selling bans can have detrimental effects on financial markets. Price declines during times of economic downturn are driven mainly driven by long-only investors selling their holdings.

Short selling is often claimed to be depressing prices. Nonetheless, short sellers also need to cover their positions and ultimately close their positions out. In effect, short sellers are often the very few market participants that buy in times of economic downturn. This points to the important role that short selling has in providing market liquidity.

From the perspective of market liquidity it is also critical to consider the role of short selling in market-neutral strategies, where short positions are taken to hedge long positions that would otherwise not be retained. Again, this points to the unintended consequences of potential short sell bans; an increase in volatility and decrease in liquidity.

In addition, FIA EPTA considers that liquidity has also been negatively impacted by the burdensome process for the market making exemption. We believe that there would be value if ESMA was to consider a reduction of the 30-day notification period and replace it by a one-way notification process, by which market participants could make use of the exemption while RCAs are reviewing the application. This could significantly alleviate adverse impact on financial markets.

<ESMA\_QUESTION\_SSRR\_1>

1. What are your views on the proposed clarifications?

<ESMA\_QUESTION\_SSRR\_2>

FIA EPTA would welcome that RCAs publish a list of instruments in scope of any future bans, to make sure that instruments that are not subject to the ban can continue trading and thereby increase legal certainty. In addition, we strongly caution against the inclusion of indices, baskets of instruments and ETFs in any bans (see also FIA EPTA’s response to Question 4).

<ESMA\_QUESTION\_SSRR\_2>

1. Do you agree with the proposed clarification?

<ESMA\_QUESTION\_SSRR\_3>

FIA EPTA is of the view that greater harmonisation of RCAs practices regarding long-term bans is needed to enhance market clarity and minimise operational disruption. This could be achieved with the introduction of a standardised template for the notification of bans, which would help providing market participants with clear parameters including about exemptions are available (e.g., market making). Additional clarity in relation to the timing would also be helpful, for example by establishing that bans should be announced a soon as possible after the close of the market.

Furthermore, FIA EPTA believes that long-term bans should only address entering into or increasing existing NSPs. Should all NSPs be included in such bans this would lead to further downward pressure on prices as long positions are unwound as they are no longer able to be effectively hedged.

We also note that the hedging of convertible bonds needs to be addressed when the investor has a delta-neutral position between the equity component of the convertible bond and the NSP taken to hedge the risk.

FIA EPTA believes that the above clarifications should be made in the Level 1 text in order to create legal certainty and provide a balanced framework that allows market participants to comply effectively with bans while operational risk is reduced.

In addition, FIA EPTA would like to reiterate the importance of ESMA’s oversight function, which is fundamental to ensure that there is a consistency of approaches between RCAs.

<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>

FIA EPTA strongly calls for the exclusion of indices, baskets and ETFs from the scope of long-term bans. In addition, we believe that this exclusion should be clearly mandated by the Level 1 text to create legal certainty and help the uniform application by RCAs.

We note that the alternative approach proposed by ESMA based on percentage-based weighting would lead to the creation of significant operational complexity, ongoing monitoring of the weighting of index constituents and the subsequential risk of market divergence. Further, issuers on many occasions do not make the weightings within index-based products available on a reasonable commercial basis, which adds additional complexity. Nonetheless, in the event that indices, baskets and ETFs were to be included in scope, we would call for the percentage threshold to be no less than 50% weighting of restricted shares.

In addition, FIA EPTA would like to stress that indices, baskets and ETFs are fundamental for firms to hedge their risk. Including these instruments in long-term bans would impact the ability of firms to provide liquidity, potentially at a time when liquidity is most needed.

<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>

FIA EPTA believes in the benefits of stronger standardisation and better coordination among RCAs. In this regard, ESMA has a key role to play. Nonetheless, ESMA’s intervention powers should only be a last resort option. We consider that RCAs are best placed to understand and manage the functioning of their markets.

<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>

FIA EPTA believes that RCAs are closest to national markets and can best assess and understand the arising challenges, RCAs should have the ability to challenge ESMA’s bans if required.

<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>

FIA EPTA supports the inclusion of subscription rights in the calculation of NSPs in shares

in the interest of transparency and in order to avoid unintended consequences such as

sending misleading signals regarding market positions.

in this regard, FIA EPTA stresses the importance of including subscription rights in the

calculation of the denominator as well, i.e., issued share capital, to prevent a situation

where the size of the net short position is artificially increased according to the size of a

rights issue.

<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>

FIA EPTA does not believe that the proposal to reinforce the third-party’s commitment is needed as the current rules are fit for purpose and a change to the legislation is not considered to be warranted at this time.

As noted by ESMA, the need to reinforce the commitment has been identified because the settlement fails rate increased between December 2020 and March 2021. However, there is no evidence to directly link this to uncovered short selling or failure to comply with the locate rule. Settlement delays can occur for a variety of reasons on both long and short sales and, given the unique circumstances during that period with Covid-19 impacting not only market conditions but also restricted movement/lockdowns in place, clearing/settlement processing delays were to be expected.

We would, also, be concerned about a legislative change being made on the back of such as limited dataset when the regime has been working smoothly to date. This change may lead to unintended consequences such as a rise in the cost of borrowing and could impact liquidity provision levels which would result in it having a detrimental effect on end-investors.

In FIA EPTA’s opinion, the current ‘locate rule’ is sufficient to protect against ‘short ‘squeezes’ as the third parties, with whom our members interact, are guided by the actual borrow liquidity in the borrow market to confirm locates.

<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>

Yes, FIA EPTA agrees with introducing a five-year record-keeping obligation for locate arrangements. However, we do not believe the obligation should be overly prescriptive in nature (for example for the record-keeping to be required to follow a particular format) as this would lead to an excessive operational burden on market participants.

<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>

As a matter of principle, and given current wide-ranging NCA practices, FIA EPTA would welcome greater certainty across the Union regarding the applicable sanctions in different Member States related to breaches of the SSR ‘naked’ short selling requirements. However, we would note that, ahead of any potential harmonisation of the monetary sanctions as-such, regard should be given to NCAs’ underlying supervisory considerations and practices. In this regard, FIA EPTA would welcome greater supervisory convergence across the Union to ensure a level playing field regarding how, and based on what material considerations, NCAs assess potential compliance breaches with these rules. We consider that ESMA Guidelines, informed by NCA best practices, could be useful tool to this end. We would imagine such Guidelines to take into account, i.a., the different potential causes for, and nature and scale of, such breaches, ranging from purely operational, unintentional breaches (which may pose limited risks to supervisory objectives) to intentional, malevolent breaches which do in fact pose such risks. Any future harmonised sanctions regime should in our view proportionately reflect the degree to which any breaches materially impact on the relevant supervisory objectives.

<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>

No.

<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>

Yes. At least every two weeks.

<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>

Yes, currently only a small number of NCAs provide data on firms’ issued share capital. The absence of published ‘issued share capital’ data means it can be difficult to work out what the correct issued share capital is for some issuers particularly when there are corporate actions taking place and the exact date(s) the issued share capital increases/decreases is not clear.

We believe a harmonised approach needs to be adopted with all NCAs providing this data in a consistent manner, based on a uniform reporting process across the Union. In this regard, we would also welcome a central publicly accessible register of the issued share capital for each issuer, reported to and maintained centrally by ESMA in a comparable manner as the FIRDS system. We would note as well that such a central data base would be of additional use to inform impact assessments and policy decisions in other areas pertaining, e.g., to Capital Market Union objectives and would suggest to consider integrating this under the European Single Access Point (ESAP).

<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>

FIA EPTA would very much welcome and appreciate the introduction of a centralised notification and publication system.

For instance, a single platform for the purpose of reporting, with the ability to view a journal or historical filings in order to reconcile firms’ positions with those held by the NCA in order to complete quality assurance, would be helpful.

FIA EPTA would also welcome additional clarity on the details for such centralised system. If it is agreed a central portal is needed, ESMA could establish a working group to help define the portal to ensure it captures user requirements and reflects current best practices among NCAs. In this regard, we consider e.g., that the AFM’s *Loket* portal is a good example of a user-friendly system.

FIA EPTA would further support the development of a centralised website with an email subscription functionality so that market participants can quickly be updated of the terms of a potential ban and the ability to make submissions via XML or another feed-based format, similar to the existing BaFIN MVP portal.

Given the challenges that all market participants appear to have with NCA portals for submitting net short positions, FIA EPTA would request ESMA extends the filing deadline for the first day that the threshold is reduced from 15h30 local time to 17h00 local time (or later). This would be very helpful as a number of portals have proven to be very slow and may have difficulty in coping with extra volumes coming in from all market participants making their additional disclosures at the same time.

One of the key benefits of the centralised system is that it would remove the operational complexities related to RCA tracking per instrument. For example, the designated RCA for a particular share is the NCA of the most relevant market for that stock in terms of liquidity. For equity options, it is the NCA of the most relevant market in terms of liquidity for the underlying security. Although the outcome can be straightforward, investment firms are required to set-up processes and build tools to ensure compliance.

Secondly, the RCAs each have their own individual NSP reporting facility. These facilities undergo maintenance/require their own credentials. To comply with notification requirements investment firms are therefore required to set-up multiple RCA reporting processes.

In both cases, a centralised system will lower compliance risks and take the additional administrative burden away.

<ESMA\_QUESTION\_SSRR\_17>

1. See i.a., the two analyses FIA EPTA undertook regarding the impact of the short-sale bans during the Covid-19 crisis of March 2020:

Impact on market volatility: <https://www.fia.org/sites/default/files/2020-05/Analysis%20of%20Impact%20of%20Banning%20Short-Selling%20on%20Market%20Volatility.pdf>

Analysis of French short-sale ban: <https://www.fia.org/sites/default/files/2020-05/20200504_FIA%20EPTA_Analysis%20of%20the%20French%20Short%20sale%20ban.pdf> [↑](#footnote-ref-2)
2. This is widely recognised by market participants, as evidenced, e.g., by this joint industry letter to EU public authorities commenting on the Covid-19 short sale bans in the EU:

<https://www.world-exchanges.org/storage/app/media/Joint%20associations%20letter%20to%20French%20authorities%20on%20short%20selling%20-%20May%202020-converted.pdf> [↑](#footnote-ref-3)