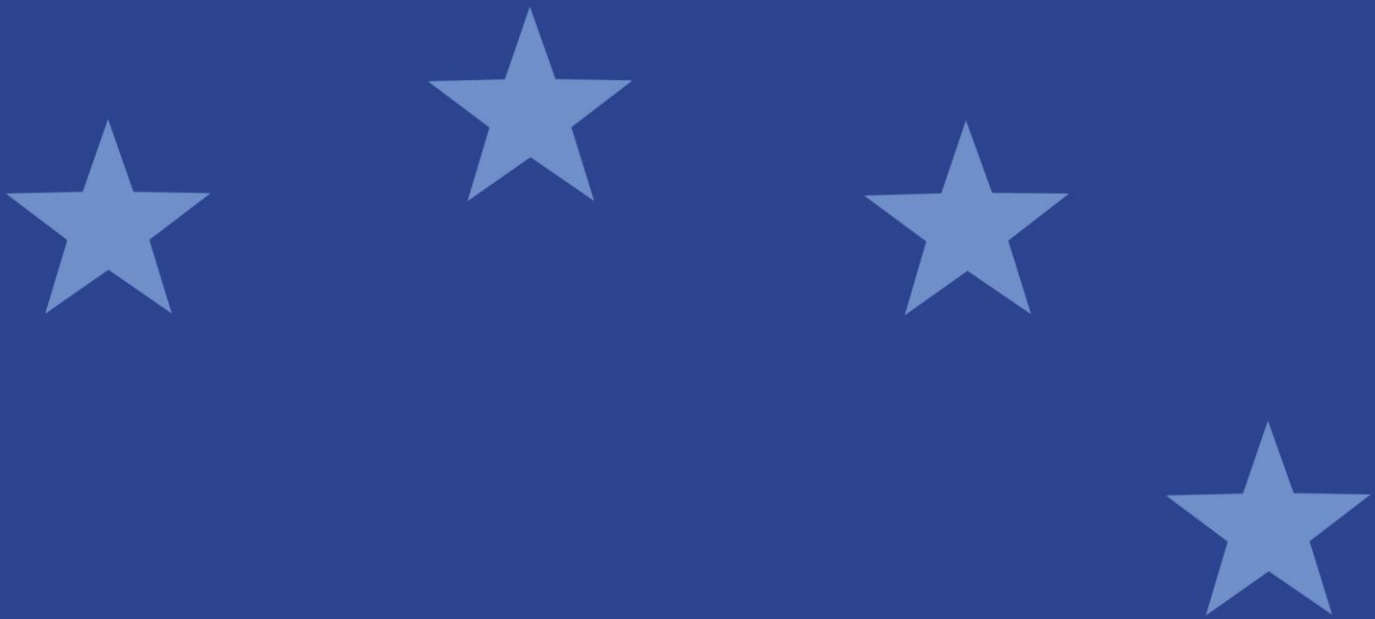




European Securities and
Markets Authority

Response Form to the Consultation Paper on the review of certain aspects of the Short Selling Regulation



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 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 under the heading [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	Eumedion
Activity	Other Financial service providers
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Netherlands

Please make your introductory comments below, if any.

<ESMA_QUESTION_SSRR_0>

Eumedion welcomes the opportunity to respond to your consultation paper on the review of certain aspects of the Short Selling Regulation (hereafter: consultation paper). By way of background, Eumedion is the Dutch based corporate governance and sustainability forum for institutional investors. Our 53 Dutch and non-Dutch members represent more than € 8 trillion assets under management. Members include a wide range of institutional investors; pension funds, mutual funds, asset managers and insurance companies. Some of the topics raised in the consultation paper fall outside the scope of Eumedion. Therefore, we have confined our response to the topics that are the most relevant for Eumedion and its members; 1) the scope of the rules with respect to long and short term bans, 2) the sanctions for ‘naked’ short selling 3) the transparency of net short positions and reporting requirements. Below you will find the answers to the questions raised in the consultation paper with respect to the aforementioned topics.

<ESMA_QUESTION_SSRR_0>

Q1 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>

Q2 What are your views on the proposed clarifications?

<ESMA_QUESTION_SSRR_2>

We agree with the proposal of ESMA to amend article 2(1)(j) of the Short Selling Regulation (SSR) by replacing the reference to Delegated Regulation 1287/2006 with a reference to RTS 22 for the sake of legal clarity. We also concur with ESMA’s proposed clarification in article 2(1)(j) of the SSR to specify the definition of Relevant Competent Authority (RCA) in the context of emergency measures. The consultation paper (p. 21) states that in case of a ban of short positions on a share that can be built through a variety of instruments (as opposed to the case of a simple short sale ban on a specific instruments), the current definition may not be seen as clear in determining the RCA for the instruments considered in the calculation of the netto short position (NSP) on that share. We believe that this might create uncertainties over the instruments covered by a ban and the necessary steps for its adoption. Given the above we concur with the proposal of ESMA to make explicit that the RCA that is competent for the ‘target’ financial instrument is also competent for all those instruments which confer a



financial advantage in the event of a decrease in the price or value of the ‘target’ instrument. We agree with ESMA that this approach provides additional legal certainty that an RCA can issue a ban for a target financial instrument with effects on all the instruments used in the calculation of NSPs for that target instrument. For the sake of completeness, the scope of the ban should in our view be subject to exclusions or limitations in relation to indices, baskets of instruments and ETFs. We refer to our answer to question 4.

<ESMA_QUESTION_SSRR_2>

Q3 Do you agree with the proposed clarification?

<ESMA_QUESTION_SSRR_3>

ESMA proposes to clarify that, where the relevant conditions contained in article 20 of the SSR are met, RCAs may adopt either one or both of the measures contained in point (a) and (b) of article 20(2) of the SSR. We agree with that. We believe that RCAs need to be sufficiently flexible to tackle emergency situations.

<ESMA_QUESTION_SSRR_3>

Q4 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>

Indices, baskets of instruments and ETFs are currently included in the calculation of the NSP in a share to the extent to which the underlying shares are included in the indices, baskets of instruments and in the ETF. The consultation paper (p. 29) correctly states that, unless expressly exempted by an RCA, those instruments are included in the scope of long-term bans under article 20 of the SSR. ESMA points out that a) those instruments would less likely be used by market participants to take an NSP in a single share, b) the inclusion of such instruments was designed for the purposes of the calculation of NSPs in the context of transparency obligations under the SSR, whilst there would be little merit in including them within the scope of an emergency measure and c) more than one ban may apply to the same instrument at the same time. Against this background we agree with the proposal of ESMA that indices, baskets and ETFs should be excluded from the scope of the long term bans. We also concur that it is worthwhile clarifying that any trading in indices, baskets and ETFs, in a manner that clearly demonstrates that it is intending to circumvent the ban, should be prohibited at all times.

<ESMA_QUESTION_SSRR_4>

Q5 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>

Q6 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>

Q7 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>

Partly. Before answering this question we would like to make a more general remark. ESMA's Final Report on the Technical Advice on the evaluation of certain elements of the Short Selling Regulation (21 December 2017) states among other things the following *"The majority of the respondents to the consultation suggested that the power of NCAs to adopt short-term bans should be altogether eliminated"*. As already mentioned in our response to the consultation paper of ESMA on the evaluation of certain elements of the Short Selling Regulation (2017) we believe that ESMA should seriously consider that. Especially, since there is no sufficient supportive evidence for regulatory interference in this area. At the same time such bans can seriously harm market liquidity and investor's confidence in EU markets. If it is decided that the current regime under article 23 of the SSR needs to be preserved instead of eliminated, we would like to make the following remarks with respect to the proposals of ESMA which are mentioned on p. 36/37 of the consultation paper.

Proposal a:

Currently, the competent authority of the trading venue where a fall in price of a financial instrument has taken place can adopt a short term ban on short selling that applies to that jurisdiction only. In turn, other competent authorities may decide to adopt similar restrictions in their own jurisdiction, take no action in their own jurisdiction or oppose the measure. As a consequence, short term bans on short selling may differ per Member State. For investors with cross-border investments, it is costly and time-consuming to get familiar with and meet the different short term bans on short selling. Against this background, we support the proposal of ESMA to change the procedure of article 23 of the SSR in order to provide that only the RCA of the most relevant market in terms of liquidity for the instrument can adopt a short term ban with respect to that instrument that is effective in all Member States. However, that competent authority should be reluctant to use this power and should in our view not use it if there is a reason which justifies the drop in the prices (e.g. unexpected bad financial results).

Proposal b:

This proposal falls outside the activities of Eumedion.

Proposal c:

Given the short duration of the ban, we agree that other RCAs should not have any power to oppose the short term measure and that the ban should be effective in all Member States upon publication on the website of the adopting RCA.

Proposal d:

We disagree with the proposal to change the scope from a ban on short selling on a trading venue into a ban on entering into or increasing NSPs. In practice market participants holding short positions use specific entities for hedging the exposures of other entities within their group. As a result short positions are often covered at the level of the group instead of the level of an individual legal entity and are not resulting in impermissible uncovered short positions.

A ban on taking or increasing net short positions instead of a ban on short selling would have profound practical implications for the aforementioned market participants. It would involve significant complexity in terms of calculation and would result in additional investments in IT systems. Besides that we believe that a ban on taking or increasing net short positions would be at odds with the objectives of the SSR. Recital 28 of that Regulation reads as follows *“As this Regulation addresses only restrictions on short selling and credit default swaps to prevent a disorderly decline in the price of a financial instrument, the need for other types of restrictions such as position limits or restrictions on products, which may give rise to serious investor protection concerns, are more appropriately considered in the context of the Commission’s revision of Directive 2004/39/EC”*. Against this background we believe that the current scope of article 23 of the SSR should be preserved.

<ESMA_QUESTION_SSRR_7>

Q8 What are your views on ESMA’s proposal to include subscription rights in the calculation of NSPs in shares?

<ESMA_QUESTION_SSRR_8>

We agree with recital 12 of the SSR that the calculation of short or long positions should take into account any form of economic interest which a natural or legal person has in relation to the issued share capital of a company. The SSR already rightfully includes the delta exposure of positions in options written or bought from market participants. Although we acknowledge that there is a legal difference between options written or bought from market participants and subscription rights issued by a listed entity; we agree with the remark in the consultation paper that from an economic standpoint subscription rights could be deemed equivalent to call options. However, currently call options are included in the calculation of NSPs, but subscription rights are not. In view of the above we see no justification why subscription rights should be treated differently in this respect. Eumedion is confident that the objective of the SSR is best met if the delta exposure of not only call options but also subscription rights are included in the calculation of the NSP. This calculation method should in our view be mandatory; we are not in favour of allowing market participants a choice on whether to include subscription rights in the calculation or not.

<ESMA_QUESTION_SSRR_8>

Q9 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>

Q10 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>

Q11 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>

We agree with the remark on p. 48 of the consultation paper that it is necessary to ensure that the sanctions for breaches of article 12 of the SSR have a sufficient deterrent effect across the EU. We concur that SSR guidelines might not be sufficient in this respect since (as correctly stated in the consultation paper) sanctions are set by law in most EEA countries. Against this background we agree that a further degree of harmonisation should be imposed in the SSR to ensure that the maximum pecuniary administrative sanctions on short sellers breaching article 12(1)(c) of the SSR are more aligned and effective in the EU. We concur with the proposal of ESMA to revise the sanction regime in line with the current text of article 30(2)(i) and (j) of MAR, establishing the minimum amount that must be imposed under the maximum administrative pecuniary sanctions in the event of the infringement of article 12(1) of the SSR.

<ESMA_QUESTION_SSRR_11>

Q12 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_SSRR_12>

Q13 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>

Q14 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>

Yes. As already mentioned in our response to the ESMA’s Call for evidence on the evaluation of the Regulation on short selling and certain aspects of credit default swaps (2013) and our response to ESMA’s consultation paper on the evaluation of certain elements of the Short Selling Regulation (2017), Eumedion generally supports the current levels of the initial thresholds for net short positions in shares. However, we still doubt whether the requirement to report all changes (upwards and downwards) of net short positions at increments of 0.1% is appropriate and results in meaningful information for both market participants and regulators. Against this background and in order to avoid disproportionate compliance costs for notifying market participants, we advise ESMA to consider removing the odd incremental thresholds. That means that changes of positions should no longer be required to be reported to the



market at 0.7%, 0.9% and 1.1%, etc. This would result in wider reporting bands and as a consequence in notifications and disclosures which reflect a more meaningful change in the size of a net short position.

We also would like to ask your attention for the following point. Some of our members consider it a very burdensome task to constantly monitor and calculate (using publicly available information) net positions regarding a share, where it is one of many in an index, basket or ETF. As already mentioned in our response to ESMA's Call for evidence on the evaluation of the Regulation on short selling and certain aspects of credit default swaps (2013) and our response to ESMA's consultation paper on the evaluation of certain elements of the Short Selling Regulation (2017), we are of the opinion that the SSR should be amended in such a way that indices, baskets and ETFs are only included in the calculation of net positions insofar as a set threshold is crossed.

<ESMA_QUESTION_SSRR_14>

Q15 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>

Just like ESMA, we see benefits in the introduction of a new requirement for competent national authorities to publish anonymised aggregated NSPs in the shares of issuers on a regular basis. Those aggregated positions could be based on the public and non-public notifications received by the competent national authorities. As a result, investors would have better information on the extent to which short selling in the shares of a specific issuer is used and could use that information to base their investment decisions on. We agree with ESMA that the publication of aggregated NSPs could be made by means of a centralised notification and publication system. In terms of frequency, we believe that the anonymised aggregated NSPs should – by derogation of the advice of ESMA to publish those position at least every two weeks – be published at least every week.

<ESMA_QUESTION_SSRR_15>

Q16 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>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_SSRR_16>

Q17 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>

Currently, the process for registration and for submitting notifications is not harmonised across the European Union. For institutional investors with NSPs in different Member States, it is costly and time-consuming to meet all these different requirements. As already mentioned



in our response to the ESMA's consultation paper on the evaluation of certain elements of the Short Selling Regulation (2017) we are in favour of a pan-European notification and publication system. Such a central, publicly accessible, free-of-cost European system would save institutional investors a lot of time and money and can contribute to achieving the overall aim of the SSR: uniform application throughout the European Union of the obligations stemming from that regulation.

<ESMA_QUESTION_SSRR_17>