



European Securities and
Markets Authority

Final Report

Review of certain aspects of the Short Selling Regulation



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References and abbreviations

Legislative References

Data Directive	Protection	Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ¹
Delegated 1287/2006	Regulation	Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive ²
Delegated 826/2012	Regulation	Commission Delegated Regulation (EU) No 826/2012 of 29 June 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council with regard to regulatory technical standards on notification and disclosure requirements with regard to net short positions, the details of the information to be provided to the European Securities and Markets Authority in relation to net short positions and the method for calculating turnover to determine exempted shares ³
Delegated 918/2012	Regulation	Commission Delegated Regulation 918/2012 of 5 July 2012, supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events ⁴
Delegated 2017/567	Regulation	Commission Delegated Regulation (EU) 2017/567 of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions ⁵
Delegated 2017/590	Regulation	Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities ⁶

¹ OJ L 281, 23.11.1995, p. 31–50.

² OJ L 241, 2.9.2006, p. 1–25.

³ OJ L 251, 18.9.2012, p. 1–10.

⁴ OJ L 274, 9.10.2012, p. 1–15.

⁵ OJ L 87, 31.3.2017, p. 90–116

⁶ OJ L 87, 31.3.2017, p. 449–478.



GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) ⁷
Implementing Regulation 827/2012	Commission Implementing Regulation (EU) No 827/2012 of 29 June 2012 laying down implementing technical standards with regard to the means for public disclosure of net position in shares, the format of the information to be provided to the European Securities and Markets Authority in relation to net short positions, the types of agreements, arrangements and measures to adequately ensure that shares or sovereign debt instruments are available for settlement and the dates and period for the determination of the principal venue for a share according to Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps
MAD	Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) ⁸
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC ⁹
MiFID	Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC ¹⁰
MiFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU ¹¹
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 ¹²
RTS 22	Commission Delegated Regulation (EU) 2017/590 of 28 July 2016 supplementing Regulation (EU) No 600/2014 of the

⁷ OJ L 119, 4.5.2016, p. 1–88

⁸ OJ L 96, 12.4.2003, p. 16–25.

⁹ OJ L 173, 12.6.2014, p. 1–61.

¹⁰ OJ L 145, 30.4.2004, p. 1–44.

¹¹ OJ L 173 12.6.2014, p. 349–496.

¹² OJ L 173, 12.6.2014, p. 84–148.



European Parliament and of the Council with regard to regulatory technical standards for the reporting of transactions to competent authorities¹³

SSR Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps¹⁴

Abbreviations

CDS	Credit Default Swap
CP	Consultation Paper
CSD	Central Securities Depository
EC	European Commission
EEA	European Economic Area
ESMA	European Securities and Markets Authority
ETF	Exchange-Traded Fund
EU	European Union
FIRDS	Financial Instruments Reference Database System
FX	Foreign Exchange
GBP	British Pound Sterling
GDR	Global Depository receipt
ISIN	International Securities Identification Number
MMoU	Multilateral Memorandum of Understanding
MTF	Multilateral Trading Facility
NSP	Net Short Position
NCA	National Competent Authority
OTC	Over-the-Counter
OTF	Organised Trading Facility
Q&A	Questions and Answers
RTS	Regulatory Technical Standards
RCA	Relevant Competent Authority
RM	Regulated Markets

¹³ OJ L 87, 31.3.2017, p. 449–478.

¹⁴ OJ L 86, 24.3.2012, p. 1–24.



SMSG	Securities Markets Stakeholder's Group
SRO	Self-regulatory Organization
TOTV	Traded on a Trading Venue
UK	United Kingdom
US	United States of America

1 Executive Summary

Reasons for publication

In this Final Report ESMA undertakes a systematic review of some of the SSR provisions and proposes targeted changes. During the COVID-19 crisis, RCAs adopted a number of emergency measures, consisting both of short-term and long-term bans. Evidence from the crisis proved how widespread emergency situations might unfold very quickly requiring immediate responses. In such instance, the measures adopted by RCAs were not only more numerous, but also differed in scope with respect to most emergency measures previously taken by RCAs under SSR. ESMA has analysed the impact of such measures and, after gathering feedback from stakeholders, proposes in this Final Report targeted amendments to the SSR, which aim, among others, at facilitating the operation of the SSR in any future emergency circumstances.

Additionally, ESMA in light of the episodes of high volatility which took place in the US markets and elsewhere in respect of the so-called “meme stocks”, has considered the possibility of similar phenomena developing in European markets and has re-assessed in light of such occurrences the relevant SSR provisions. In this respect this Final Report proposes some targeted changes which aim at promoting supervision of locate arrangements and strengthen supervisory convergence.

Content

This Final Report focusses on three main areas of the SSR. Section 3 presents an empirical analysis of the impacts of the short selling bans adopted during the COVID-19 crisis and proposes amendments to the current legislative provisions which govern emergency measures (i.e. long term bans, short term bans and ESMA powers to issue emergency measures). Such amendments aim at clarifying the interpretation of certain provisions and overall ensuring that the procedure for the issuance of short and long-term bans is sufficiently flexible for RCAs to tackle emergency situations. Section 4 reviews the current framework for the calculation of NSPs, the so-called “locate rule” and the list of exempted shares. In this section it is proposed to enhance the existing rules against uncovered short sales by introducing record keeping requirements and proposing harmonisation of sanctions. Section 5 presents a review of the framework for transparency and publication of NSPs, also in light of recent market turmoil events and proposes the introduction of a centralised system for publication and disclosure to the public of NSPs.

Next Steps

This report is submitted to the EC and is expected to provide technical support in relation to a potential review report of SSR. ESMA stands ready to provide further technical assistance to develop the legislative amendments suggested in the report.

2. Introduction

1. The SSR entered into force in November 2012 with the aim of creating a common regulatory framework regarding the requirements and powers with respect to short selling. The need to establish such common regulatory framework emerged in the aftermath of the financial crisis, where EU Member States adopted highly diversified measures to restrict or ban short selling, as such practice could aggravate the downward spiral of share prices and lead to systemic risks.
2. More specifically, the SSR was introduced with a threefold aim: (i) ensuring direct and uniform application throughout the EU of obligations on private parties to notify and disclose NSPs, (ii) fostering greater coordination and consistency between Member States when taking measures in exceptional circumstances and (iii) prohibiting uncovered short sales. Such coordination is achieved also by granting ESMA the power to coordinate the measures taken by RCAs and, in some instances, to take measures itself.
3. In January 2017 ESMA received a mandate from the EC to deliver Technical Advice on some aspects of the SSR. ESMA delivered such Technical Advice in December 2017¹⁵. The 2017 Advice focussed on three elements of the SSR: the exemption for market making activities, the procedure for imposing short-term restrictions on short selling, and the method of notification and disclosure of NSPs. At this point in time no legislative review has been launched further to the 2017 Technical Advice.
4. In the aftermath of the COVID-19 crisis, ESMA has considered it appropriate to undertake a further review of the SSR provisions. Hence in September 2021, ESMA has published a Consultation Paper that broadly focused on three areas: (i) an empirical analysis of the impacts of the bans adopted during the COVID-19 crisis and some proposed improvements to the current legislative provisions which govern emergency measures (i.e. long-term bans, short-term bans and ESMA's intervention powers); (ii) a review of the current framework for the calculation of NSPs, the locate rule and the list of exempted shares; (iii) a review of the framework for transparency and publication of NSPs.
5. In the CP, ESMA noted that a review of the SSR was particularly relevant as, during the COVID-19 crisis, RCAs and ESMA adopted a number of emergency measures which differed in scope with respect to emergency measures previously taken by RCAs under SSR. The evidence gathered on the effects of those measures is presented in Section 3 of this Final Report. At the same time the COVID-19 crisis has highlighted the necessity to streamline the legal framework to render the emergency measures adopted as effective as possible and the relevant procedure compatible with the emergency context.
6. ESMA highlighted in the CP that a review of the SSR proved relevant also considering the events which took place in the US markets and elsewhere in respect of the so-called "meme stocks", where large purchases of shares and call options in those meme stocks

¹⁵ https://www.esma.europa.eu/sites/default/files/library/technical_advice_on_the_evaluation_of_certain_aspects_of_the_ssr.pdf

combined with very high short positions created the conditions for sharp price increases leading to a ‘short squeeze’.

7. In light of such events, ESMA deemed it relevant to seek feedback from stakeholders on the rules encompassing the publication of NSPs and the prohibition of uncovered short sales in shares. The aim was to understand if events similar to those of the “meme-stocks” could occur in the EU and to understand if the current locate arrangements were a sufficient safeguard.
8. Based on the feedback gathered in the consultation process and considering further evidence which emerged in the aftermath of the US events, Section 4 of this Final Report puts forward proposals which are mostly aimed at simplifying the supervision of locate arrangements through the introduction of record keeping obligations and harmonizing the sanctions for breaches of the locate rule, without engaging in a fundamental revision of the latter as they are overall considered effective.
9. Additionally, in this Final Report ESMA proposes some measures which aim at increasing transparency and promoting standardization in the disclosure mechanisms of NSPs. With respect to transparency, ESMA proposes an EU statutory requirement to periodically disclose aggregated NSPs at the issuer level. With respect to standardization, following up on the 2017 SSR Technical Advice, this report reiterates the benefits of the creation of a centralised notification and publication system for NSPs. Such proposals are discussed in Section 5.
10. Finally, in Section 6 it is proposed that several references currently contained in the SSR should be updated and aligned with the legislation currently in force.

3 Emergency measures adopted under SSR

3.1 Long term bans: empirical analysis of the impact of the bans adopted after the COVID-19 outbreak

3.1.1 Legal Framework

11. Articles 20 and 23 of SSR set out the framework under which RCAs may prohibit or restrict NSPs and short-selling practices.
12. More specifically, SSR provides RCAs with the possibility to make use of two different types of restrictions, i.e. long-term and short-term bans. The short-term ban aims at preventing a disorderly decline in the price of the instrument while the long-term ban aims at mitigating the effects of adverse developments which constitute a serious threat to financial stability or can undermine market confidence.

13. More specifically, Article 23 of SSR foresees that, short-term bans may be imposed by RCAs where the price of a financial instrument on a trading venue has fallen significantly during a single trading day in relation to the closing price on that venue on the previous trading day. In this case, the RCA may prohibit or restrict persons from engaging in short selling of that financial instrument in the relevant trading venue to prevent a disorderly decline in the price of the instrument. In any case, the length of the ban cannot exceed three consecutive trading days and no ESMA opinion is required.
14. Article 20 of SSR instead, provides that an RCA may impose long-term bans, consisting in prohibiting or imposing conditions to any persons entering into a short sale or any other transaction which has the effect of conferring a financial advantage on the natural or legal person in the event of a decrease in the price or value of another financial instrument.
15. Such measure can be taken by RCAs only where the following conditions are met: (i) there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned (or in one or more other Member States); and (ii) the measure is necessary to address the threat without having a detrimental effect on the efficiency of financial markets.
16. Pursuant to Article 24 of SSR, long-term bans can last for a period not exceeding 3 months and may be renewed for further periods not exceeding another 3 months when the conditions which have led to the ban in the first place continue to be met.
17. Finally, for long-term bans, Article 27 of SSR mandates ESMA to issue an opinion on whether it considers the measure necessary to address the exceptional circumstances, within 24 hours of the notification made by an RCA.

3.1.2 Proposal in the CP

18. ESMA carried out an impact analysis of the long-term bans adopted under Article 20 of SSR during the first wave of the COVID-19 pandemic in 2020, with the aim to assess their impact on market quality, looking at liquidity, returns, and volatility indicators, as well as the possibility of a displacement effect between countries and to assess the effects of the bans on the financial sector compared to the industrial one.
19. The analysis was conducted at European level, taking into account all EEA30 countries as well as the UK¹⁶. The main findings of ESMA's impact analysis can be summarised as per below:
 - the short selling bans imposed during the crisis were associated with a liquidity deterioration (as measured by bid-ask spreads and the Amihud illiquidity indicator);

¹⁶ Since the data used in the analysis are encompassing the years 2019 and 2020, i.e. before the end of the Brexit transition period, and the amount of trading activities in the UK allow for increasing accuracy of the analysis during the matching process, UK shares are included in the matching process and in the regressions as a control group.

- the deterioration of liquidity was more pronounced for large-cap stocks, highly fragmented stocks and for stocks with listed derivatives;
- shares in banned countries exhibited a lower degree of volatility during the ban period, implying an average decrease of between -6% and -10%;
- the effects on abnormal returns did not appear significant, suggesting that the bans did not harm nor sustain market prices over the enactment period;
- all in all, the results did not appear to be entirely conclusive to claim the presence of a “sectorial effect”;
- overall, there was no clear displacement effect of short selling bans or reversal of NSPs towards non-banned shares.

20. From such analysis, ESMA concluded that the European long-term bans of 2020 had mixed effects, since on one side they entailed a deterioration of market liquidity but on the other side they diminished the volatility of the concerned shares¹⁷. Therefore, it was considered that the current framework, accompanied by operational improvements, supports RCA’s capacity to address concerns on financial stability and shall therefore remain available to RCAs in case of developments impacting the resiliency of financial markets.

3.1.3 Feedback to the consultation

21. The majority of the respondents did not agree with the conclusions of ESMA’s analysis. Those respondents were very critical and provided several arguments in favour of short-selling activities, including references to analyses that reached the conclusion that short-selling is not detrimental.

22. The residual part of the respondents was split between those who either did not provide any feedback or were neutral and, those supporting ESMA’s assessment. Those who supported ESMA’s assessment are of the view that, when markets are stressed maintaining liquidity is essential and while in normal market conditions short selling plays an important role in price discovery, in extreme market conditions (experienced during the start of the COVID-19 pandemic) it can potentially contribute to unnecessary downward pressure on share prices.

23. Finally, this topic was also discussed by the SMSG where there were also different views as to whether short selling bans in the COVID-crisis were counterproductive or useful. One view was that short selling activity is deemed to be very important for price discovery, liquidity provision and market efficiency in adverse circumstances and highly volatile markets. Another view is that short selling bans in crisis situations provide protections to

¹⁷ Lower volatility and mixed effects on the liquidity were also found in the most recent [study](#) conducted by the French and Dutch Authorities (AMF and AFM), Short selling ban impact – a comparison of the French and the Dutch markets (Kheira Benhami (AMF), Leon van Veldhuijzen (AFM), Tom Schoolderman (AFM)), February 2022

issuers and investors. Therefore, in its advice, the SMSG proposed that ESMA should be obliged to conduct an ex-post analysis of short selling bans imposed in the future, on which it issues an opinion, to inform market participants and increase knowledge about the consequences of short selling bans.

3.1.4 ESMA's assessment and final approach

24. It comes as no surprise that the opinions on the usefulness of short-selling activity and the related short-selling bans are very different and divergent across respondents.
25. ESMA appreciates the outcomes of different research papers supporting the usefulness of short-selling activities or highlighting the limits of the bans. However, at this point in time, taking into account the very divergent views, ESMA considers that the current framework, accompanied by operational improvements explained in more details in the following sections, supports RCA's capacity to face circumstances of financial instability and should therefore remain at the disposal of RCAs as a tool that they can use in those circumstances.
26. ESMA acknowledges the importance of analysing the effects of the bans further. However, it would be extremely resource intensive to perform those assessments after each ban. Nevertheless, it is ESMA's intention to continue monitoring and analysing the effects of those bans when applied, in order to reach a more comprehensive analysis and more robust results on the effects of such measures.

3.2 Long-term bans: relevant competent authority

3.2.1 Legal framework

27. The identification of the RCA is of relevance for the application of several provisions contained in the SSR, like notifications and emergency measures.
28. In respect of emergency measures, the determination of the RCA is particularly important to identify the scope of a national ban and whether the consent from another RCA has to be sought in the adoption process.
29. As reported in the CP, during the adoption of SSR emergency measures linked to the COVID-19 pandemic, ESMA noted that the current definition of RCA in the SSR can be subject to different readings, creating uncertainties over the instruments covered by a ban and the necessary steps for its adoption.
30. First, the RCA definition contains a reference to MiFID I delegated regulation which appears to be outdated in the light of the transition to MiFID II which already took place years ago.
31. Furthermore, in case of a ban on short positions on a share that can be built through a variety of instruments (as opposed to the case of a simple short selling ban on a specific instrument), the current definition may not be seen as clear in determining the RCA for the instruments considered in the calculation of the NSP on that share.
32. More in detail, Article 2(1)(j) of SSR provides different criteria to identify the RCA for the application of SSR according to the financial instrument considered¹⁸.
33. Article 2(1)(j)(v) of SSR stipulates that with respect to instruments other than sovereign debt, like shares, depository receipts and derivatives, including index related derivatives, the RCA is to be determined in accordance with the criteria contained in Delegated Regulation 1287/2006¹⁹.
34. Delegated Regulation 1287/2006 is a level two measure supplementing MiFID I on the obligations to report transactions under Article 25(3) of that Directive.
35. In particular, Article 2(7) of Delegated Regulation 1287/2006 identifies the RCA for a financial instrument as the competent authority of the most relevant market in terms of liquidity for that financial instrument²⁰.

¹⁸ Point (i)-(vii) of SSR list the criteria to identify the RCA for different type of sovereign debt and other financial instruments.

¹⁹ Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive OJ L 241, 2.9.2006, p. 1–25

²⁰ The criteria for the determination of the most relevant market in terms of liquidity are provided by Chapter III of the same Delegated Regulation.

36. With the application of the MiFID II / MiFIR regime, Article 26(1) and (2) of MiFIR replaced Article 25(3) of MiFID I on the obligations to report transactions. Under the current regime, obligations to report transactions described in MiFIR are supplemented by RTS 22²¹.
37. As a result, Article 16 of RTS 22 laid down the current rules for determining the most relevant market in terms of liquidity.
38. Delegated Regulation 1287/2006 under MiFID I and RTS 22 under MiFID II partly differ in the criteria to identify the most relevant market in terms of liquidity. For example, with respect to shares, Delegated Regulation 1287/2006 identified the most relevant market in terms of liquidity as the place of first admission to trading, whereas RTS 22 uses for the same aim the highest turnover, giving preference to RMs first and then MTFs.
39. Pursuant to Article 27 of MiFIR and Article 4 of MAR, the national competent authority for the most relevant market in terms of liquidity for transaction reporting purposes is published by ESMA in the FIRDS section of its website²².
40. In its Q&A 4.10 of November 2018 on the identification of the RCA²³, ESMA clarified that despite the formal reference in SSR to the Delegated Regulation 1287/2006 supplementing MiFID I has not being changed, such references should be read as referring to RTS 22²⁴.
41. As a result, the RCA for instruments listed in Article 2(1)(j)(v) of SSR coincides with the competent authority of the most relevant market in terms of liquidity for transaction reporting as identified pursuant to RTS 22 and as displayed in the FIRDS section of the ESMA website.
42. In respect of emergency measures, the Articles from 18 to 23 of SSR provide RCAs with different powers that can be deployed in exceptional circumstances.
43. In particular, Article 20(2) of SSR grants RCAs the power to ban short sales and transactions that may have as an effect to confer a financial advantage in the event of a decrease in the price or value of another financial instrument.
44. Such emergency measures, also referred to as bans, apply directly to those instruments for which the authority adopting the ban is the RCA.

²¹ Article 26(1) MiFIR establishes a reporting obligation for investment firms and requires RCAs to take arrangements to ensure that the competent authority of the most relevant market in terms of liquidity for the financial instruments receives the details of transactions in financial instruments. Paragraph 9 of Article 26 MiFIR confers to ESMA the task to develop RTS specifying the criteria for defining a relevant market in accordance with paragraph 1, which served as a legal basis for the Delegated Regulation 2017/590 (RTS 22).

²² Therefore, the notification of NSPs in shares (Article 5 SSR) and the public disclosure of significant NSPs in shares (Article 6 SSR) have to be submitted to the national competent authority of the jurisdiction that appears in FIRDS as "Upcoming RCA".

²³ Questions and Answers on the Regulation on short selling and certain aspects of credit default swaps (ESMA70-145-408), available at this link: https://www.esma.europa.eu/sites/default/files/library/esma70-145-408_qa_on_ssr.pdf.

²⁴ ESMA's reading was based *inter alia* on i) rules of succession of laws and legal certainty; ii) reading of the reference to Delegated Regulation 1287/2006 in Article 2(1)(j)(v) of SSR as a dynamic reference; and iii) the specific obligation provided by Article 94 MiFID II to construct references to MiFID I as references to MiFID II or to MiFIR.



45. Pursuant to Article 22 of SSR, where an authority is not the RCA for a financial instrument which it wishes to include within the scope of the ban, the consent from the RCA has to be sought.

3.2.2 Proposal in the CP

46. In the CP, ESMA noted that the outdated reference to the old MiFID I framework could be misleading with respect to the RCA determination, despite having already clarified in its Q&A that the references to the MiFID I framework in the RCA definition should be read as referring to MiFID II.

47. In particular, for derivatives based on an index composed of shares all of which are traded on a particular regulated market, the application of the outdated reference to MiFID I would lead to a different result²⁵. The same would be true in the case of depository receipts²⁶.

48. Additionally, in the CP ESMA analysed another aspect connected to the definition of RCA for financial instruments other than sovereign debt that may be subject to different readings in relation to emergency measures.

49. One reading would be to determine the RCA for the emergency measure on a **per-instrument basis**, i.e. in relation to every single instrument included in the calculation of the NSP.

50. Under this approach, if an authority adopts a ban on NSPs in respect of a share, it will need to seek the consent from the RCA for those instruments that are included in the calculation of the NSP in that share for which the authority adopting the ban is not the RCA.

51. The alternative reading would be to determine the RCA for the emergency measure on a **“share-based approach”**, i.e. considering the share as the only target of the measure, with all the instruments included in the calculation of the NSPs automatically falling within the scope of the ban.

52. Under this approach, the RCA competent for the instrument target of the ban (typically a share) has the competence to include in the ban also all the instruments considered in the calculation of the NSP for the target instrument.

53. In practical terms, the difference between the two approaches would be relevant whenever the RCA for the share is not the RCA for the other instruments included in the calculation of the NSP for that share (e.g. index based derivatives and GDRs)²⁷.

²⁵ In that case, the RCA for such instruments under Delegated Regulation 1287/2006 would be the competent authority supervising the market of the shares composing the index, whereas under RTS 22 the RCA for the instruments would be the competent authority of the market where the instrument was first admitted to trading. Differently, for any derivative based on multi-country indices like the Eurostoxx, the application of MiFID I and MiFID II would lead to the same result in terms of RCA.

²⁶ Delegated Regulation 1287/2006 would apply as criterion for identification of the RCA the place of first admission to trading, whilst RTS 22 uses the highest turnover, giving preference to RMs first and then to MTFs.

²⁷ In the CP to explain the different outcomes of the application of the two approaches was presented the following example. RCA A supervises the most liquid market for share X and intends to adopt an emergency measure for that share, thereby prohibiting

54. In the CP, ESMA highlighted that the **shared-based approach** is based on the objective of the ban, i.e. the prevention of a disorderly decline in the price of a financial instrument and the mitigation of the developments which may constitute a threat to financial stability or market confidence. In this sense, the success of the ban depends on its capacity to capture all financial instruments which confer a financial advantage in the event of a decrease in the price or value of the ‘target’ share.
55. Thus, in the CP ESMA expressed the view that on the basis of the ban’s objectives, the approach to be applied in the context of the emergency measures is the shared-based approach, whereby the RCA is to be determined only in relation to the share on which the ban on an NSP is adopted.
56. In this respect, ESMA noted that the ‘financial instruments’ referred to both in Articles 20 and 22 of SSR are the primary target of the ban (e.g. shares) and that for a ban to be efficient it should cover all the instruments that effect the calculation of the NSP in the very instrument subject to the ban. Differently, a ban leaving out some instruments that could affect the value of the target share would render the ban ineffective.
57. On the same line, ESMA noted that the reference in Article 20(2)(b) of SSR to any transaction which “creates, or relates to” a financial instrument suggests that the legislators wished to give RCAs powers to cover any transaction able to confer a financial advantage in the event of a decrease in the price of the share.
58. Furthermore, ESMA also pointed out that the per-instrument approach is grounded on the criteria to identify the competent authority for transaction reporting purposes under MiFIR, whereas the range of instruments through which an NSP can be created is much wider, as it includes instruments that may not be subject to transaction reporting.
59. Additionally, from a practical perspective, the use of the FIRDS database - necessary to identify the RCA under the per-instrument approach - would not allow the RCA adopting a ban to trace back all potential instruments included in the calculation of the NSP. Such circumstance could create uncertainties about the RCAs to whom the request for consent should be addressed. Moreover, it would imply that the RCAs continually monitor whether new instruments included in the calculation of the NSP in the banned share are created in other jurisdictions in order to seek new consent(s) whenever another authority is the RCA. This would imply a risk of omitting requests for consent and having newly issued financial instruments which are not covered by a ban.

transactions which result in opening or increasing a NSP on share X. For derivatives on indices that include that share, pursuant to RTS 22 the RCA is the one supervising the market where the derivative was first admitted to trading. Under the per-instrument approach, if that market does not coincide with the most liquid one for the share X, the RCA for the index-based derivatives would not be RCA A (referred to as NCA B from this point). Therefore, the effectiveness of the ban in relation to those derivatives would be conditional upon RCA B’s consent.

On the contrary, following the share-based approach, the ban adopted by RCA A would be applicable to the index-based derivatives without the need to request RCA B’s consent. On the same line, under the share-based approach, other related instruments such as GDRs would be automatically caught by the ban, without any consent needing to be requested even where the RCA for the GDR is not the RCA for the share.

60. In light of the above, in the CP ESMA proposed firstly to amend Article 2(1)(j)(v) of SSR by replacing the reference to Delegated Regulation 1287/2006 with a reference to RTS 22, for the sake of legal clarity.
61. Secondly, considering that the correct approach to identify the RCA in relation to emergency measures is the share-based one, ESMA proposed a clarification in Article 2(1)(j) of SSR to specify the definition of RCA for instruments other than sovereign debt in the context of emergency measures.
62. More specifically, whilst the definition currently contained in Article 2(1)(j) of SSR should apply in general to the SSR provisions not relating to emergency measures, in the specific context of emergency measures, ESMA proposed to make it 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.
63. This amendment would provide additional legal certainty that an RCA can issue a ban for a target financial instrument with has effects on all the instruments used in the calculation of NSPs for that target instrument (for potential exclusions or limitations to the scope of the ban in relation to indices, baskets of instruments and ETFs see Section 3.5).

3.2.3 Feedback to the consultation

64. ESMA received 20 responses to the question on the proposal to amend the RCA definition explained in the CP, the majority of which expressed support for the proposals.
65. On the update of the references contained in the RCA's definition in the Delegated Regulation 1287/2006 with a reference to RTS 22, ESMA did not seek any feedback from the stakeholders, considering the amendment would merely insert in the SRR a technical update already described in the Q&A 4.10 of November 2018 on the identification of the RCA.
66. Despite the lack of a specific question on the CP, few respondents expressly supported the update of the references.
67. Positive feedback was received also in respect to the proposal to adjust the RCA's definition to clarify that the share-based approach is to be adopted to determine the RCA for the emergency measure (i.e. the share is the target of the measure and all the instruments used in the calculation of the NSPs are automatically included in the scope of the ban).
68. In this respect, 15 respondents confirmed that the current RCA definition creates uncertainties on the perimeter of the ban and expressed the view that ESMA's proposed amendment would provide legal certainty to market participants. To support this stand, two respondents reported to have faced doubts on the inclusion of index derivatives in SSR bans adopted in the context of the COVID-19 crisis. The same respondents flagged that the lack of a standardised approach followed by different RCAs in the same context



resulted in opportunities for regulatory arbitrage and uncertainties amongst market participants on the application of emergency measures.

69. Only one respondent was against the proposal. This respondent argued that the amendment would allow an RCA to adopt a ban including also instruments which are not traded in its jurisdiction without the RCA competent for the market where the instrument is traded participating in the decisional process, to the detriment of the proportionality of the measure.
70. Additional suggestions collected from the consultation included the proposal that (i) ESMA adopts a specific set of Q&A on the functioning of SSR emergency measures and (ii) the RCA adopting a ban publishing the list of instruments in the scope of the measure, to increase clarity on what instruments are subject to the ban.
71. Finally, the SMSG supported the clarifications proposed by ESMA, as they would increase legal certainty and provide clarity on the scope of the bans.

3.2.4 ESMA's assessment and final approach

72. On the update of the outdated reference to MiFID I with references to MiFID II in the RCA definition, ESMA recalls its Q&A already issued on the matter, the technical nature of such amendment, the benefits it would bring in terms of legal quality and, lastly, the support shown by market participants in respect to the proposal.
73. On this basis, ESMA brings forward the proposal to update Article 2(1)(j)(v) SSR by replacing the reference to Delegated Regulation 1287/2006 with a reference to RTS 22 for the sake of legal clarity.
74. In addition, ESMA notes the great majority of respondents agreed with the proposal to amend the RCA definition for instruments other than sovereign debt, like shares, depository receipts and derivatives, including index related derivatives, to clarify that the share-based approach in the context of the emergency measure is the correct one. In light of the positive feedback received, ESMA maintains its proposal.
75. For completeness, ESMA appreciates the concern shown by a market participant that under the share-based approach an RCA competent for the market where the instrument is traded may not take part to the decision-making process regarding the ban adoption, to the detriment of proportionality.
76. However, ESMA recalls that pursuant to Article 27(2) of the SSR, ESMA is required to issue an opinion on emergency measures, which should state whether the measure is appropriate and proportionate to address the relevant threat. Furthermore, Article 27(3) of the SSR requires the RCA which intends to diverge from the ESMA's opinion to explain the reason for doing so in a notice to be published on its website.
77. Therefore, ESMA's opinion should ensure that overall proportionality is adequately taken into account in the approach of adopting a ban, mitigating the risks connected with the

potential exclusion of RCAs competent for some instruments included in the calculation of the NSP from the decisional process.

78. Furthermore, ESMA believes that the advantages in terms of ban efficiency of the share-based approach overall outweigh the described proportionality issue.
79. Lastly, ESMA acknowledges the suggestion for ESMA to adopt a specific set of Q&As on the functioning of SSR emergency measures. Whilst this is an issue beyond the potential review of SSR and the scope of this report, ESMA will consider whether that should be addressed from a supervisory convergence perspective.
80. With respect to the suggestion that the RCA adopting a ban should publish the list of instruments in the scope of the measure to increase clarity on what instruments are subject to the ban, ESMA recalls that the share-based approach would permit considering under the ban's scope any instrument able to confer a financial advantage in the event of a decrease in the price or value of the 'target' share. Thus, the adoption of such approach would already enhance the clarity of the ban's scope with regards to the instruments covered, without any need for the RCA to publish a closed list.

3.3 Long term bans: prohibitions under point a and b of Article 20(2) of SSR

3.3.1 Legal Framework

81. RCAs can adopt the prohibitions under Article 20 of SSR which are often referred to as long-term bans. In light of the evidence gathered since the entry into force of the SSR, ESMA believes that there is merit in clarifying the reading of such provisions.
82. Under Article 20 of SSR, RCAs can prohibit or impose conditions for natural or legal persons to enter into (i) a short sale or (ii) transactions other than a short sale which provide a financial advantage to the person if there is a decrease in the price or value of another financial instrument.
83. Article 1(2) of SSR specifies that Article 20 shall apply to all financial instruments as defined in Article 2(1)(a) of SSR, these being the instruments listed in Annex I C of MiFID I²⁸. Furthermore, Article 20(3) specifies the scope of the emergency measures under Article 20 of SSR, clarifying that they might apply to all financial instruments, a specific class of financial instruments or a specific financial instrument. RCAs also have the right to determine exceptions to the measures, e.g. in relation to market making and primary markets activities.

²⁸ See Section 6 for the need to update outdated references including the reference to Annex I Section C of MiFID I.

3.3.2 Proposal in the CP

84. The current drafting of Article 20(2)(a) and (b) of SSR may be read in the sense that long-term bans can target either short sales or transactions, other than a short sale, which provide a financial advantage to the person if there is a decrease in the price or value of another financial instrument.
85. In this respect ESMA noted in the CP that RCAs should have the possibility to be flexible in adopting long term bans, by modulating their measure from a simple ban on short selling all the way through the spectrum to a ban on entering into new or increasing existing NSPs.
86. Whilst of the view that under Article 20(2) of SSR RCAs can already choose between one of the two options contained in point a) or b) of that Article or opt for both, ESMA was made aware of an alternative reading whereby point a) and b) could be seen as alternatives.
87. Hence in the CP, ESMA proposed to clarify that, where the relevant conditions contained in Article 20 of SSR are met, RCAs may adopt either one or both of the measures contained in point (a) and (b) of Article 20(2) of SSR. ESMA stated that such clarification would confer to the RCAs the flexibility which is necessary to address emergency circumstances, and asked stakeholders' feedback on the proposed clarification.

3.3.3 Feedback to the consultation

88. The majority of stakeholders supported ESMA's proposal to clarify that, where the relevant conditions contained in Article 20 of SSR are met, RCAs may adopt either one or both of the measures contained in point (a) and (b) of Article 20(2) of SSR.
89. Several respondents noted that it would be helpful to develop an EU template with a standardised format to be used when bans are communicated to the market. More in detail, respondents suggested that the template should systematically specify: (a) the scope of a ban, in terms of the impacted instruments and the type of activity (i.e. short selling and/or increasing NSPs, additionally providing information if the ban refers to entering into new NSPs or increasing existing ones) and (b) any exemption envisaged (i.e. market making activity, indices/baskets/ETFs, passive increases in NSPs due to a delta variation, rolling of existing NSPs via expiring derivatives, hedging the equity component of convertible bonds and subscription rights previously purchased, sales to rebalance an index). Additionally, some respondents noted that it would be beneficial to have a single centralized register containing information regarding all the bans issued in the EU.
90. A minority of respondents did not support the proposal, the argument being that such proposal might reinforce concentration of intervention powers with one RCA, that could issue long-term bans targeting a share and other financial instruments referencing to that share which might not even be traded within the jurisdiction of the RCA issuing the ban.

91. Three respondents commented more generally that in their view bans should address only the entering into or increasing of existing NSPs. Such approach was justified by noting that some RCAs in 2020 adopted bans on both short selling and increasing short positions, and this led to market participants being unable to carry out short selling long positions for hedging positions entered into for example through derivatives.
92. The SMSG also supported ESMA's proposed clarification, stating that RCAs should be provided with the flexibility offered by the reading that "both" measures in point (a) and (b) of Article 20(2) of SSR could be used.

3.3.4 ESMA's assessment and final approach

93. Considering the feedback received from stakeholders, ESMA is of the view that it is relevant to clarify that, where the relevant conditions contained in Article 20 of SSR are met, RCAs may adopt either one or both of the measures contained in point (a) and (b) of Article 20(2) of SSR.
94. Regarding the response of those stakeholders who believe that such clarification could reinforce concentration of intervention powers with one RCA, ESMA notes that the suggested clarification would not fundamentally change the powers currently attributed to RCAs, as they currently may already ban any increased net short, potentially covering related instruments that are not traded within the jurisdiction of the RCA adopting the ban.
95. ESMA takes note of the comments that bans should address only the entering into or increasing of existing NSPs, as bans on both short selling and increasing NSPs would prevent market participants from using short selling to hedge positions entered into for example through derivatives. In that sense, ESMA agrees that normally a ban on NSPs does not need to also prohibit short selling, as every short selling which is not for hedging purposes would already be banned as it results in an increased NSP. However, in exceptional circumstances, RCAs may also deem it opportune to adopt a wider measure where short selling is also banned in addition to increased NSPs.
96. Hence, on balance, ESMA believes that the proposed clarification would foster RCAs' flexibility, have a positive effect on financial markets in emergency situations and therefore recommends the EC to take it forward.
97. Additionally, ESMA takes note of the suggestion raised by stakeholders in several instances throughout this consultation regarding an EU template to be used for communication of bans to the market and on the benefits of developing a central register to access information about all the bans which are issued in the EU.
98. However, ESMA is not convinced that a central ESMA register containing information regarding all the bans issued in the EU is justified, also considering the exceptional nature of the bans.
99. As to the proposal to achieve a standardization of the format of bans, e.g. through a standardized format which can be used across Member States when publishing



information about the bans, ESMA intends to work in that direction through its supervisory convergence tools, without the need for a statutory reform.

3.4 Long-term bans: scope of the ESMA Opinion

3.4.1 Legal Framework

100. When an RCA adopts a long-term ban under the SSR, that RCA is expected to notify ESMA within a set timeframe before the measure takes effect. Further to the evidence gathered from the COVID-19 events, ESMA believes that it is worth re-visiting the current regime to provide clarity on the scope of the Opinion that ESMA is required to publish within 24 hours of reception of the RCA's notifications, and on the feasibility within such timeframe to carry out a thorough analysis of the circumstances represented by the proposing RCA in its notification.
101. Article 26 of SSR states the duty for RCAs to notify ESMA and other RCAs before imposing or renewing any measure under Article 18, 19, 20 or 21 of SSR. Article 26(3) establishes a timing framework for notifications, stating that notification of measures under Article 18, 19, 20 or 21 of SSR shall be made not less than 24 hours before the measure is intended to take effect or renewed. In exceptional circumstances, where the 24 hours' notice is not possible, the measure can be notified within a shorter time frame.
102. Article 27 of SSR establishes ESMA's duties after receiving a notification under Article 26 of SSR. Article 27(2) establishes that when ESMA receives a notification, within 24 hours from reception, should issue an Opinion which specifically establishes (i) if ESMA believes adverse events or developments which constitute a serious threat to financial stability or to market confidence in one or more Member States have occurred, (ii) if the measure proposed by the RCA is appropriate to address such threat and (iii) if the proposed duration of the measure is justified.
103. In its Opinion, ESMA is also expected to indicate whether it believes that any other competent authority should also take any relevant measure to address the threat. The Opinion has to be published on ESMA's website. Whenever an RCA intends to adopt a measure contrary to ESMA's Opinion (or declines to take a measure contrary to an ESMA Opinion), within 24 hours should publish a notice on its website explaining the reasons for doing so. In the latter circumstances, ESMA is expected to evaluate if it should exercise its intervention powers as per Article 28 of SSR.

3.4.2 Proposals in the CP

104. As highlighted above, ESMA upon receiving a notification under Article 18, 19, 20 or 21 of SSR is expected to publish on its website an Opinion, within 24 hours.
105. ESMA noted in the CP that due to the short timeframe within which ESMA is mandated to issue such Opinion, it is challenging to conduct an in-depth assessment of the events which occurred and the possible impacts of such events. Hence, there is a need for ESMA

to rely on the factual basis and in-depth analysis provided by the RCA at the time of the notification.

106. ESMA additionally noted, on the basis of the events of market turmoil in several EU Member States due to the COVID crisis, that the 24 hours deadline set out in the regulation for the publication of ESMA's Opinion is challenging, particularly in all those cases where a preliminary exchange of information and views between the adopting RCA and ESMA is not possible ahead of the official notification triggering the 24 hours deadline.
107. At the same time, acknowledging the exceptional nature of the circumstances where ESMA is required to adopt its Opinion, ESMA recommended in the CP to amend the relevant SSR provisions. The proposed amendments would consist in stating that ESMA's assessment and the relevant Opinion will mainly rely on the factual events and representations outlined by the RCA in its notification and will consider further sources only when available and their assessment is compatible with the short deadline. Any ESMA analysis on the facts upon which the emergency measure is proposed would not be compatible, in the majority of cases, with the 24 hours deadline for adopting the Opinion.

3.4.3 Feedback to the consultation

108. ESMA did not explicitly seek feedback from stakeholders on the proposed amendments to Article 27(2) of SSR, as they are connected to the practical challenges that ESMA faces in fulfilling the relevant legal requirements as they stand.
109. Nevertheless, one respondent commented that ESMA's oversight function is very important in the context of the issuance of long-term bans and suggested the possibility to amend the relevant provisions, attributing to ESMA an ex-post review role. That respondent suggested that such ex-post review role could consist in ESMA undertaking, in the days immediately following the implementation of the ban, an analysis of its necessity and impact.
110. The SMSG supported an amendment in line with the ESMA proposal. However, it recommended that ESMA should not only be transparent about the extent to which it relies on information from the RCA, but also that it should consider as many relevant sources as possible in the available time.

3.4.4 ESMA's assessment and final approach

111. With respect to the proposals put forward in the CP concerning the scope of the ESMA Opinion in the context of long-term bans, ESMA maintains the approach and proposals brought forward in the Consultation Paper, based on the reasoning outlined above. ESMA notes the comment of one stakeholder which suggests carrying out an ex-post review of the necessity of the ban in the days immediately after its implementation. Nevertheless, ESMA notes that such proposal would represent an extremely resource-intensive change,

as it would require an ex-post analysis every time a ban is adopted, even more so when multiple bans are adopted in the same period, e.g. as a result of a global crisis.

112. Additionally, ESMA would like to highlight that any ESMA prior or subsequent assessment of a ban would still need to rely on the factual basis and in-depth analysis provided by the RCA. This as any assessment of the factual representations provided by the proposing RCA would go beyond ESMA's remit and powers, as they may be connected with dynamics at national level over which ESMA does not have intelligence.

113. Hence, ESMA recommends that the EC considers amending the relevant SSR provisions, stating that ESMA's assessment and the relevant Opinion will mainly rely on the factual events and representations outlined by the RCA in its notification, and will consider further sources only when available and their assessment is compatible with the short deadline.

114. ESMA also deems it useful to accompany the above proposal by including some wording in Article 26 of SSR to specify that the evidence provided to ESMA by RCAs before imposing or renewing any measure under Article 18, 19, 20 or 21 (and before imposing any restriction under Article 23), should be as encompassing as possible and an objective representation of the events and outcomes in the relevant jurisdiction.

3.5 Long-term bans: scope of the measure in relation to indices, baskets of instruments and ETFs

3.5.1 Legal framework

115. 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 share is included in the indices, baskets of instruments and in the ETF.

116. Therefore, unless expressly exempted by an RCA, those instruments are included in the scope of long-term bans under Article 20 of the SSR by virtue of the financial advantage conferred in the event of a decrease in price or value of the associated financial instrument²⁹.

3.5.2 Proposal in the CP

117. In the CP, ESMA considered two aspects that needed to be examined in relation to indices, baskets and ETFs in the context of long-term bans under Article 20 of the SSR.

²⁹ See Article 3(1)(b) and 3(3) of the SSR as well as Articles 5 and 6 supplemented by Annex I and Annex II of Delegated Regulation No. 918/2012.

118. The first aspect relates to whether it would be appropriate to exclude such instruments from the scope of the bans. ESMA has been made aware that those instruments may be used for hedging market-wide risk and/or for taking positions on broader market movements. As such, there is an argument that those instruments would less likely be used by market participants to take an NSP in a single share.
119. In addition, one could argue that 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. This is confirmed by the fact that historically RCAs have often limited or excluded those instruments from the scope of the bans that were adopted since the application of the SSR.
120. The second aspect is linked to the determination of the RCA for the purposes of restrictive measures as described in Section 3.2. As different RCAs may issue a ban targeting one or more shares included in those instruments at the same time, following the share-based approach in the determination of the RCA for the shares included in indices, baskets and ETFs, more than one ban may apply to the same instrument at the same time.
121. This is due to the fact that all the related instruments that are included in the calculation of the NSP for the target share would be captured by the ban (with no consent required where the RCA of the target share is not the RCA for the related instruments), making the same index, basket or ETF potentially subject to a different restrictive measure, whose scope may vary or even conflict with the other(s).
122. In the CP, ESMA considered proposing that indices, baskets and ETFs should be excluded from the scope of the long-term bans. Such exclusion would also work for – and align with – ESMA’s reading in respect of the determination of the RCA for emergency measure purposes as set out in Section 3.2.
123. Alternatively, ESMA suggested the introduction of a percentage-based weighting approach, whereby indices, baskets and ETFs should be excluded from the scope of the long-term bans only when the banned instruments do not exceed a given percentage of the overall components.
124. Without prejudice to the above proposals ESMA consulted upon whether it is also 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.

3.5.3 Feedback to the consultation

125. All but one respondent welcomed ESMA’s proposal to exclude indices, baskets and ETFs from long-term bans.
126. Where the proposal to exclude indices, baskets and ETFs from long-term bans were not to be followed, some respondents would agree - as second best – with the exclusion

following a percentage-based weighting approach, however highlighting the complexity connected with such approach (e.g. monitoring the percentages). Some of them considered that in any case exclusion should be granted where an index, basket or ETF contains no more than 50% weighting of restricted shares.

127. Because of the mentioned increased complexity, a few respondents opposed the percentage-based weighting approach, stressing that such policy choice would be pursuable only if a series of measures are also introduced, such as ESMA's maintenance of a list of relevant financial instruments, a market-making exemption by default and the exemption from the scope of the ban of certain market activities such as the rolling of derivatives positions.
128. A good number of respondents favoured an anti-circumventing rule, whereby any trading in indices, baskets and ETFs that clearly demonstrates that it is intending to circumvent the ban should be prohibited at all times. However, they highlight that guidance is needed as to what "clearly demonstrates" means.
129. A couple of respondents argued against such an anti-circumventing rule, seen as difficult to operate in practice, as it would not be clear when an investor can be accused of intending to circumvent the ban.
130. The SMSG would also favour the exclusion of indices, baskets, and ETFs from the scope of long-term bans, to avoid a disproportionate cost with respect to a limited (if existent) benefit. The SMSG also considered that the exclusion should not allow behaviours and trades intended to circumvent the SSR. In this respect a principle-based approach, that would limit the costs associated with a complex set of rules, should be implemented and enforced.
131. As a second-best scenario – in case a cost-benefit analysis showed the need to include such instruments in the scope of long-term bans – the SMSG considered that the exclusion should at least be granted to indices, baskets, and ETFs providing for sufficient diversification (e.g. identified by the EU rules on UCITS or equivalent).
132. Lastly, the SMSG is of the view that, to avoid situations where narrow indices or undiversified baskets or ETFs theoretically could be used to circumvent the SSR, a percentage-based weighting approach could be used.

3.5.4 ESMA's assessment and final approach

133. Also considering the feedback received, ESMA is of the view that indices, baskets of instruments and ETFs should be by default excluded from the scope of long-term bans under Article 20 of the SSR.
134. Prohibiting going short on indices, baskets and ETFs and derivatives thereof may have a detrimental effect on all those legitimate trading activities that incidentally result in increasing the NSPs on the share(s) subject to the ban.

135. However, RCAs are well aware that trading on those instruments may be easily used to circumvent the bans, e.g. by going short on the very index or basket and long on all the other components but the one subject to the ban and for which they intend to increase their NSP.
136. Therefore, ESMA would like to propose an amendment to the SSR to ensure that, in any case, 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. RCAs must thus retain the power to ensure the effectiveness of the ban, ensuring that any trading that eventually resulted in an increase of NSPs in a banned share through the use of indices, baskets or ETFs trading may be subject to special scrutiny.
137. Whilst of the view that by default the above instruments should be excluded from the scope of long-term bans, in exceptional circumstances RCAs may not exclude them or make them subject to conditions (such as a percentage of the components subject to the ban). However, that should be done only in a limited number of justified cases, e.g. where the ban covers the majority or all the financial instruments of a market or a sector, and index, basket or ETF trading could not take place without expressly voiding the bans' objectives.

3.6 Review of the conditions for RCAs to adopt emergency measures and ESMA intervention powers under Article 28 SSR

3.6.1 Legal Framework

138. Under Article 20 of SSR, RCAs can prohibit or impose conditions to natural or legal persons entering into short sales or increasing their NSPs where:
- a. *“there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States; and*
 - b. *the measure is necessary to address the threat and will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits”³⁰.*
139. The above conditions are identical to those contained in Article 18, 19 and 21 of SSR in relation to RCAs' power to respectively require exceptional disclosure from holders of NSPs, to require notification of significant changes in the fees from entities lending financial instruments, and to prohibit or limit the possibility of entering into sovereign credit default swaps transactions. Article 18 of SSR (Notification and disclosure in exceptional circumstances) provides RCAs, if circumstances identical to those of Article 20 of SSR materialise, the power to require natural or legal persons who have NSPs in

³⁰ Article 20(1) of SSR.

relation to a specific financial instrument or class of financial instruments to notify it or to disclose to the public details of the position where the position reaches or falls below a notification threshold fixed by the competent authority.

140. Article 28 of SSR gives ESMA intervention powers which are comparable to the RCAs' ones under Articles 18 and 20 of SSR. Such powers respectively substantiate the right to require natural or legal persons to notify to the relevant RCA or disclose to the public details of their NSPs and to prohibit or impose conditions on short selling or increasing NSPs in a given financial instrument.
141. ESMA's powers under Article 28 of SSR can be exercised only when:
- a. the measures *“address a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union and there are cross-border implications; and*
 - b. *no competent authority has taken measures to address the threat or one or more of the competent authorities have taken measures that do not adequately address the threat”*³¹.
142. ESMA, when exercising such direct powers, needs to take into account the extent to which the measure:
- a. *“significantly addresses the threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union or significantly improves the ability of the competent authorities to monitor the threat;*
 - b. *does not create a risk of regulatory arbitrage;*
 - c. *does not have a detrimental effect on the efficiency of financial markets including by reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure”*³².
143. Measures imposed by ESMA under Article 28 of SSR prevail over any previous measure taken by an RCA under Articles 18 and 20 of SSR.
144. Article 24 of the Delegated Regulation 918/2012 specifies the cases of adverse events or developments for RCAs to adopt restrictive measures under Articles 18 to 21 of SSR³³ and what should be considered as a threat to the orderly functioning and integrity of financial markets or to the stability of the financial system for ESMA to adopt its intervention powers under Article 28 of SSR³⁴.

³¹ Article 28(2) of SSR.

³² Article 28(3) of SSR.

³³ See Article 24(1) of Delegated Regulation 918/2012.

³⁴ See Article 24(3) of Delegated Regulation 918/2012.

3.6.2 Proposals in the CP

145. In the CP, ESMA noted that the intervention powers conferred to ESMA by Article 28 of SSR are comparable to the powers conferred to RCAs by Articles 18 and 20 of SSR. However, the current drafting of such provisions is not fully aligned and the conditions to adopt them differ.
146. On the one hand, the conditions for RCAs to activate their powers are stricter, as they require the presence of a serious threat, compared to the mere threat for ESMA's powers.
147. On the other hand, the conditions for ESMA to activate its powers are more stringent compared to the RCAs' e.g. as the measure should "significantly" address the threat and there should be cross border implications and no regulatory arbitrage nor adequate measure adopted at national level. Additionally, RCAs' powers can be activated in presence of a threat to market confidence, whilst that is not the case for ESMA to activate its own intervention powers.
148. Whilst the additional conditions about the presence of cross border effects and the absence of adequate measure at national level and regulatory arbitrage seem coherent with the role of ESMA in the European supervisory landscape, the other differences do not seem to be justified in relation to measures whose scope is overlapping in substance.
149. Moreover, the experience gathered in the use of the above powers has highlighted some limits in relation to the cases contained Article 24(1) and the clarifications provided in Article 24(3) of Delegated Regulation 918/2012.
150. In particular, many of the provisions contained in Article 24 of Delegated Regulation 918/2012 are drafted in relation to financial institutions, market infrastructures and clearing settlement systems, while there is no reference to other types of issuers that, either for their size and systemic importance or for business specificities, may nonetheless raise supervisory concerns in case of a sharp decline in price or accumulation of NSPs in their financial instruments.
151. Additionally, ESMA noted that some of the adverse events mentioned in Article 24 of Delegated Regulation 918/2012 are connected to natural disasters or terrorist attacks, while other types of adverse scenarios such as the recent outbreak of the COVID-19 pandemic and the disruptions caused by the measures adopted by the governments to tackle the consequences of the pandemic are not explicitly mentioned.
152. ESMA noted in the CP that the conditions set forth in Article 18 to 21 of the SSR for RCAs to adopt their powers should not be different from those for ESMA to activate its intervention powers under Article 28 of SSR, while ESMA's powers should remain subject to some additional conditions connected with its specificities in the European supervisory landscape.
153. Therefore, ESMA proposed that the conditions for ESMA to activate its intervention powers under Article 28 of SSR should be aligned with the ones for RCAs to adopt their

national measures and that the list of events contained in Article 24(1) of Delegated Regulation 918/2012 (currently relating to RCAs' powers) should apply also to ESMA's powers under Article 28 of SSR. Additionally, ESMA proposed that the list of adverse events and developments currently contained in Article 24(1) of Delegated Regulation 918/2012 should be amended to include new type of adverse events.

3.6.3 Feedback to the consultation

154. Two aspects were analysed: the alignment of the conditions to adopt measures under Article 20 and Article 28 of the SSR and the proposal to amend Article 24 of the Delegated Regulation 918/2012.
155. On the first point, respondents in favour of aligning conditions noted that stronger standardisation would benefit RCAs and ESMA. Therefore, an alignment would enhance clarity in the market and facilitate a better coordination and.
156. Among supporters of the proposal, some respondents emphasised that ESMA's use of powers should be viewed, in line with the principle of subsidiarity, as a last resort solution, recognising that RCAs are closer to local markets. They also did not support the introduction of market-wide bans where the RCA does not deem it necessary or appropriate. A respondent also indicated that a move towards consolidations via ESMA would create a risk of duplication as RCAs should retain SSR powers.
157. A few respondents opposed the proposal for alignment of conditions as they see it incompatible with the mentioned principle of subsidiarity for ESMA powers. In that sense, the feedback received indicated that it is crucial to recognize that RCAs play a key role in the direct supervision, as they have the expertise required to fulfil supervisory functions and they should keep some discretionary power, while ESMA can support supervisory convergence across RCAs. Along the same line, another comment highlighted that ESMA's role should be focussed on improving consistency and convergence rather than taking up a first line role by expanding its current powers.
158. However, ESMA notes that the proposal does not conflict with the principle of subsidiarity for ESMA powers, nor calls for expanding ESMA's powers. In that sense it should be noted that one of the conditions for ESMA to activate its powers is that no competent authority has taken adequate measures.
159. On the second point, i.e. the proposal to amend Article 24 of the Delegated Regulation 918/2012, the majority of respondents were in favour. They mentioned that:
- the pandemic has been an unprecedented circumstance which shows the need for institutions to act in anticipation of critical situations. The regulatory framework needs to contemplate new scenarios and modify the current instruments of action and supervision;
 - other adverse events may have effects similar to a pandemic or widespread epidemic (for instance a widespread industrial accident). Therefore, the definition

of “adverse events” should not be limited to a predefined number of events. Instead, a wording is proposed: “any relevant damage to the physical structures of important financial issuers, market infrastructures, clearing and settlement systems, and supervisors which may adversely affect markets in particular where such damage results from a natural disaster, terrorist attack, pandemic or widespread epidemic, or any event that has similar effect”;

- the inclusion of new typologies of adverse events should be sufficiently narrowed down so that it does not affect the orderly functioning of markets.

160. Three respondents opposed proposal to amend Article 24 of the Delegated Regulation 918/2012. In their view, ESMA and RCAs should focus more narrowly on the financial markets rather than on global catastrophes.

161. Lastly, a respondent added the need to recognise that RCAs have a direct connection to national markets and, therefore, may have a better understanding of the challenges the particular market is facing and for that reason they should have the ability to challenge other RCA’s bans if needed.

162. The SMSG also supported the proposal to align the conditions to adopt measures under Article 20 and Article 28 of the SSR and to amend Article 24 of Regulation 918/2012.

3.6.4 ESMA’s assessment and final approach

163. Having seen the support from the majority of the respondents, ESMA would therefore suggest aligning the conditions for activating ESMA’s intervention powers (Article 28 of SSR) with those for RCAs to adopt national measures (Article 18 to 21 of SSR).

164. In practice, this would involve amending Article 28 of SSR by stating that the relevant ESMA’s powers could be activated:

- a. In presence of adverse events or developments representing a **serious threat to financial stability or market confidence**;
- b. Where the measure is **necessary** to address the threat and **does not have a detrimental effect on the efficiency** of financial markets which is disproportionate to its benefits.

165. ESMA’s powers should remain subject to additional conditions connected with their specificities in the European supervisory landscape, i.e. they could be activated where:

- a. there are cross-border implications;
- b. no competent authority has taken adequate measures;
- c. the measure does not create a risk of regulatory arbitrage.

166. ESMA maintains the view that its measures under Article 28 of SSR should continue prevailing over any previous measure taken by an RCA.
167. At the same time, the majority of the respondents also supported ESMA's proposal regarding the criteria and factors to be taken into account in determining when adverse events or developments and threats arise, (detailed in Article 24 in Regulation 918/2012).
168. Therefore, ESMA is proposing that the conditions set forth in Article 24(3) of Delegated Regulation 918/2012 in relation to ESMA's powers under Article 28 of SSR should be deleted and instead the list of events contained in Article 24(1) of Delegated Regulation 918/2012 (currently relating to RCAs' powers) should apply also to ESMA's powers under Article 28 of SSR.
169. As a result, there would be a single list of adverse events and developments that would apply to both ESMA's and RCA's powers. Additionally, capitalising on the previous years' experience in the application of the SSR and considering the feedback received from the consultation, ESMA would like to propose that such list should be amended to include additional types of adverse events or developments in relation to:
- a. **issuers other than those operating market infrastructures, clearing settlement systems and financial institutions** that, either because of their size, systemic importance, interconnections or business specificities, may also raise supervisory concerns in case of a sharp decline in price or accumulation of NSPs in their financial instruments;
 - b. new typologies of adverse events such as pandemic or widespread epidemic, geopolitical crisis, war, or **any other event that has similar effect**, that either for their direct implications or as a result of the measures adopted by the governments to contain them may involve unusual volatility and downward spirals in financial instruments.

3.7 Short-term bans: procedure for issuing short term bans and ESMA mediation powers

3.7.1 Legal Framework

170. In 2017 ESMA advised the EC to review the procedure for the issuance of short-term bans, proposing, among other amendments, that only the RCA of the most relevant market in terms of liquidity for an instrument should be empowered to adopt a short-term ban which would be applicable to all Member States. Currently, ESMA believes that is necessary to revise such procedure, especially taking into account the newly introduced duty for ESMA to undertake a mediation process to settle potential disagreements among RCAs. In fact, the recent amendments to ESMA's mediation procedure appear to make it not suitable in emergency circumstances.

171. Article 23 of SSR attributes powers to RCAs to temporarily restrict short selling of financial instruments in case of a significant fall in price, as detailed in Article 23(5) of SSR. Such powers are limited to cases in which the price of a financial instrument on a trading venue has fallen significantly during a single trading day compared to the closing price on the same venue on the previous trading day. The measures under Article 23 of SSR can be applied for one trading day after the significant fall in price has materialised and can be extended for a maximum of two additional trading days, where relevant conditions apply.
172. Where an RCA intends to adopt a short selling ban under Article 23 of SSR, it should inform ESMA within two hours of the end of the trading day. ESMA, in turn, should inform the other RCAs supervising the venues that trade the same financial instrument. Where those RCAs disagree with the RCA's decision to restrict or prohibit short sales of the relevant instrument, ESMA should exercise mediation powers.
173. ESMA's mediation powers are detailed in Article 23(4) of SSR and prescribe that ESMA should attempt a conciliation among the relevant authorities before midnight of the same trading day. Where it is not possible to reach an agreement within the conciliation phase, ESMA may take a decision, as per Article 19(3) of the ESMA Regulation, before the opening of the next trading day.

3.7.2 Proposals in the CP

174. In 2017 ESMA issued Technical Advice to the EC on proposed improvements to the SSR. On that occasion ESMA undertook an in-depth analysis of the procedure for imposing short-term restrictions under Article 23 of the SSR. Such analysis encompassed (i) an evaluation of cases in which short term bans had been adopted, (ii) evidence on the crossing of the thresholds which identify a significant drop in price and (iii) the effects of short-term bans on prices, volatility and liquidity.
175. Considering the results of such analysis and the feedback received from market participants, ESMA suggested amending Article 23 of the SSR so that only the RCA of the most relevant market in terms of liquidity for the instrument should be empowered to adopt a short-term ban that would be effective in all Member States, with an extended scope to cover not only short selling but also NSPs. According to the proposal, the other RCAs would not have any power to oppose the short-term measure.
176. The revised procedure proposed by ESMA envisaged that the RCA of the most relevant market in terms of liquidity informs ESMA and all other RCAs of its intention to adopt a short-term ban. The RCA adopting the short-term ban should then liaise with ESMA to ensure coordinated publication of the information concerning the short-term ban on the adopting RCA's and ESMA's website. The ban would be effective in all Member States upon publication on the website of the adopting RCA.
177. In the CP, ESMA reiterated its 2017 Technical Advice, recommending, among other things, to amend the procedure to issue short term bans. However, ESMA noted that in

January 2021 ESMA's mediation procedure has been amended³⁵ to take into account the changes introduced by Regulation (EU) 2019/2175. Therefore, ESMA recommended in the CP that, should the 2017 advice not translate into an amendment of Article 23 SSR, an amendment of the mediation procedure would prove necessary.

178. The new binding mediation procedure includes some changes, among which the appointment by ESMA Chair of an ad-hoc mediation panel, through a call for participation, in case the conciliation phase does not succeed. ESMA explained in the CP that such additional step adds complexity, clearly requiring a longer timeframe to be implemented and making it even more challenging to apply the new mediation procedure to the emergency situation envisaged in Article 23 of the SSR. The limited number of hours within which mediation should take place under Article 23 of SSR is incompatible with the mediation procedure envisaged in the ESMA Regulation.
179. Overall, ESMA recommended that the SSR should be amended following the recommendations put forward in the 2017 Technical Advice.
180. Alternatively, ESMA proposed in the CP that, should the EC not take on board ESMA's 2017 advice, a revision of the mediation procedure as described in current Article 23 of SSR should take place, to make it compatible with ESMA's new general mediation procedures.

3.7.3 Feedback to the consultation

181. The majority of respondents supported, or did not overall oppose, the proposed amendments, not only in relation to the mediation procedure, but also in reference to what was proposed in the 2017 Advice. Nevertheless, some respondents did highlight that it would be important to still grant RCAs the possibility to challenge the ban issued by the RCA of the most relevant market in terms of liquidity, as other RCAs might have more specific knowledge of their market conditions.
182. One of the respondents noted that if a single RCA was to adopt a ban which is effective in all Members States, it would be advisable to publish such decision throughout the Union in an easily accessible way, ideally authorizing ESMA to make such information available to the market in a centralised and harmonised manner.
183. Among the respondents who did not support the proposal, several points were raised. Some respondents highlighted that the mediation procedure is important to reconcile possible diverging views and diverse approaches among Member States and can prove to be a useful tool to foster coordinated action at the EU level. In this respect respondents suggested that ESMA should amend its mediation procedure as to have the possibility to apply it in such instance. Additionally, some respondents noted that an RCA might have a better understanding of the specifics of its own market, hence should be enabled to

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https://www.esma.europa.eu/sites/default/files/library/2015/11/esma41-140-139_decision_rules_of_procedure_on_mediation.pdf

challenge the bans issued by another RCA if needed. This specific reasoning was reinforced for derivative instruments, where the most liquid market for the derivative instrument does not always correspond to the most liquid market for the underlying.

184. Additionally, some respondents expressed concerns with the proposal put forward in the 2017 Advice to change the scope of short-term bans from a ban on short selling on a trading venue into a ban on entering into or increasing NSPs.
185. In particular, some respondents stated that, while supporting the 2017 Advice proposals with respect to the possibility for the RCA of the most relevant market in terms of liquidity to adopt a ban which would be applicable in all jurisdictions, they had some concerns with the proposal to change its scope from a ban on short selling on a trading venue to a ban on entering into or increasing NSPs. One respondent noted that such change would have profound practical implications for those market participants using specific entities for hedging the exposures of other entities within the same group. In the view of the respondent, as short positions are often hedged at the group level, rather than at the level of the individual legal entity, the proposed change would limit hedging strategies at group level, increase the complexity of calculations and result in additional investments in IT systems.

3.7.4 ESMA's assessment and final approach

186. ESMA acknowledges the point raised by market participants with respect to the fact that there might be instances where a ban issued by the RCA of the most relevant market in terms of liquidity might affect derivatives traded in other jurisdictions, and that the RCA of the latter jurisdiction might have more specific knowledge of its market conditions. Nevertheless, ESMA believes that the benefits which would derive from the suggested simplification (in terms of uniform and swift implementation of such bans) would outweigh the potential shortcomings.
187. ESMA also acknowledges the concerns raised by stakeholders on changing the scope of short-term bans from a ban on short selling on a trading venue into a ban on entering into or increasing NSPs. In this respect ESMA believes there is merit in aligning the scope of long-term and short-term bans, as it would render the short-term-bans a more effective tool which would be less easily circumvented, e.g. through derivative trading.
188. With particular reference to the practical implications for those market participants using specific entities for hedging the exposures of other entities within the same group, ESMA would like to recall that RCAs may currently decide to exempt such practices where they deem it adequate.
189. Overall, also in light of the feedback received to the CP, ESMA reiterates what was proposed in the 2017 Technical Advice and recommends:
- a. the review the current procedure under Article 23 of the SSR, to provide that only the RCA of the most relevant market in terms of liquidity for the instrument can adopt a short-term ban that is effective in all Member States;

- b. a proposed procedure for the issuance of the ban which envisages that the RCA should inform ESMA and all other RCAs of its intention to adopt a short-term ban. The RCA adopting the short-term ban should then liaise with ESMA to ensure coordinated publication of the information concerning the short-term ban on the adopting RCA's and ESMA's website;
- c. 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;
- d. the proposal to change the scope of the short-term ban from a ban on short selling on a trading venue into a ban on entering into or increasing NSPs. Additionally, the scope of short-term bans would be limited to shares and sovereign debt instruments.

190. With respect to the proposed amendment to the mediation procedure if the EC were not to follow the 2017 Technical Advice, ESMA reiterates the need of amending Article 23 SSR. ESMA considers that such amendment is necessary due to the impossibility of implementing the mediation procedure as envisaged in the ESMA Regulation within the limited number of hours contemplated in Article 23 of SSR.

4 Review of SSR regarding the requirements for the calculation of NSPs, the 'locate' rule and the list of exempted shares

4.1 Calculation of NSPs in shares: subscription rights

4.1.1 Legal framework

191. Currently, in the calculation of NSPs in shares, investors have to include long and short positions in all classes of shares issued by the listed company (e.g. common stock, preferred, saving, etc.) including positions held through any instruments listed in Annex I, Part 1, of Delegated Regulation No. 826/2012 (e.g. derivatives, depositary receipts, etc.).

192. However, instruments that relate to unissued share capital, like subscription rights, are not included in the above-mentioned list by virtue of the fact that they give a claim to shares that are not yet issued while Article 3 of the SSR mentions instruments referring to the "issued share capital" for the purposes of the calculation of NSPs.

193. Hence, they are not considered to be within the scope of Article 3(2)(b) of the SSR³⁶.

4.1.2 Proposal in the CP

194. ESMA had previously considered whether an amendment to the SSR would be appropriate so as to include subscription rights in the calculations of NSPs in shares.

195. Firstly, in its 2013 Technical Advice, in paragraph 40, ESMA highlighted that, *if an investor has a flat net position composed of a long position in a subscription right and a short position in the related shares, he could nevertheless have to report the short leg of its position to CAs and to the market, when the reporting levels are reached. This could be considered as potentially misleading for both the market and the issuers*³⁷. At that point, it had already been brought to ESMA's attention, that this could lead to the notification and publication of a "technical" NSP (i.e. a virtual NSP, as the short leg of the position is offset by a long position in subscription rights), which would not represent genuine positions.

196. After consideration of the arguments made by market participants for that matter, ESMA concluded that long positions in subscription rights and convertible bonds should remain excluded from the calculations. However, ESMA recommended to amend Delegated Regulation No. 826/2012 so that investors have a possibility to flag such positions in their notifications and disclosures of NSPs. Specifically, ESMA's view was that *"without challenging the method of calculation, this technical amendment to the reporting and disclosure forms would allow for commonly used shorting strategies to be visible to competent authorities or the market; this is of particular importance when companies are raising capital and thus more likely to be subject to short selling"*.

197. ESMA reconsidered the matter for the purposes of its 2017 Technical Advice and reiterated the same point and conclusion in its Final Report³⁸.

198. Since then, ESMA has continuously been made aware of the fact that this remains an issue for certain market participants. This point has also been accompanied by the argument that, from an economic standpoint, subscription rights could be deemed equivalent to call options, which are currently included in the calculation of NSPs³⁹.

199. Therefore, in the CP ESMA considered it useful to reassess its approach vis-à-vis subscription rights to consider the possibility to amend the SSR to allow for their inclusion in the calculation of the NSP: this could be achieved by a change in Article 3(4) of SSR together with an amendment to Article 7(b) of Delegated Regulation 918/2012.

³⁶ See also Article 7(1)(b) of [CDR 918/2012](#) as well as Q&A 6.3, p.21 of [ESMA SSR Q&A](#).

³⁷ https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-614_final_report_on_ssr_evaluation.pdf

³⁸ See ESMA70-145-386 Technical Advice on the evaluation of certain elements of the Short Selling Regulation, para. 293

³⁹ Options, as referred to in Article 5(2) and Annex I, Part 1 of Delegated Regulation 918/2012

4.1.3 Feedback to the consultation

200. ESMA's proposal for the inclusion of subscriptions rights in the calculation of NSPs in shares was welcomed by a number of respondents and the SMSG.

201. The main arguments in favour of its inclusion focused on:

- the economic similarities to call options, that are included in the calculation of the NSP;
- that it would likely foster the trading in subscription rights, e.g. with respect to arbitrage between subscription rights and the referring shares which could contribute to more efficient markets by increasing price quality.

202. Several respondents indicated that the same approach should apply to subscription rights and convertible bonds. However, notwithstanding the similarities between subscription rights and convertible bonds, ESMA also acknowledges the difference in terms of higher incertitude associated with convertible bonds compared to subscription rights, due to the longer time horizon for the first to translate into new shares actually being issued.

203. Respondents to the CP highlighted that if an amendment was introduced to include subscription rights and convertible bonds in the calculation of NSPs in shares, those should be also included in the calculation of the denominator (in addition to the currently issued share capital). This would prevent a situation where the size of the NSPs is artificially increased.

204. Some respondents opposed the inclusion of subscription rights in the calculation of NSPs in shares, considering:

- those rights are an expectation, they do not correspond to shares actually issued;
- the objective ESMA tries to achieve, increasing instruments disclosure, could be better tackled via transaction reporting instead of through a change in the calculation methodology;
- such inclusion would expand the scope of the SSR.

4.1.4 ESMA's assessment and final approach

205. ESMA acknowledges there are split views regarding the inclusion of subscriptions rights in the calculation of NSPs in shares and the economic similarities between subscription rights and convertible bonds.

206. On the one hand, NSPs should represent genuine bearish positions and one could argue that short positions that are fully backed by long positions in subscription rights and convertible bonds are not. In addition, it is not rare that NSPs above 0.5% are in fact covered by long positions in subscription rights or convertible bonds and, under the current

transparency regime, those publicly disclosed NSPs could have a misleading signalling effect on certain issuers.

207. On the other hand, ESMA is also aware of the risk of increasing uncertainty in the methodology to calculate NSPs in shares by including those instruments. Indeed, subscription rights (and also convertible bonds) are an expectation and they do not correspond to shares actually issued. This uncertainty would be even greater in the case of including convertible bonds, due to the longer time horizon to convert those bonds into potentially issued shares.
208. Further, their inclusion in the calculation would bring increased complexity, costs and potentially a higher percentage of potentially incorrect short selling notifications whenever a change in the capital increase process occurs.
209. Moreover, in the calculation of an NSP where the inclusion of a long position in subscription rights or convertible bonds is not much relevant, it is not clear to which extent their inclusion would provide valuable information, while other elements such as the volatility or price sensitivity could be more relevant.
210. Additionally, when hedging, there could also be cases where there is no perfect hedge, and the numerator for the calculation of the NSP is not zero. This would require including to-be-issued-shares in the denominator. Subsequently, any change in this direction would require well-calibrated amendments to SSR and the Delegated Regulation 918/2012, taking both the numerator and denominator into account.
211. Considering the mixed feedback from the CP and the issues connected with the inclusion of subscription rights and convertible bonds in the calculation of NSPs in shares, ESMA would not recommend amending Article 3(4) of the SSR and Article 7(b) of Delegated Regulation 918/2012.

4.2 Rules against uncovered short sales in shares

212. One of the key requirements of the SSR is that all short sales of shares must be covered, i.e. naked short selling in shares is banned. The SSR requires short sellers to enter into different types of arrangements before entering into a short sale transaction, to ensure that they have the securities they wish to short sell available at settlement time.
213. However, this rule presents certain potential weaknesses, in particular:
- a. One of the risks that may arise in the context of short selling is that the third party in charge of locating the shares may not provide the shares when requested, given the low level of commitment expected from third parties under Article 12(1)(c) of SSR. ESMA also considered that the current rule is too complex.

- b. There is no explicit record-keeping obligation in Level 1 in relation to locate arrangements, which also makes supervision more complex in this respect.
- c. The SSR does not provide for specific and harmonised sanctions to be imposed in case of a breach of Article 12 of SSR. That has led to diverse sanctioning regimes across the different Member States, which might not be sufficiently discouraging in certain jurisdictions.

214. Further to the analysis developed in the CP, ESMA suggested a number of potential amendments aiming at reinforcing the EU rule against 'naked' short selling: (1) reinforcing the commitment of third parties providing certain locate arrangements, (2) imposing a record-keeping requirement for locate arrangements at Level 1 and (3) improving the sanctions regime applicable to infringements of the locate rule.

4.2.1 Weakness of the third party's commitment under Article 12(1)(c) SSR

4.2.1.1 Legal Framework

215. Recital 18 of SSR states that in order to reduce the potential risk of settlement failure and volatility, it is appropriate to place proportionate restrictions on uncovered short selling of such instruments.

216. To that end, Article 12(1) of the Regulation requires that a natural or legal person may only enter into a short sale of a share admitted to trading on a trading venue where one of the following conditions is fulfilled:

- a. the natural or legal person has borrowed the share; or has made alternative provisions resulting in a similar legal effect;
- b. the natural or legal person has entered into an agreement to borrow the share or has another absolutely enforceable claim under contract or property law to be transferred ownership of a corresponding number of securities of the same class so that settlement can be effected when it is due;
- c. the natural or legal person has an arrangement with a third party under which that third party has confirmed that the share has been located and has taken measures vis-à-vis third parties necessary for the natural or legal person to have 'reasonable expectation' that settlement can be effected when it is due.

217. The condition in point (c) above has been specified in Article 6 of Implementing Regulation 827/2012 and through dedicated ESMA Q&As. This article identifies three categories of locate arrangements, which must be properly evidenced before a short sale of shares can be undertaken:

- a. Standard locate arrangements and measures;
- b. Standard same day locate arrangements and measures;

- c. Easy to borrow or purchase arrangements (only for shares meeting certain liquidity requirements⁴⁰).

4.2.1.2 Proposal in the CP

218. ESMA proposed revising the language used in Article 12(1)(c) of SSR to simplify it (by means of permitting a single type of locate arrangements) and to ensure that the locate arrangements adequately address the risk of non-delivery at the settlement date.

219. ESMA also suggested making clear in Article 6 of Implementing Regulation (EU) 827/2012 that the confirmations provided by the third party should contain a real commitment to make the shares available for settlement in due time.

4.2.1.3 Feedback to the consultation

220. Most of the responses received were against any change to the existing locate requirements aiming at reinforcing the third party's commitment, whilst some responses supported their revision, but very few respondents addressed the alternative provided in the CP (to keep the three types of locate arrangements or to simplify the regime).

221. The main arguments raised against the revision of the locate arrangements were:

- a. it would amount to restricting short-selling. For these respondents such measures would have a damaging impact on the liquidity of the market as a whole, because short selling is essential for other types of market activities, including market making or hedging long positions.
- b. respondents do not see enough evidence supporting the need for such reinforcement of the locate requirements. These respondents also referred to the SEC report⁴¹ on the meme stock events that did not recommend any revision of their own locate rules.
- c. Some respondents also considered that the risk of non-delivery of the relevant shares on the settlement date will soon be adequately addressed by the settlement discipline measures imposed under CSDR.

222. Some of the supportive answers also introduced nuances, noting that despite it being desirable that locate agreements do not just provide anecdotal evidence, their regulation should be proportionate.

⁴⁰ See as well Q&A 10.13 in [ESMA Q&As on the SSR](#).

⁴¹ Staff Report on Equity and Options Market Structure Conditions in Early 2021 (October 14, 2021). <https://www.sec.gov/files/staff-report-equity-options-market-structure-conditions-early-2021.pdf>

223. The SMSG would also support a reinforcement of the third-party's commitments, being however mindful that this should not subject lenders and borrowers of shares in non-NSP situations to additional administrative burden as this could hamper liquidity.

4.2.1.4 ESMA's assessment and final approach

224. ESMA acknowledges the responses received regarding the improvements expected from the implementation of the CSDR settlement discipline regime and will closely monitor its impact on settlement efficiency.

225. However, ESMA also understands that there can be instances where inadequate locate confirmations may put at risk the settlement of short sales with potential knock-on effects for other market participants.

226. In line with that, while ESMA does not recommend amending Article 12(1)(c) of SSR, it concludes that there is value in revisiting Article 6 of Implementing Regulation (EU) 827/2012 and enhancing the supervisory convergence across EEA authorities in relation to the implementation of the locate rule.

227. At this stage, ESMA considers that follow-up work on Article 6 of Implementing Regulation (EU) 827/2012 should at least address the concepts of 'reasonable expectation' and 'easy-to-borrow or purchase list' and reinforce dialogue amongst NCAs to foster supervisory convergence in this area.

228. Finally, ESMA is assessing the opportunity to further consider possible uses of SSR data, CSDR data on settlement fails and SFTR data on securities lending to improve the overall monitoring of short selling.

4.2.2 Absence of a Level 1 record-keeping obligation in relation to 'locate' arrangements

4.2.2.1 Legal Framework

229. Although Article 6(5) of Implementing Regulation 827/2012 provides that "*the arrangements, confirmations and instructions referred to in paragraphs 2, 3 and 4 shall be provided in a durable medium by the third party to the natural or legal person as evidence of the existence of the arrangements, confirmations and instructions*", ESMA notes that, as opposed to the obligation to keep records of gross positions which establish a significant NSP for five years⁴², there is no equivalent obligation in relation to the arrangements set out in Article 12 of SSR⁴³.

⁴² Article 9(1) second paragraph SSR.

⁴³ Although ESMA published a Q&A recommending a five-year period to retain the evidence of the agreement (see [Q&A 10.4](#))

230. Additionally, ESMA has carried out an internal fact-finding exercise that demonstrates that RCAs usually carry out supervision of Article 12 of SSR and Article 6 of Implementing Regulation 827/2012 on an 'ex post' case-by-case basis, mostly in case of settlement fails. That circumstance renders it critical to have records of the short selling activity and more specifically of compliance with Article 12 of SSR.

4.2.2.2 Proposal in the CP

231. ESMA understands that the lack of an explicit requirement in Level 1 to record and store all the documentation regarding the requirements set out in Article 12 of SSR may seriously undermine the capacity of RCAs to monitor their effective fulfilment with the subsequent risk for the integrity and orderliness of the market. Those records become even more relevant in a situation where most RCAs monitor breaches of Article 12 of SSR on an ex-post basis, mostly where a settlement failure has taken place.

232. The current lack of an explicit requirement in Level 1 indicates a severe divergence between the relevance of Article 12 of SSR and the RCAs powers to monitor and enforce its requirements.

233. As a consequence, ESMA's view is that Article 12 of SSR should include the obligation for natural and legal persons entering a short sale to keep the records of their arrangements for five years.

4.2.2.3 Feedback to the consultation

234. The majority of respondents agreed with ESMA's proposal to introduce a record keeping obligation for locate arrangements. In addition, respondents within this group expressed the following considerations:

- registers should collect agreements with third parties for the hedging of positions, and this requirement should also be extended to third party guarantors. In this way, the RCA and ESMA would have this information available for formal and material inspection, so that their analysis could detect procedures that may pose a risk to market stability and establish appropriate corrective measures;
- regarding the length, some respondents indicated five years as being a regulatory standard and therefore appropriate;
- regarding the data format, six respondents indicated that the obligation should not require to store data/documents in a format which is inconsistent with other record-keeping obligations;
- ESMA should also consider potential overlapping requirements, for instance with MIFID II obligations;

- record-keeping requirements may demonstrate that the current locate rules do operate effectively and would therefore suggest record-keeping as a necessary first step to gather empirical data, with which ESMA can then properly carry out an analysis of the efficacy of the existing locate arrangements.

235. A few respondents opposed the introduction of a record keeping obligation, raising that:

- the obligation as proposed would be extremely burdensome and would make it more costly for market actors regularly engaging in short sales;
- regarding the length, a shorter period for the record-keeping obligation, even of a few months, might be sufficient to reach supervisory objectives;
- instead, a respondent suggested to require firms to document significant breaches of obligations under a locate arrangement, potentially connected to the locate agent's neglect or inappropriate business practices, and that firms would be required to change their locate agent in the case of repeated unreliability.

236. The MSG is also in favour of introducing such recording requirement, "where relevant and necessary".

4.2.2.4 ESMA's assessment and final approach

237. The proposal to introduce a five-year record-keeping obligation received large support among respondents as it is considered an initiative that is consistent with other regulatory frameworks and that would allow to gather data and better assess how the current framework works. ESMA therefore recommends introducing such a requirement in the SSR. This would allow to ensure that RCAs can properly fulfil their supervisory and investigatory responsibilities and collect reliable evidence for the enforcement of the locate rule.

238. Regarding the implementation of such requirement, ESMA stands ready to assist the EC and suggests undertaking an analysis so that, on the one hand, the relevant changes avoid overlapping with requirements within other regulatory frameworks, and on the other hand, the format prescribed for the records follows current standards with which market participants are already familiar.

4.2.3 Lack of harmonised sanctions for ‘naked’ short selling

4.2.3.1 Legal framework

239. As regards ‘naked’ short selling, the SSR only determines that Member States shall establish their own rules on penalties and administrative measures applicable to SSR infringements. The list of links to these measures is available on the ESMA website⁴⁴.

240. However, a majority of Member States does not establish a specific sanction for the infringement of Article 12(1) of the SSR, but instead have just a generic reference to infringements of the SSR. That has led to diverse sanctioning regimes across the different Member States, which might not be sufficiently discouraging in certain jurisdictions.

4.2.3.2 Proposal in the CP

241. ESMA considers it necessary to ensure that the sanctions for breaches of Article 12 of SSR have a sufficient deterrent effect across the EU.

242. ESMA recognises that Article 41 of SSR entitles ESMA to issue guidelines to ensure a consistent approach concerning the penalties and administrative measures to be established by Member States. However, ESMA also notes that sanctions are set by law in most EEA countries, not by the RCAs themselves.

243. Therefore, ESMA considers 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 SSR are more aligned and effective across the EU.

244. To that end, ESMA suggested in the CP that the sanction regime applying to breaches of the locate rule could be revised 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 SSR.

245. ESMA also suggested that RCAs should retain the capacity to impose any other administrative sanctions or administrative measures in the event of infringements of Article 12(1) of SSR, and that the SSR should provide for the disgorgement of any identified profit, including interests, to ensure an appropriate deterrent effect.

4.2.3.3 Feedback to the consultation

246. Referring to the ‘extreme variability of pecuniary sanctions’ coupled with the absence of precise criteria or guideline explaining how the amount of the sanction is actually computed, most respondents were in favour a greater harmonisation of the sanctions applicable to breaches of the ‘locate’ rule, as it would bring more clarity and predictability.

⁴⁴ See Article 41 of SSR and the [list of administrative measures and sanctions applicable in Member States to infringements of the SSR](#) published by ESMA.

It was highlighted by several respondents that this could be achieved through greater supervisory convergence at the level of ESMA.

247. Most respondents strongly advocated for sanctions to be determined by each RCA for their jurisdiction, to ensure individualisation and on a case-by-case, proportionate basis.
248. It was also suggested to consider sanctions other than fines, depending on the conduct and the degree of severity of damage caused (e.g. administrative sanctions such as temporary prohibitions to operate on certain markets).
249. On the level of the potential pecuniary sanctions, most respondents were not in favour of fixing a “minimum maximum” as proposed but rather a cap on the maximum sanction that an RCA could impose. Most were also in favour of harmonising at EU level the criteria (profit, intention, harm to third parties, etc.) for RCAs to set the level of the fines.
250. Finally, it was also mentioned that CSDR settlement discipline measures were possibly a better tool to address breaches of the locate rule as they ultimately result in settlement fails.

4.2.3.4 ESMA’s assessment and final approach

251. ESMA acknowledges the responses received on the improvements expected from the implementation of the CSDR settlement discipline regime in terms of settlement efficiency and will ensure that the impact of its implementation on settlement efficiency will be closely monitored and assessed. However, this regime is not specific to breaches of the ‘locate rule’ and in that sense can only be complementary to specific sanctions.
252. ESMA agrees that sanctions should not be automatic but decided on a case-by-case basis by each RCA. ESMA however does not consider it appropriate to establish a cap on the pecuniary administrative sanctions as this would not in all cases ensure a deterrent effect.
253. ESMA is of the view that this deterrent effect would be better achieved through the establishment in Article 41 of SSR of a ‘minimum-maximum’ administrative pecuniary sanction in line with the current text of Article 30(2)(i) and (j) of MAR.

4.3 List of exempted shares

4.3.1 Legal Framework

254. Recital (25) of SSR explains that “*for reasons of efficiency, it is appropriate to exempt securities from certain notifications and disclosure requirements, where the principal venue for trading of that instrument is located in a third country*”.

255. Article 16 of SSR exempts shares admitted to trading on a trading venue within the EU where the principal venue for the trading of shares is located in a third country from the obligation to notify RCAs of significant NSPs in shares (Article 5), the obligation to publicly disclose significant NSPs in shares (Article 6) and the restrictions on uncovered short sales in shares (Article 12).
256. In this regard, Article 2(1)(m) of SSR defines the principal venue in relation to a share as the venue for the trading of that share with the highest turnover.
257. Delegated Regulation 826/2012 specifies the method to calculate turnover to determine the principal venue for the trading of a share. According to Article 6 of that Regulation, RCAs must use the best available information⁴⁵.
258. The identification of the shares having the principal trading venue in a third country is made by the RCAs at least every two years (Article 16(2) of SSR) unless specific circumstances arise (such as the removal from trading of the share from the EU trading venue)⁴⁶. The list of exempted shares is published by ESMA⁴⁷.
259. Article 16 of SSR has to be read in conjunction with Article 38(1) of SSR that foresees that RCAs shall, where possible, conclude cooperation arrangements with supervisory authorities of third countries that should specifically address the exchange of information to ensure that RCAs can efficiently carry out their duties under SSR.
260. RCAs make use on an ongoing basis of these type of arrangements⁴⁸ that in many cases operate on the basis of 'ad hoc' requests between the relevant authorities.
261. As a consequence, SSR aims at limiting the duplication of obligations connected to short selling activities on shares admitted to trading on an EU trading venue but more heavily traded on a third-country venue: these shares are not subject to the SSR obligations as regards the notification and publication of NSPs and the restrictions on uncovered short sales⁴⁹ while potentially subject to correspondent obligations in relation to short selling in the third country jurisdiction. At the same time, these shares could still be subject to the SSR legal requirements under Article 18 and the other emergency measures foreseen in Chapter V of SSR.

⁴⁵ This may include:

- (a) publicly available information;
- (b) transaction data obtained under Article 25(3) of Directive 2004/39/EC of the European Parliament and of the Council;
- (c) information from trading venues where the relevant share is traded;
- (d) information provided by another competent authority, including a competent authority of a third country;
- (e) information provided by the issuer of the relevant share;
- (f) information from other third parties, including data providers

⁴⁶ Article 12 Implementing Regulation (EU) 827/2012

⁴⁷ https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_mifid_shsexs

⁴⁸ See <https://www.fca.org.uk/publication/mou/mmou-eu-fca.pdf> and <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf>

⁴⁹ Articles 5,6, 12 and 15 SSR.

4.3.2 Proposal in the CP

262. ESMA's preliminary view was that the current Article 16 of SSR still permits an adequate monitoring of the relevant shares in most cases.
263. At the same time, ESMA agreed that if the trading volumes of a share within the EU are significant enough, the short selling activity on those shares could still impact the rest of the market in the form of potential systemic risks, abusive behaviour or creation of disorderly trading conditions for the EU markets where they are traded.
264. As a consequence, ESMA requested the views of market participants on whether RCAs should have the capacity to maintain within the scope of the SSR obligations those shares for which a significant percentage of trading takes place within the EU. ESMA's preliminary view was that "a significant percentage of trading" could imply that the share in question has no less than 40% of its turnover traded in the EU.
265. ESMA also asked market participants whether NCAs should also take any other parameters into account (e.g. where the company is based, whether it is a systemically important credit institution, etc).

4.3.3 Feedback to the consultation

266. Most of the respondents to the question on whether shares with only 40% of their turnover traded in an EU trading venue should remain subject to the full set of SSR obligations rejected lowering the threshold.
267. The arguments tabled against such reduction were the lack of analysis of the impact that such measure would entail, the unforeseeable impact on other regulatory requirements (and in particular, CSDR), the increasing administrative burden for EU and third-country market makers that might lead to a decrease of the liquidity of the additional shares affected by the measure and finally, the uncertainties surrounding the transition to the new regime. The ESMA MSG also requested more data before assessing the lower threshold.
268. The vast majority of responses, including the MSG, rejected that RCAs should take any other qualitative but specific parameter into account in the identification of the shares subject to the full set of SSR obligations.

4.3.4 ESMA's assessment and final approach

269. On balance, ESMA does not see a sufficient need for amending Article 16 of SSR at this point in time.

270. Moreover, the list of exempted shares has been recently revised by both the UK FCA and ESMA at ESMA's initiative to minimise the cases of potential double-reporting⁵⁰.
271. Therefore, ESMA is not proposing a revision of the current regime for exempted shares under Article 16 of SSR.

5 Transparency of net short positions

5.1 Article 6(2) SSR Publication Threshold

5.1.1 Legal framework

272. Article 6 SSR establishes the obligation for natural or legal persons to publicly disclose NSPs above 0.5% of the issued share capital of the company concerned and each 0.1% above that. A final disclosure is required once the position has fallen below 0.5%. As clarified in recital (7) SSR, the obligation is designed to provide useful information to other market participants about significant individual NSPs in shares.
273. Article 9(4) SSR specifies that the disclosure should take place in a manner that ensures fast access to information on a non-discriminatory basis. The information on NSPs in shares shall be disclosed to the public on a central website operated or supervised by the RCA, as specified in Article 2 of Implementing Regulation 827/2012⁵¹.
274. Article 6(3) SSR foresees that ESMA may issue an opinion to the EC on adjusting the thresholds for which no prior consultation is foreseen. However, given the impact that the disclosure regime has on the behaviour of market participants, further described below, ESMA considered it appropriate to consult on this element.

5.1.2 Proposal in the CP

275. ESMA revisited the advantages and disadvantages of the current public reporting threshold, including the evidence gathered back in its prior technical advice delivered in 2017⁵². ESMA also noted that the disclosed NSPs remained relatively stable both in terms of number of shares with NSPs above 0.5% and in terms of the market value of the companies with public NSPs in the course of 2020, even with the COVID-19 outbreak.
276. ESMA also analysed, amongst other parameters, the disclosure of individual NSPs in light of the events that took place in respect to the so-called meme stocks in January

⁵⁰ The last version of ESMA's list of exempted shares is available in https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_mifid_shsexs. 426 additional shares were included in the ESMA list of exempted shares in the course of the last update.

⁵¹ The links to the national websites where NSPs in shares are disclosed is available in https://www.esma.europa.eu/sites/default/files/library/ssr_websites_ss_positions.pdf

⁵² See Annex V [ESMA's Final Report on the Evaluation of certain elements of the SSR](#).

2021⁵³ where, despite a decline in the number of short sellers disclosing NSPs above 0.5%, a significant number of them operated at the end of April 2021.

277. In light of that, ESMA's preliminary view was that the current publication threshold still provides a good compromise between transparency to the market and market efficiency and requested the views of market participants on whether the SSR public disclosure regime should be revised.

5.1.3 Feedback to the consultation

278. Most of the responses received and the SMSG aligned with ESMA's preliminary view of maintaining the public disclosure threshold at 0.5% of the issued share capital. However, some respondents considered it necessary to either raise the threshold or to substitute the threshold by the publication of aggregated net short positions per issuer.

279. Additionally, one association recommended raising the threshold for increments or decrements of the NSP once the 0.5% has been reached or exceeded.

280. It is worth noting that four responses highlighted that a notification of NSPs above the notification threshold (0.1% since the amendment of SSR) but below 0.5% of the issued share capital should not be disclosed and raised a complaint since this does not seem to be the case in certain jurisdictions.

281. The SMSG noted that apart from "naked short selling", too much transparency may increase the risk of speculation leading to the call of stock loans to such an extent that it creates a short squeeze.

5.1.4 ESMA's assessment and final approach

282. The evidence gathered for the consultation and the feedback received from it support ESMA's preliminary view that the current 0.5% threshold provides a sufficient degree of transparency without compromising market efficiency.

283. ESMA also notes that the recommendation to maintain the publication threshold at 0.5% should be read in conjunction with the proposal to carry out the publication of aggregated NSPs per issuer, further elaborated in the next section. Both disclosures should provide an increased and adequate degree of transparency to the market.

⁵³ For reference see: <https://www.ft.com/content/acc1dbfe-80a4-4b63-90dd-05f27f21ceb2>.

5.2 Publication of aggregated net short positions on shares

5.2.1 Legal framework

284. Recital (40) SSR refers to fostering transparency of NSPs with the aim of reducing information asymmetries and ensuring that all market participants are adequately informed about the extent to which short selling is affecting prices.

285. However, the SSR does not foresee the compulsory publication by RCAs of the aggregated NSPs per issuer on a regular basis, based on the public and non-public notifications received.

5.2.2 Proposal in the CP

286. After analysing the U.S. experience and the pros and cons included in its prior technical advice delivered in 2017, ESMA concluded that the current situation is more favourable for setting up the publication of aggregated NSPs per issuer.

287. The recent amendment of Article 5(2) SSR by the EC to lower the notification threshold from 0.2% to 0.1%⁵⁴ should decisively contribute to that since based on ESMA's experience it should increase additional NSPs to the RCAs by up to 40%. ESMA considered that such amendment will not only improve the capacity of RCAs to monitor the risks that short selling might entail but shall also contribute to enhance the transparency regarding NSPs by means of a centralised notification and publication system.

288. Therefore, ESMA consulted on whether the SSR should reflect the publication of aggregated NSPs per issuer in addition to the publication of NSPs above 0.5% of the issued share capital and on which should be the periodicity of that publication.

289. ESMA also requested the views of market participants on whether there is publicly available up to date information on the issued share capital for the calculation of NSPs.

5.2.3 Feedback to the consultation

290. Most of the responses were supportive of the initiative. The SMSG also supported providing this data. It is relevant to remark that two of the supporters considered that the publication of the aggregated NSP should substitute the existing publication about 0.5% of the issued share capital.

291. As regards the periodicity there were diverging views: some responses were in favour of adequate delays that would not penalize short sellers, while others suggested timely publication of the aggregated data. Five respondents were in favour of weekly or bi-weekly publication of the aggregated NSPs. The ESMA SMSG supported publication on a bi-

⁵⁴ The [Commission Delegated Regulation amending Article 5\(2\) SSR](#) was published in the Official Journal on 11 January 2022.

weekly basis during an initial trial period. Finally, one response suggested a monthly publication.

292. In relation to the problems in the identification of the issued share capital to fulfil the SSR notification/publication obligations, the majority of the respondents found problems due to unreliable data (or to the late update of the existing data sources) and suggested a centrally available database that could be provided by ESMA. One of the responses suggested that it should be integrated in the European Single Access Point.

293. On the opposite side, the SMSG and other responses did not detect any major problem in this regard, subject to minor delays that may occur for technical reasons in connection with new share issues, buy-backs etc. The SMSG also noted that stock exchanges normally provide information regarding issued share capital of companies listed on them.

5.2.4 ESMA's assessment and final approach

294. In line with the feedback received, ESMA concludes that the current SSR transparency regime could be complemented by the compulsory publication of aggregated NSPs per issuer integrating all individual positions reaching or exceeding the notification and the publication threshold at least every two weeks.

295. ESMA also considers that the aggregated NSP figure should include the aggregated data from all notifications reported between the previous publication date until a date close to the publication date.

296. ESMA also acknowledges that in case this proposal is adopted, it would still be necessary to further specify a number of working instructions to make it operational, including the publication periodicity.

297. Moreover, and in line with the feedback received back in 2017⁵⁵, ESMA considers that such publication of aggregated NSPs could be made by means of a centralised notification and publication system described in Section 5.3.

298. Finally, ESMA acknowledges that the timely identification of the issued share capital is a matter of concern for market participants and that the fulfilment of the SSR obligations depends on the accuracy of that data.

299. As a consequence, ESMA recommends revising SSR to mandate ESMA to publish the issued share capital of companies that are admitted to trading or traded in the EU and not included in the list of exempted shares.

⁵⁵ Pages 56 to 58.

5.3 Centralised notification and publication system

5.3.1 Legal Framework

300. The current mechanism of notification and disclosure of NSP is based on natural and legal persons notifying the RCAs the details of their NSPs above the relevant notification threshold. In turn, where the NSPs are also above the publication threshold, the RCAs disclose the relevant information to the public through a central website which they operate or supervise at national level. Such mechanism for notification and disclosure of NSPs in shares and sovereign debt and of uncovered positions in sovereign credit default swaps is contained in Articles 5, 7, 8 and, in exceptional circumstances, in Article 18 and 28(1)(a) of SSR.
301. To promote a form of harmonisation of the information to be submitted to each RCA and to be disclosed to the public, ESMA has been mandated to develop technical standards specifying the details of the information that natural and legal persons should submit to the relevant RCA and the means the latter should use to disclose to the public.

5.3.2 Proposal in the CP

302. In the CP, ESMA explained that, in line with the current procedure, RCAs have put in place reporting systems through which NSP holders should register in order for them to be able to notify the RCAs once their NSP has crossed the relevant thresholds. Despite the harmonisation of information achieved through the Level 2 measures, the reporting and publication systems put in place by RCAs differ across the EU, and the registration mechanism for positions holders also appear to be specific to each jurisdiction.
303. As previously discussed in this Report, Article 11 of SSR prescribes that RCAs should provide to ESMA, on a quarterly basis, information on aggregated NSPs relating to the issued share capital and to issued sovereign debt, and on uncovered positions relating to sovereign credit default swaps. Such notifications serve the purpose of enabling ESMA to have an overview and to periodically monitor the evolution of NSPs across the EU.
304. In 2017 ESMA already publicly consulted on the possibility to build an EU centralised notification and publication system in the context of the SSR. Such proposal was driven by the fact that such centralised system would lead to a more harmonised reporting mechanism and allow investors reporting to different RCAs to reduce their administrative burden, through a unique process of registration. To ensure RCAs' ability to perform efficient national monitoring and enforcement, ESMA had envisaged such system as capable of granting RCAs the access on a real-time basis to the information on NSPs and reporting entities of their competence, enabling them to check in real time any registrations and notifications.
305. ESMA believes that such centralised notification system would support the principle currently stated in Recital 3 of SSR that "provisions directly imposing obligations on private parties to notify and disclose net short positions relating to certain instruments and

regarding uncovered short selling” are to be applied “in a uniform manner throughout the Union”.

306. Based on the responses received to the public consultation, in its final Technical Advice to the EC⁵⁶, ESMA acknowledged the support received for a centralised EU-wide notification system.
307. ESMA reiterated that such centralised system would, on the one hand reduce the cost and administrative burden for reporting entities stemming from the need to register to several national systems and, on the other hand, would benefit RCAs that would no longer have to maintain their national notification system and could be relieved from the obligation to provide information on a quarterly basis to ESMA in accordance with Article 11 of SSR. Additionally, the system would provide an advantage for end investors, enabling them to access all the information in a centralised and standardised manner.
308. ESMA also highlighted that such centralised system would not affect the way RCAs currently perform monitoring and enforcement, as it would ensure that RCAs can access on a real-time basis the information on both the registrations and the notified NSPs of their competence the same way as they currently do via their national notification systems.
309. In the CP, ESMA reiterated that it would see merits in the implementation of an EU-wide notification and publication system through which natural or legal persons could register and notify their NSPs once they cross the relevant thresholds. At the same time, ESMA highlighted that the creation of such system would be paired with lifting current obligations for RCAs to provide information on a quarterly basis to ESMA in accordance with Article 11(1) of SSR. The system would also eliminate the cost for RCAs connected to maintaining their own systems at national level.
310. Moreover, ESMA noted that, in the aftermath of the COVID-19 outbreak and the subsequent economic turmoil, threats to the financial stability⁵⁷ of the EU financial system may unfold very rapidly. In response to such threat and potential emergency situations, the need for timely interventions might arise in short time spans. Due to such developments, in 2020 RCAs and ESMA deemed it necessary to provisionally introduce a reporting system from RCAs to ESMA, to enable ESMA to carry out an EU-wide monitoring activity on a daily basis. The proposal to establish a centralised notification and publication system would serve that purpose on a permanent basis.
311. Such capacity to monitor on an ongoing basis the development of NSPs across the EU would also support ESMA’s intervention powers under Article 28 of the SSR, by providing the intelligence needed to assess when the relevant conditions and scenarios are met.

⁵⁶https://www.esma.europa.eu/sites/default/files/library/technical_advice_on_the_evaluation_of_certain_aspects_of_the_ssr.pdf

⁵⁷ ECB’s financial stability review: “financial stability is a condition in which the financial system – which comprises financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances”, quoted by ESMA in its [December Decision on lower reporting threshold](#).

Additionally, it would promote ESMA's coordination powers in case of potential threats whilst ensuring that RCAs do not lose any access to the information of their competence.

312. In that sense ESMA recommended that, as RCAs play a key role in performing efficient monitoring and enforcement, the centralised notification system should be designed in a manner that enables RCAs to fully carry out their supervisory duties on registrations and notifications by ensuring that they maintain real-time access to the information of their competence.
313. While the introduction of a centralised reporting system would require a legislative change, the technical details of the reporting should be regulated via delegated regulation to be adopted on the basis of ESMA's technical standards.
314. In the CP, ESMA asked stakeholders to express views with respect to the establishment of such centralised notification and publication system and the possible benefits and shortcomings this system could bring.

5.3.3 Feedback to the consultation

315. Most respondents supported the proposed establishment of a centralised notification and publication system of NSPs. In this respect few respondents noted that the need for a central notification and publication system is in their view increased with the reduction in the notification threshold for net short positions to 0.1%⁵⁸, which will significantly increase the number of reports that market participants will have to notify.
316. The respondents also noted that such system would help to improve the transparency of EU markets, strengthening the capacity to react to crises (such as the one caused by the COVID-19 pandemic) and help ESMA monitor the development of NSPs, overall producing a positive effect for EU markets.
317. Some respondents also noted that such system would provide significant time savings for firms that need to report NSPs in multiple financial instruments, as currently reporting systems differ widely in terms of design and operation. Some respondents suggested that such system could be also used as a centralised tool to aggregate and display to the public information on short and long-term bans.
318. One point which was raised by several respondents is that such system should be designed considering which are the desirable features and functionalities. In this respect respondents provided some examples and further recommend the establishment of an industry working group to help assessing these matters.
319. On a related matter, few respondents encouraged ESMA to consider an extension in the existing timing for reporting the NSPs, moving it from 3:30 pm to 5:00 pm local time.

⁵⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R0027>

5.3.4 ESMA's assessment and final approach

320. Considering the wide support received to the proposal of establishing a centralised notification and publication system for natural and legal persons to register and communicate their NSPs, ESMA would like to reiterate the opportunity to bring forward such proposal. ESMA would hence recommend amending the SSR provisions, specifying that position holders would have to register and submit their NSPs to ESMA's centralised system, rather than to the RCAs'.
321. ESMA reiterates that it is paramount that the system is designed in a way to grant RCAs real-time access to the information of their competence, but also to enable them to receive alerts and data feeds with respect to registrations and NSPs, in order to ensure RCAs' ability to perform efficient national monitoring and enforcement.
322. In designing such centralised notification and publication system it will be important to take in due considerations the need of stakeholders. This could be organised via an ad-hoc established technical working group or an appropriate public consultation prior to the development of such system, in order to identify which features the system should allow and identify examples of user-friendly characteristics which might be desirable.

6 Outdated References

6.1.1 Proposal in the CP

323. In the CP, ESMA noted that there are various outdated references in the SSR that would require an update to ensure alignment with the legal texts currently into force. This includes but is not limited to references to: the Data Protection Directive (repealed by GDPR), the Market Abuse Directive (repealed by MAR) and MiFID (repealed by MiFID II/MiFIR). For MiFID, this would include, amongst others, references to the list of financial instruments contained in Section C of Annex I of MiFID, the definition of trading venues as well as various references within the SSR to 'admitted to trading on a trading venue in the Union'.
324. In respect of the MiFID references specifically, ESMA in the CP proposed to replace the references to financial instruments contained in Section C of Annex I of MiFID with the references to Section C of Annex I of MiFID II. ESMA also suggested amending the reference to the definition of trading venue contained in Article 2(1)(l) of SSR so as to include OTFs. Lastly, ESMA proposed to replace all references contained within the SSR to 'financial instruments admitted to trading on a trading venue in the Union' with references to 'financial instruments admitted to trading or traded on a trading venue in the Union', in line with MiFID II/MiFIR. Such amendment would allow for a clarification that all MiFID II/MiFIR financial instruments currently admitted to trading or traded on MTFs and OTFs would fall within the scope of the SSR.



325. ESMA highlighted that the above is a non-exhaustive list of references to the MiFID texts and that in principle all references to MiFID should now be thought to have been replaced by references to MiFID II/MiFIR, for the sake of legal clarity.

326. With respect to other outdated references, ESMA proposed their replacement with the ones of the pieces of legislation currently in force.

6.1.2 Feedback to the consultation

327. Given the mere technical nature, ESMA did not expressly ask questions to market participants on the proposal to update the references in the SSR to ensure alignment with current texts of different pieces of legislation.

328. No indication of negative feedback to the proposal nor any concerns were raised in other parts of the consultation.

6.1.3 ESMA's assessment and final approach

329. To ensure legal clarity and the consistency of the EU legislation ESMA brings forwards the proposed updates entailing an alignment of the SSR with the legislation currently in force.

7 Annexes

7.1 Annex 1 – Summary of Responses to the Consultation Paper

Summary of questions

Q1: Does ESMA's analysis confirm the observation that you made in your perimeter of competency? Please provide data to support your views.

330. ESMA received 17 responses to this question. Eleven of the respondents were associations, three firms, two exchanges and one advisory committee.
331. The majority of the respondents did not agree with the conclusions of ESMA's analysis. Those respondents were very critical and provided arguments in favour of short-selling activities.
332. More specifically, they noted that several analyses indicated that short-selling is not detrimental, they claimed that short sellers are often some of the very few market actors who are actually buying during particularly difficult moments and are therefore providing demand for stocks at the very moment when that demand is, by definition, at its weakest.
333. An analysis by the World Federation of Exchanges (WFE) was mentioned as concluding that short-selling bans not only reduce liquidity, but also increase price inefficiency and hamper price discovery. These statements were confirmed by some of the members of the associations that claimed that during the COVID-19 crisis they experienced both lower volumes in markets subject to short selling bans as well as somewhat higher volatility, along with higher costs of trading reflected in widened spreads, as compared to spreads prior to the imposition of the bans.
334. Finally, it was highlighted that liquidity was also negatively impacted by the burdensome process for the market making exemption. Here respondents claimed 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.
335. The other half of the respondents is split between those who either did not provide any feedback or the feedback was neutral and those supporting ESMA's assessment.
336. Those who supported ESMA's assessment stated that when markets are stressed maintaining liquidity is essential and while in normal market conditions, short selling plays an important role in price discovery, in extreme market conditions (experienced during the start of the COVID-19 pandemic), they can potentially contribute to unnecessary downward pressure on share prices. Furthermore, they encouraged regulatory alignment and coordinated actions across Europe as it would support effectiveness.

337. Furthermore, it must be noted that one respondent, despite providing evidence contrary to the effectiveness of the short-selling bans, retained that the current framework supports RCAs' capacity to address concerns on financial stability and therefore agreed that it should remain available to RCAs in case of developments impacting the resiliency of financial markets.
338. Finally, it is worth highlighting that also the SMSG discussed the need for regulatory coordination in regard of short selling in its Own Initiative Report II on COVID-19 related Issues, dated 29 June 2020 (2020 ESMA22-106-2738) ("the SMSG Report"). In the Report, the SMSG acknowledged the important role of short selling in price discovery, market efficiency and liquidity provision. At the same time, there were different views in the SMSG as to whether short selling bans in the COVID-crisis were counterproductive or useful. One view in the SMSG Report was that especially in adverse circumstances and highly volatile markets, short selling activity is very important for price discovery, liquidity provision and market efficiency. Another view is that short selling bans in crisis situations provide protections to issuers and investors.
339. However, SMSG Members generally agreed that some operational improvements and clarifications could be beneficial. The SMSG addressed the short selling regime again in its own initiative overview report on the Wirecard case (2021 ESMA22-106-3194). On this occasion the SMSG advised to make a distinction between (i) a systemic short selling ban due to specific circumstances and (ii) a short selling ban applied to a specific share, noting that in effect the burden of proof may be higher for the imposition of a ban on individual shares than for sectoral or market-wide bans.
340. Last but not least, the SMSG proposed that ESMA should be obliged to conduct an ex-post analysis of short selling bans imposed in the future, on which ESMA issues an opinion, to inform market participants and increase knowledge about the consequences of short selling bans.

Q2: What are your views on the proposed clarifications?



ESMA received 20 responses: 14 from associations, four from firms, one coming from the regulatory side and one from a stock exchange.

15 respondents are favourable to adjust the RCA definition to clarify that the share-based approach is to be adopted to determine the RCA for the emergency measure (i.e. the share is the target of the measure and all the instruments used in the calculation of the NSPs are automatically included in the scope of the ban).

This group of respondents confirmed the current definition creates uncertainties on the perimeter of the ban and believe the proposed amendment would provide legal certainties to market participants. To support this view two respondent reported to have faced doubts on the inclusion of index derivatives in SSR bans adopted in the context of the COVID-19 crisis. The same respondents flagged that the lack of a standardised approach across different RCAs in the same context resulted in opportunities for regulatory arbitrage and uncertainties amongst participants on the application of emergency measures.

Within those favourable, ten respondents – anticipating their answer to Q4 – emphasised that indices, baskets and ETF should be excluded from the scope of long-term bans. Alternatively, two respondents suggested ESMA to introduce a percentage-based weighting approach to indices, baskets and ETFs, e.g. providing that bans only apply to an index, basket, or ETF with more than 50% weighting of restricted shares.

Only one respondent was against the proposal. They argued that the amendment would allow an RCA to include in a ban also instruments which are not traded in its jurisdiction. Given the utility of short selling for market functioning and the impact of a ban, this respondent argued that the RCA competent for the market where the instrument is traded should always participate in the decision process regarding the ban adoption to ensure the proportionality of the measure.

Four respondents did not take a clear stand in respect to the proposal.

Five respondents also expressly showed their support in updating the reference contained in the RCA definition to Delegated Regulation 1287/2006 with a reference to RTS 22.

One respondent suggested that ESMA adopt a specific set of Q&A on the functioning of SSR emergency measures.

Another respondent suggested that the RCA adopting a ban publish the list of instruments in the scope of the measure to increase clarity and legal certainty on what instruments are subject to the ban.

The SMSG noted that unclear rules and a lack of legal certainty can lead to process delays as well as consequences that cannot always be foreseen. Against this background, to increase legal certainty and provide clarity, the SMSG supported the clarifications proposed by ESMA, subject to the exclusion from the approach of diversified indices, baskets, and ETFs, as set out in their reply to Q4.

Q3: Do you agree with the proposed clarification?

ESMA received 18 responses to this question. The majority of respondents supported the proposal or did not oppose it. They noted that:

- It is important to have some room for manoeuvre in emergency situations, but this should be followed by controls by the RCA and ESMA;
- few respondents noted that it would be beneficial to have standardised format for bans to be communicated to the market. Specifically, two respondents stated that the ban should systematically specify:
 - a) the scope of a ban, in terms of impacted instruments and activities (i.e. short selling and/or increasing NSPs, providing information as to whether the bans cover entering into new NSPs or increasing existing ones)
 - b) if there are exemptions (e.g. market making activities, indices/baskets/ETFs, passive increases in NSPs due to a delta variation, rolling of existing NSPs via expiring derivatives, hedging the equity component of convertible bonds and subscription rights previously purchased, sales to rebalance an index).
- It would be useful to have a single register for all the bans.

Few respondents opposed the proposal stating that:

- it would be beneficial to have standardised format for bans to be communicated to the market.
- Three respondents believe that bans should address only the entering into new or increasing of existing NSPs. The respondents justify this approach by noting that some RCAs implemented bans on new short positions in 2020 in a way that led to market participants being unable to roll short hedging positions for long positions. The respondent additionally suggests that Level 1 clarifies that short selling bans should not prevent the creation of, or increase in, net short positions when an investor who acquires a convertible bond has a delta-neutral position between the equity component of the convertible bond and the short position taken to cover that component.
- One respondent believes that the proposal would reinforce concentration of intervention powers with one individual national authority, as the authority could issue a long term ban for that share and other financial instruments referencing to that share (which are not even traded within the jurisdiction of this RCA).

One respondent stated he is overall opposed to issuing bans.

In addition, the SMSG considered that RCAs should be provided with the flexibility offered by the reading that “both” measures could be used, and supported the clarification proposed by ESMA.

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 received 23 responses to this question, the majority of them being associations, but also firms, banks, exchanges and one advisory committee.

All but one respondent welcome ESMA's proposal to exclude indices, baskets and ETFs from long-term bans.

Where the proposal to exclude indices, baskets and ETFs from long-term bans were not to be followed, seven respondents would agree - as second best – with the exclusion following a percentage-based weighting approach, however highlighting the complexity connected with such approach (e.g. monitoring the percentages). Some of them consider that in any case exclusion should be granted where an index, basket or ETF contains no more than 50% weighting of restricted shares.

Because of the mentioned increased complexity, four respondents oppose the percentage based weighting approach, stressing that such policy choice would be pursuable only if a series of measures are also introduced, e.g. ESMA's maintenance of a list of relevant financial instruments, a market making exemption by default, the exemption from the scope of the ban of certain market activities such as the rolling of derivatives positions.

Eight respondents express in favour of anti-circumventing rule, whereby any trading in indices, baskets and ETFs that clearly demonstrates that it is intending to circumvent the ban, should be prohibited at all times. However, they highlight that guidance is needed as to what “clearly demonstrates” means.

Two respondents argued against such an anti-circumventing rule, seen as difficult to operate in practice, as it would not be clear when an investor can be accused of intending to circumvent the ban.

The SMSG favoured the exclusion of such indices, baskets, and ETFs from the scope of long-term bans, to avoid a disproportionate cost with respect to a limited (if existent) benefit. However, the SMSG noted that such exclusion should not allow behaviours and trades intended to circumvent the SSR. In this respect, the SMSG considered that a principle-based approach should be implemented and enforced to limit the costs associated with a complex set of rules.

As a second-best scenario – in case a cost-benefit analysis shows the need to include such instruments in the scope of long-term bans – the SMSG mentioned that the exclusion should at least be granted to indices, baskets, and ETFs providing for sufficient diversification (e.g. identified by the EU rules on UCITS or equivalent).

In addition, the SMSG supported the use of a percentage-based weighting approach to avoid situations where narrow indices or undiversified baskets or ETFs theoretically could be used to circumvent the SSR.

Q5: Do you agree with the proposed alignment of the conditions to adopt measures under Article 20 and Article 28 of SSR?



ESMA received 15 responses. The feedback received can be divided in 3 groups:

- A group in favour of the proposed alignment on the conditions to adopt measures under Art. 20 and 28 of SSR, with 8 responses. Within this group, one respondent indicated to favour the alignment but does not see it necessary to include the specific language proposed in relation to the pandemic.
- A group in favour of procedural alignments and standards, with 4 respondents. These responses see in stronger standardisation a benefit to RCAs and ESMA. They understand aligning conditions enhances clarity in the market and facilitates a better coordination. At the same time, respondents indicate that ESMA's use of their powers should be viewed as a last resort solution recognising that RCAs have the capacity to understand local markets better and in line with the principle of subsidiarity.

Respondents in this group would not support the introduction of market-wide bans where particular RCAs have not deemed it necessary or appropriate to introduce restrictions in the markets for which they have competence. A respondent also indicated that a move towards consolidations via ESMA would create risk of duplication and that RCAs should retain SSR powers.

- A group contrary to the proposal for alignment. A respondent considered that the current differentiation is adequate and does not give rise to regulatory concern and that the intervention powers conferred to ESMA by Article 28 of SSR contain some element of subsidiarity, which is crucial for the understanding of the legislative intent as reflected on the current SSR wording. A respondent pointed at the difference between improving consistency and convergence and expanding ESMA's power. In this sense, indicated is crucial to recognize that competent authorities play a key role regarding direct supervision, they have the expertise required to fulfil supervisory functions and they should keep some power of discretion while ESMA can support supervisory convergence across RCAs.

The SMSG supported the alignment of the conditions to adopt measures under Article 20 and Article 28 of the SSR.

Q6: do you agree with the proposed amendments to Article 24 of Delegated Regulation 918/2012?

ESMA received 13 responses. A majority (eight) are clearly in favour of the proposed amendments to Article 24 of Delegated Regulation 918/2012. Some of the responses indicated:

- The pandemic has been an unprecedented circumstance which shows the need to adapt institutions to act in anticipation of critical situations. It also highlighted the need to contemplate new scenarios and modify the current instruments of action and supervision.
- To mention only pandemic or widespread epidemic is too limited since we do not know yet the nature of the next important crisis.
 - a) A wording is proposed: “~~new typologies of~~ adverse events such as pandemic or widespread epidemic or any event that has similar effects, (...)”.
- Other adverse events may have similar effects to a pandemic or widespread epidemic (for instance a widespread industrial accident). Therefore, the definition of “adverse events” should not be limited to a predefined number of events.
 - a) A wording is proposed: “any relevant damage to the physical structures of important financial issuers, market infrastructures, clearing and settlement systems, and supervisors which may adversely affect markets in particular where such damage results from a natural disaster, terrorist attack, pandemic or widespread epidemic, or any event that has similar effect;”.
- Another respondent considered that the inclusion of new typologies of adverse events should be sufficiently narrowed down so that it does not affect the orderly functioning of markets.
- the deletion of Article 24 (3) and the application to ESMA of the same conditions of Article 24 (1) applicable to the RCAs seem justified and it will simplify the wording, interpretation and application of provisions.

A group of three respondents indicated they do not support ESMA’s proposed amendments. One of the responses argued ESMA and RCAs should focus on the financial markets and on the events on those financial markets and not global catastrophes.

Lastly a respondent also mentioned the need to recognise that RCAs have a direct connection to national markets and, therefore, may have a better understanding of the challenges the particular market is facing and for that reason they should have the ability to challenge other RCA’s bans if needed.

The SMSG considered it important that ESMA has the authority to act where this is justified, where volatility is caused e.g. by a pandemic or other events with a similar effect or when an entity other than financial institutions is involved.

However, while ESMA should have the right “tools” and a proper mandate at its disposal, it should be carefully considered how such tools and mandates are put to use.

Q7: Do you agree with the proposed amendments to the SSR and, more specifically, the mediation procedure under Article 23 of SSR?



ESMA received 16 responses to this question.

Overall, the majority of respondents was in favour or not opposing of the proposed amendment, including in reference to what was proposed in the 2017 technical advice.

One of these respondents commented that if a single RCA can implement a ban which needs to be observed throughout the Union, the decision should be published throughout the Union in an easily accessible way, ideally authorizing ESMA to make such information available to the market in a centralised and harmonised way.

Another respondent, while agreeing with the 2017 technical advice proposals to have one RCA establishing a ban which would be applied in all jurisdictions, noted that the 2017 proposal to change the scope from a ban on short selling on a trading venue into a ban on entering into or increasing NSPs would have profound practical implications for those market participants using specific entities for hedging the exposures of other entities within their group. As short positions are often covered at the level of the group, instead of the level of an individual legal entity, the suggested change would increase the complexity of calculations and result in additional investments in IT systems. Referring to this point another respondent asked ESMA for further explanations, as an example showing the differences between the current regulation and the proposal.

The rest of the respondents raised the following comments, either with respect to the proposed change to the mediation procedure or with respect to the technical advice which ESMA issued in 2017:

- The mediation procedure is important for the resolution of conflicts between states and is a useful tool for coordinated action of the RCA. In this respect ESMA should amend its mediation procedure as to have the possibility to apply it in such instance.
- As the RCAs might have a better understanding of the specific challenges the particular market is facing, they should have the ability to challenge other RCA's bans if needed.
- For derivatives markets, where liquidity is not with the most relevant exchange of the underlying, it should be recognized that the RCA has a unique understanding of the market, especially if the short-term ban is referring to a national incident or event.
- the lack of a consensus mechanism between member states could lead to significantly divergent approaches.

The SMSG supported the proposed amendments to the SSR including the proposed changes related to the mediation procedure.

However, considering that the proposed changes would in effect leave it up to the most relevant national authority to take decisions on short-selling bans, it is important that a process is available to discuss and analyse the effects of such bans with concerned NCAs.

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

ESMA received 19 responses. A majority (14) are supportive of the inclusion of subscriptions rights in the calculation of NSPs in shares. The reasons being:



- The economic similarities to call options;
- It would likely foster the trading in subscription rights, e.g. with respect to arbitrage between subscription rights and the referring shares which could contribute to more efficient markets by increasing price quality.

Several respondents emphasised 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.

In addition, supporters of the proposal indicated that the same approach should apply to convertible bonds and that the current NSP calculation methodology (based on a 2013 ESMA Q&A), which distinguishes between convertible bonds that convert into existing shares and those that convert into to be issued shares, should be updated.

A minority of five respondents are not in favour of the inclusion of subscription rights in the calculation of NSPs in shares, their arguments being:

- Preferential subscription rights are an expectation, they do not correspond to shares actually issued and seems not justifies accounting them.
- The objective ESMA tries to achieve, increasing instruments disclosure, could be better tackled via transaction reporting instead of through a change in the calculation methodology;
- This inclusion expand the SSR scope.

SMSG would support the inclusion of subscription rights in the calculation of NSPs in shares. The SMSG noted the importance of transparency and avoiding unintended consequences, such as sending misleading signals regarding market positions.

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 received 20 replies to this question.

The majority of the responses received (14) were against changing the existing locate requirements whilst six responses supported their revision.

The main arguments against the revision of the locate arrangements were:

- It would amount to restrict short-selling, and since it is essential for other types of market activities, including market making or hedging long positions, such measures would have a damaging impact on the liquidity of the market as a whole.
- ESMA does not provide evidence supporting the need for such reinforcement of the locate requirements. These respondents also raised the conclusions of the S.E.C. report on the Gamestop events, which does not identify any data justifying revising their own locate rules.
- Some responses also considered that the risk of non-delivery at the settlement date is adequately addressed by the financial penalties and measures in SFTR and CSDR.

Some of the supportive answers also introduced nuances, noting that despite it is desirable that locate agreements do not just provide anecdotal evidence, their regulation should be proportionate: one of these respondents suggested clarifying the concept of 'reasonable expectation' and limiting the enforcement to non-compliance as a consequence of neglective behaviour or poor business practices.

The responses provided hardly addressed the alternatives provided (keep the three types of locate arrangements or simplify the regime).

Finally, one respondent suggested ESMA to extend the capacity to undertake uncovered short selling in sovereign bonds to CCPs as part of their default management process.

The SMSG would support a reinforcement of the third-party's commitments, being however mindful that this should not subject lenders and borrowers of shares in non-NSP situations to additional administrative burden as this could hamper liquidity. They add that this could also be addressed by better enforcing existing rules, including sanctions for parties taking NSPs without having, or even intending to get, commitments from third parties, and CSDR settlement discipline.

Q10: Do you agree with this introducing a five-year-long record-keeping obligation for locate arrangements? If not, please justify your answer.

ESMA received 16 answers. The majority of respondents (13) agree with ESMA's proposal to introduce a record keeping obligation for locate arrangements. In addition, respondents within this group expressed the following considerations:

- Registers should collect agreements with third parties for the hedging of positions and this requirement should also be extended to third party guarantors. In this way, the RCA and ESMA would have this information available for formal and material inspection, so that their analysis can detect procedures that may pose a risk to market stability and establish appropriate corrective measures.
- Regarding the length, some respondents indicated five years as being a regulatory standard and therefore appropriate. However, another respondent considered no significant changes should be introduced to the Implementing Regulation 827/2012 that states evidence of locates must be 'provided in a durable medium'.

- Regarding the data format, six respondents indicated that the obligation should not require to store data/documents in a format which is inconsistent with other record-keeping obligations.
- A respondent was mindful about potential overlapping requirements, for instance with MIFID II obligations.
- Record-keeping requirements may demonstrate that the current locate rules do operate effectively and would therefore suggest record-keeping as a necessary first step to gather empirical data, with which ESMA can then properly carry out an analysis of the efficacy of the existing locate arrangements.

Four respondents opposed the introduction of a record keeping obligation. These respondents expressed the following considerations:

- The obligation as proposed would be extremely burdensome for market actors regularly engaging in short sales.
- It would make the use of short selling as an investment tool more costly, especially for smaller investors who might stop using short selling, hindering market's efficiency.
- Regarding the length, two respondents indicated that a shorter period for the record-keeping obligation, even of a few months, might be sufficient to reach supervisory objectives.
- It seems that the proposed record-keeping obligation would be imposed to the natural or legal person than incur in short selling and not to the third party of the locate arrangement which is a financial entity and has issued a confirmation in a durable medium according with Article 6(5) of the Implementation Regulation 827/2012.
- A respondent suggested instead to require firms to document significant breaches of obligations under a locate arrangement, potentially connected to the locate agent's neglect or inappropriate business practices. Firms would be required to change their locate agent in the case of repeated unreliability.

The SMSG is also in favour of introducing such recording requirement, "where relevant and necessary".

Q11: Do you agree with reinforcing and harmonising sanctions for "naked short selling" along the proposed lines? If not, please justify your answer.

ESMA received 15 responses. 11 of the respondents are associations, three firms, and one advisory committee.

Four respondents fully agreed with the objective of harmonisation and reinforcement of sanctions for breaching the 'locate' rule and the proposal

All respondents but one agreed with the broad objective of harmonisation of the sanctions at EU level. One respondent pointed out that harmonisation would indeed help avoiding the transfer of activity from one State to another. Another respondent insisted that the extreme variability with the possibility of extremely high pecuniary sanctions coupled with the absence of precise criteria or guideline explaining how the amount of the sanction is actually computed across the EU fuelled uncertainty. A few respondents suggested that before a potential



harmonisation of pecuniary sanctions, there was a great need for greater supervisory convergence, for instance through ESMA guidelines, to be informed by NCAs' best practices.

However, most respondents did not agree with the proposal and suggested the following:

- On the principle for determining a sanction: they all strongly advocated for a case-by-case, proportionate approach and for sanctions to be determined by NCAs to ensure individualisation.
- On determining the level of a pecuniary sanction, the suggestions were made:
 - a) no 'minimum maximum';
 - b) there should be a cap on maximum sanction: it is important to set a cap on sanction as unduly punitive fines could lead to poorer dialogues between authorities and firms and risk to increase the price of locate arrangements;
 - c) criteria for NCAs to set the level of fines (profit, scienter, harm to third parties, etc) to be harmonised at EU level.
- Other measures/sanctions (to be considered in addition to pecuniary sanction):
 - a) temporary prohibitions to operate on certain markets depending on degree of conduct and severity of damage caused;
 - b) CSDR settlement discipline measures are a better tool to specifically address these breaches as they result in settlement fails.

The SMSG considered it would be valuable to have stricter and harmonised sanctions for "naked short selling" in the EU, without however being in a position to determine exactly what these levels should be (but noting they presently very much differ between jurisdictions).

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 received sixteen responses to this question.

The vast majority of the responses (13) rejected lowering the threshold. The arguments tabled against such reduction were the lack of analysis of the impact that such measure would entail⁵⁹, the foreseeable impact on other regulatory requirements (and in particular, CSDR), the increased burden for EU and third-country market makers (that might lead to a decrease of the liquidity of the additional shares affected by the measure) and the uncertainties surrounding the transition to the new regime. The ESMA SMSG also requested more data before making an assessment of the lower threshold.

Two of these responses also complained about the excessive delays for updating the list of exempted shares and requested the adoption of measures to speed the updates up. One of



these respondents also noted that further guidance about how to treat shares that should be in the list of exempted shares would be necessary.

Only two responses supported the proposal.

The SMSG understood the reasoning behind the proposal, but it considered it was not in a position to agree on a specific threshold. The SMSG also identified potential difficulties with having the SSR rules apply to shares primarily traded outside the EU.

Against this background, the SMSG advised ESMA to underpin the proposal with more data, e.g., regarding stocks that would historically have been affected by a 40% threshold.

Q13: Do you consider that NCAs should take any other qualitative but specific parameter into account in the identification of the list of shares that should not be exempted from the SSR obligations despite being more heavily traded in a third-country venue? If yes, please elaborate

ESMA received fourteen responses to this question.

The vast majority of them (13) rejected considering other qualitative parameters to identify shares subject to the full set of SSR obligations. The ESMA SMSG considered that qualitative criteria would make the rule more complex. One response proposed that shares primary listed in the EU should remain subject to the full set of SSR obligations.

The SMSG considered that including additional parameters into the equation would make the rules more complex and did not support this proposal.

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 received 20 responses to this question.

Most of the responses aligned with ESMA's preliminary view of maintaining the public disclosure threshold at 0.5% of the issued share capital. The ESMA SMSG also supported maintaining the threshold at 0.5%. However, five responses considered necessary either raising the threshold⁶⁰ or substituting the threshold by the publication of aggregated net short positions per issuer.

Additionally, one association recommended raising the threshold for increments or decrements of the NSP once the 0.5% has been reached or exceeded.

It is worth noting that four responses highlighted that a notification of a NSPs above the notification threshold (0.1% since the amendment of SSR) but below 0.5% of the issued share



capital should not be disclosed and raised a complaint since this does not seem to be the case in certain jurisdictions.

SMSG noted that apart from “naked short selling”, the main problem for securities markets is stock loans being called to such an extent that it creates a short squeeze. While transparency is often good, too much public disclosure may increase the risk of speculation.

Against this background, the SMSG concurred with ESMA that the present threshold seems to provide a “good compromise” between transparency to the market and market efficiency, as long as a compulsory publication of anonymised aggregated NSPs per issuer integrating all individual positions reaching or exceeding the notification and the publication thresholds, are published on a weekly basis, as suggested by ESMA.

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 received 19 replies to this question.

13 of them were supportive of the initiative, one expressed against and four identified benefits and drawbacks without taking a clear position on this and demanded more specifications about this. The ESMA SMSG also supported providing this data.

It is relevant to remark that two of the supporters considered that the publication of the aggregated NSP should substitute the existing publication about 0.5% of the issued share capital.

As regards the periodicity there were diverging views: three responses were in favour of adequate delays that would not penalize short sellers, while other three suggested timely publication of the aggregated data. Five respondents expressed in favour of weekly or bi-weekly publication of the aggregated NSPs. The ESMA SMSG supported publication on a bi-weekly basis during an initial trial period. Finally, one response considered that monthly publication, in line with the current Finanstilsynet’s practice was the adequate delay.

Against the approach of most responses, one stakeholder suggested publishing aggregated NSPs considering only the published NSPs, to avoid ‘short squeezes’ for market participants between 0.1 and 0.5%.

To increase transparency without harming market efficiency, the SMSG would support the introduction of a system where more information is published, on an anonymised basis, about aggregated NSPs.

As regards periodicity, the SMSG would find it valuable if such information was published on a regular basis, to begin with, during an initial trial period, on a bi-weekly basis.

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 received 16 responses regarding the detection of problems in the identification of the issued share capital to fulfil SSR notification/publication obligations.

Nine of those respondents found problems due to unreliable data (or to the late update of the existing data sources) and suggested a centrally available database that could be provided by ESMA. One of the responses suggested that it should be integrated in the European Single Access Point. Another response requested ESMA guidance on what type of data source could be unambiguously relied upon, in the absence of a central database of issued share capital. Finally, another respondent suggested that this information should be offered by the primary exchanges.

Six responses reported not having found problems or that the problems were not significant.

The SMSG did not detect any major problem in this regard, subject to minor delays that may occur for technical reasons in connection with new share issues, buy-backs, etc.

The SMSG noted that stock exchanges normally provide information regarding issued share capital of companies listed on such exchanges.

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.

The large majority of respondents supported the proposed establishment of a centralised notification and publication system for natural and legal persons to communicate their NSPs. One respondent states he might see the benefits of such system but is sceptical about the need for this exercise to be undertaken in scope of this particular area and at this moment in time.



On the other hand, some respondents note that the need a central reporting channel is increased by the reduction in the notification threshold for net short positions to 0.1%, which will on an ongoing basis significantly increase the number of reports that market participants must make.

The rest of the respondents note that:

- such system would help to improve the necessary transparency that should be inherent in RM, strengthen the capacity to react to crises (such as the one caused by the COVID-19 pandemic), help ESMA monitor the development of net short positions and benefit all the agents involved in the RM investment decision-making;
- a single platform for the purpose of reporting, with the ability to view a journal or historical filings to reconcile members positions with those held by the regulator in order to complete Quality Assurance, would be helpful;
- The system would provide significant time savings for firms that short sell in multiple European financial instruments, given that existing reporting systems differ widely in terms of their design, operation and easiness of use;
- The single system may also be used as a centralised tool to publish possible bans.

Respondents believe it would be extremely relevant to have clarity on the details and functioning of such centralized system. Some respondents provide input on what should be the features of such system and additionally recommend the establishment of an industry working group to help assess which are the desirable functionalities.

Few respondents additionally encourage ESMA to consider an extension in the existing filing deadline, moving it from 3.30 pm to 5 pm local time.

The SMSG noted that several notification and publication systems are in use across the EU and considered that a centralised notification and publication system for natural and legal persons to communicate their NSPs would be valuable.

However, it is important that the introduction of any such system be preceded by consultations with market participants, and that robust standards and templates are agreed and used in all markets and by all relevant market participants, in order to ascertain that there are no unintended negative side effects.

It is also important that RCAs retain a right and possibility to access data that is of relevance to their supervision of national markets.

7.2 Annex 2 – Advice of the Securities and Markets Stakeholders Group

Background

1. The SMSG discussed the need for regulatory coordination in regard of short selling in its Own Initiative Report II on COVID-19 related Issues, dated 29 June 2020 (2020 ESMA22-106-2738) (“the SMSG Report”). The SMSG noted in the SMSG Report that the Short Selling Regulation (“SSR”) enables national competent authorities (“NCAs”) to introduce restrictions aimed at tackling specific adverse circumstances that constitute a serious threat to market confidence. The assessment of the situation, the initiative and the specification of the measure are taken at national level and ESMA is asked to provide an opinion on whether the national measure is necessary. To this end, ESMA considers the measure, its appropriateness, proportionality, and duration.
2. In the SMSG Report, the SMSG acknowledged the important role of short selling in price discovery, market efficiency and liquidity provision. At the same time, there were different views in the SMSG as to whether short selling bans in the COVID-crisis were counterproductive or useful. One view in the SMSG Report was that especially in adverse circumstances and highly volatile markets, short selling activity is very important for price discovery, liquidity provision and market efficiency. Another view is that short selling bans in crisis situations provide protections to issuers and investors.
3. Further to this Report, the SMSG addressed the short selling regime again in its own initiative overview report on the Wirecard case (2021 ESMA22-106-3194). On this occasion the SMSG highlighted the limitations of the short selling regime at national and EU levels, and the need for a fundamental reflection on the use of short selling bans. The SMSG advised to make a distinction between a systemic short selling ban due to specific circumstances and a short selling ban applied to a specific share, noting that in effect the burden of proof may be higher for the imposition of a ban on individual shares than for sectoral or market-wide bans. The SMSG recommended that ESMA would use its supervisory convergence tools to clarify the circumstances under which a prohibition or a restriction can be enacted. In addition, it was stressed that ESMA’s opinion in regard of any short selling restriction proposed by an NCA should not be a mere consistency check.
4. While members of the SMSG may thus hold different views on some aspects of short selling, there is broad support for having common interpretations of the applicable rules, based on which NCAs may issue short selling bans, and a common interpretation of what constitutes short selling.
5. Finally, the SMSG considers that the exemptions granted to market-making activities in the Level 1 text are integral to price discovery, liquidity provision and market efficiency.
6. Against this background, the SMSG welcomes this ESMA consultation (“the Consultation”), which will be followed by a report to the Commission on suggested improvements to the SSR



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

7. ESMA concludes in its analysis inter alia that the European long-term bans of 2020 had mixed effects, that restrictions on acquiring and increasing Net Short Positions ("NSPs") could have contributed to 3 preventing increasing NSPs from exacerbating disorderly downward price spirals, impacts that were particularly relevant in stressed market conditions after the COVID-19 outbreak.

8. Against this background, ESMA considers that the current framework supports Relevant Competent Authorities' ("RCAs") capacity to address concerns on financial stability and it is in favour of keeping it that way. ESMA also proposes some "operational improvements" as further described in the Consultation.

9. As noted in the introductory comments, SMSG members have different views on some aspects of short selling, but generally agree that some operational improvements and clarifications could, as further discussed below, be beneficial. III. Question 2: What are your views on the proposed clarifications?

10. ESMA proposes certain amendments to the SSR, with the aim to clarify certain rules to increase legal certainty.

11. The first proposed clarification, amending Article 2(1)(j) SSR, means that a reference to Delegated Regulation 1287/2006 supplementing MiFID I is replaced with a reference to RTS 22. ESMA thereby refers to certain situations, where the outcome could be different, depending on the interpretation of the rule.

12. A second proposed clarification, to the same SSR article, aims to specify the RCA definition in the context of emergency measures. ESMA proposes to make it explicit, thereby providing additional legal certainty, that the RCA competent for the "target" financial instrument is also competent in relation to all those instruments (subject to potential exclusions or limitations, see further below) conferring a financial advantage in the event of a decrease in the price or value of the "target" instrument.

13. The SMSG notes that unclear rules and a lack of legal certainty can lead to process delays as well as consequences that cannot always be foreseen. Against this background, to increase legal certainty and provide clarity, the SMSG would support the clarifications proposed by ESMA, subject to the exclusion from the approach of diversified indices, baskets, and ETFs, as set out under Question 4.

IV. Question 3: Do you agree with the proposed clarification?

14. ESMA proposes a clarification to Article 20(2) of SSR, to the effect that RCAs may adopt either one or both measures set out in point (a) and (b) of said Article. ESMA points out that the text as presently drafted could be read in such a way, that a choice would have to be made between the alternatives.



15. The SMSG considers that RCAs should be provided with the flexibility offered by the reading that “both” measures could be used, and supports the clarification proposed by ESMA.
V. Clarification of ESMA’s reliance on information provided by the RCA

16. ESMA proposes an amendment to relevant SSR provisions, providing that the ESA’s assessment and the relevant ESMA opinion will mainly rely on the factual events and representations outlined by the RCA in its notification. ESMA will consider further sources only when available and where its assessment is compatible with the short deadline.

17. While there is no explicit question on this proposal, the SMSG generally supports an amendment in line with the ESMA proposal. However, the SMSG considers that ESMA should not only be transparent about the extent to which it relies on information from the RCA, but also be obliged to consider as many relevant sources as possible and make as much analysis as possible in the available time.

18. The SMSG would further see value in and would propose an amendment to the effect that ESMA should conduct an ex-post analysis of short selling bans that are imposed in the future on which ESMA gives an opinion. By doing this, and by making such analysis publicly available, market participants will be better informed and can make a proper analysis of the consequences of short selling bans.

4 VI. Question 4: 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?

19. ESMA is considering that indices, baskets, and ETFs be excluded from the scope of long-term bans. As an alternative, a percentage-based weighting approach is considered, where the amounts of banned instruments as a percentage of the overall components are taken into account.

20. ESMA further considers whether it should be clarified that it is prohibited to trade in indices, baskets and ETFs, in a manner that clearly demonstrates an intention to circumvent the ban.

21. The SMSG preliminary observes that indices, baskets, and ETFs are largely used for taking positions on broader market movements and may be used to hedge market-wide risks. Such instruments are less likely to be used to take an NSP in a single share. Consequently, the SMSG believes that the exclusion of such instruments from the scope of long-term bans should be considered as a first best scenario to avoid a disproportionate cost with respect to a limited (if existent) benefit. An appropriate cost-benefit analysis should be performed prior to considering the percentage weighting approach.

22. The SMSG also considers that the exclusion of such instruments from the scope of long-term bans should not allow behaviours and trades intended to circumvent the SSR. In this respect a principle-based approach, that would limit the costs associated with a complex set of rules, should be implemented and enforced.

23. As a second-best scenario – in case a cost-benefit analysis shows the need to include such instruments in the scope of long-term bans – the SMSG considers that the exclusion should at

least be granted to indices, baskets, and ETFs providing for sufficient diversification as – e.g. – identified by the EU rules on UCITS or equivalent. In any case, it is also important to ascertain that the SSR is not circumvented.

24. To avoid situations where narrow indices or undiversified baskets or ETFs theoretically could be used to circumvent the SSR, a percentage-based weighting approach could be used.

25. In case a threshold is set, such threshold should be decided based on a proper analysis and simulations to avoid unintended consequences, e.g. by making it more difficult or impossible for market participants to carry out normal market hedging transactions.

26. Furthermore, this form of indirect restriction should not undermine the market-making exemption set at Level 1 and specified by the competent authority under article 20.3. We also call on the Commission to endorse the aspects of the Technical Advice submitted by ESMA in December 2017 which relate to OTC market making activities.

27. In case ESMA excludes indices, baskets and ETFs governed by EU rules or equivalent, the SMSG would see the need to accompany such an exclusion with an explicit principle, clarifying that it is at all times prohibited to trade in indices, baskets as well as ETFs in a manner that clearly demonstrates that it is intended to circumvent the ban.

28. The SMSG would in such case also welcome more information about which indices, baskets and ETFs may be affected, and what the potential effects would be. The SMSG would also favour more clarity and consistency across the EU.

VII. Question 5: Do you agree with the proposed alignment of the conditions to adopt measures under Article 20 and Article 28 of SSR?

29. The SMSG can support the alignment of the conditions to adopt measures under Article 20 and Article 28 of the SSR. In connection herewith, we refer to the comments above (question 5) on the value of making an ex-post analysis of future short-selling bans where ESMA issues an opinion.

5 VIII. Question 6: Do you agree with the proposed amendments to Article 24 of Delegated Regulation 918/2012?

30. The SMSG considers it important that ESMA has the authority to act where this is justified, also where volatility is caused e.g. by a pandemic or other events with a similar effect or when an entity is involved other than financial institutions and entities that are now listed. It could in this context be noted that a recent example involved a FinTech company.

31. However, while ESMA should have the right “tools” and a proper mandate at its disposal, it should be carefully considered how such tools and mandates are put to use.

IX. Question 7: Do you agree with the proposed amendments to the SSR and, more specifically, the mediation procedure under Article 23 of SSR?



32. The SMSG would, based on the analysis provided by ESMA, support the proposed amendments to the SSR including the proposed changes related to the mediation procedure.

33. However, considering that the proposed changes would in effect leave it up to the most relevant national authority to take decisions on short-selling bans, it is important that a process is available to discuss and analyse the effects of such bans with concerned NCAs.

X. Question 8: What are your views on ESMA's proposal to include subscription rights in the calculation of NSPs in shares?

34. SMSG would support the inclusion of subscription rights in the calculation of NSPs in shares. The SMSG notes the importance of transparency and avoiding unintended consequences, such as sending misleading signals regarding market positions.

XI. Question 9: 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?

35. The SMSG notes that the location rules today include relatively "weak" options, such as a promise of a third party that certain shares are easy to procure. Against this background, the SMSG would support a reinforcement of the third-party commitments, with the aim to reduce NSPs, so that commitments are based on clear confirmations. However, it is also important not to subject lenders and borrowers of shares in non-NSP situations to further administrative burdens, as this would hamper liquidity in markets.

36. As further discussed below (question 11) more focus should also be put on enforcing the rules that are already in place, including sanctions for parties taking NSPs without having or even intending to get commitments from third parties. The SMSG also underlines the importance of supervisory convergence in this area, to create a level playing field.

37. It could be noted that CSDR, incl. rules that are of relevance to this area, is presently being reviewed. XII. Question 10: Do you agree with this introducing a five-year-long record-keeping obligation for locate arrangements? If not, please justify your answer.

38. The SMSG would support the introduction of a five-year-long record keeping obligation for locate arrangements, where relevant and necessary.

XIII. Question 11: Do you agree with reinforcing and harmonising sanctions for "naked short selling" along the proposed lines? If not, please justify your answer. 6

39. The SMSG takes note of the fact that questions relating to sanctions are primarily dealt with at level 1, but nevertheless considers that it would be valuable to have stricter and harmonised sanctions for "naked short selling" in the EU.



40. While the MSG is not in a position to determine exactly what those levels should be, it notes that levels of sanctions presently differ very much between markets in the EU. At the same time, it is noted that markets in the EU have different characteristics.

XIV. Question 12: 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?

41. The MSG understands the reasoning behind the proposal but is not in a position to agree on a specific threshold. The MSG also notes potential difficulties with having the SSR rules apply to shares primarily traded outside the EU.

42. Against this background, the MSG advises ESMA to underpin the proposal with more data, e.g. regarding stocks that would historically have been affected by a 40% threshold.

XV. Question 13: 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.

43. The MSG considers that including additional parameters into the equation would make the rules more complex and does not support this proposal.

XVI. Question 14: 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.

44. MSG notes that apart from “naked short selling”, the main problem for securities markets is stock loans being called to such an extent that it creates a short squeeze. While transparency is often good, too much public disclosure may increase the risk of speculation.

45. Against this background, the MSG concurs with ESMA that the present threshold seems to provide a “good compromise” between transparency to the market and market efficiency, as long as a compulsory publication of anonymised aggregated NSPs per issuer integrating all individual positions reaching or exceeding the notification and the publication thresholds, are published on a weekly basis, as suggested by ESMA in section 15.

XVII. Question 15: 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?

46. The MSG would, to increase transparency without harming market efficiency, support the introduction of a system where more information is published, on an anonymised basis, about aggregated NSPs.

47. As regards periodicity, the MSG would find it valuable if such information was published on a regular basis, to begin with, during an initial trial period, on a bi-weekly basis. XVIII. Question 16: 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.

48. The SMSG has not detected any major problems in this regard, subject to minor delays that may occur for technical reasons in connection with new share issues, buy-backs etc. 7

49. The SMSG finds that stock exchanges normally provide information regarding issued share capital of companies listed on such exchanges.

XIX. Question 17: 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.

50. The SMSG takes note of the fact that several notification and publication systems are in use across the EU and considers that a centralised notification and publication system for natural and legal persons to communicate their NSPs would be valuable.

51. However, it is important that the introduction of any such system be preceded by consultations with market participants, and that robust standards and templates are agreed and used in all markets and by all relevant market participants, in order to ascertain that there are no unintended negative side effects.

52. It is also important that NCAs retain a right and possibility to access data that is of relevance to their supervision of national markets.