

## ESMA CONSULTATION PAPER ON THE REVIEW OF CERTAIN ASPECTS OF THE SHORT SELLING REGULATION

### AMAFI contribution

**Association française des marchés financiers (AMAFI)** is the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities.

AMAFI welcomes the opportunity to respond to this consultation paper (hereafter the CP) on the review of certain aspects of the Short Selling Regulation (SSR).

Before answering the specific questions raised in the CP, AMAFI would like to highlight the following comment

### COMMENT

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As it is stated in the CP (Introduction para 7), in December 2017 ESMA delivered a technical advice which notably focussed on the market making exemption but "at this point in time no measures have been taken yet in response to the ESMA Technical Advice".

AMAFI fully supports the content of the technical advice and encourages ESMA to contact the European Commission to see what follow-up could be given to this technical advice.

### ANSWERS

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

AMAFI is not in a position to answer this question.

**Q2: What are your views on the proposed clarifications?**

AMAFI agrees with ESMA analysis and ESMA proposals which will bring more legal certainties and will facilitate the taking of emergency measures.

Nevertheless, this change should not be linked to the question of the potential exclusions or limitations in relation to indices, baskets of instruments and ETFs. See our answer to question 4

In addition, the market making exemption for both the "target instrument" and "those instruments which confer a financial advantage in the event of a decrease in the price or value of the 'target' instrument" should not be affected.

**Q3: Do you agree with the proposed clarification?**

AMAFI agrees with ESMA proposal.

**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?**

AMAFI fully supports the exclusion the exclusion of indices, baskets and ETFs from the scope of long-term bans. As it is stated in the CP, “there is an argument that those instruments would less likely be used by market participants to take an NSP in a single share” and “historically RCAs have often limited or excluded those instruments from the scope of the bans that were adopted since the application of the SSR.”

AMAFI also considers that the introduction of a percentage-based weighting approach, would be very complicated to implement and would raise various issues (non-compatible with ESMA proposal in section 3.2, identification of which instruments are below or above the thresholds, hedging strategies would affected...)

Such approach could not be envisaged without other several measures: ESMA's maintenance of a list of relevant financial instruments; a market making exemption by default, exemption from the scope of the ban of certain market activities such as the rolling of derivatives positions.. .

AMAFI fully agrees with ESMA consideration 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”.

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

AMAFI agrees with this proposal.

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

AMAFI tends to agree with ESMA but considers that mentioning only pandemic or widespread epidemic is too limited since we do not know yet the nature of the next important crisis. The definition of adverse events should not be limited to a pre-definition of events.

Therefore, AMAFI suggests the following wording:

b. ~~new typologies of~~ adverse events such as pandemic or widespread epidemic or **any event that has similar effects**, 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

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

AMAFI agrees with this proposal.

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

AMAFI agrees with this proposal.

**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?**

AMAFI strongly disagrees with the proposal to reinforce third party's commitment.

Indeed, from the discussion in the CP, this approach does not seem to be based on any compelling evidence of major problems in terms of the operation of the existing locate standards. No "short squeeze nor increase in the settlement fails has been observed in the EU. Moreover, the fail rate in the EU is very low and the implementation of the penalty regime of CSDR in February 2022 will improve this rate.

In contrast, it would restrain market short selling activities at the expense of market liquidity and the quality of the price formation process.

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

AMAFI agrees with this proposal.

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

AMAFI is not opposed to a harmonization of sanctions but that, in any cases, sanctions must be taken on a case-by-case basis.

**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?**

It is not possible to agree with this proposal since we do not have any information on the list of shares that would be captured by this threshold. It would bring a lot of uncertainties in the scope of SSR.

**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**

AMAFI does not agree with this proposal which would end up with more complexity and more uncertainties.

**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 recognized that; "the current publication threshold still provides a good compromise between transparency to the market and market efficiency". A diminution of the threshold would restrain market short selling activities at the expense of market liquidity and the quality of the price formation process.

**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?**

AMAFI agrees and suggests that ESMA should be in charge of such a publication. At the beginning, a weekly or bi-weekly publication could be envisaged.

**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.**

AMAFI has no information on this topic

**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.**

AMAFI is in favor of a centralized notification and publication system which would reduce the administrative costs for market participants and would help the publication of anonymized aggregated NSPs by issuer.

