Deutsches Aktieninstitut

Short sales: improve transparency – but well considered

Response to ESMA's Consultation Paper on the review of certain aspects of the Short Selling Regulation on (ESMA70-156-4948), 19 November 2021

Responses

General Remarks

Deutsches Aktieninstitut has supported the core elements of the EU Short Selling Regulation, in particular the two-level transparency regime for covered short sales (Articles 5 and 6), the restrictions on uncovered short sales (Article 12) and the exemptions for market making and primary market operations (Article 17). From our perspective the current SSR basically finds a good balance between limiting potential problems arising from excessive or abuse short selling and the benficial role of short sales for the efficiency of the price discovery process and the liquidity of markets. Ensuring market efficiency as well as avoiding abusive practices are in the interest of listed companies whose shares might be shortened.

Against this background and the spirit of the SSR we comment on a selective number ESMA's proposals which Aktieninstitut finds worth considering. However, in general we believe that the SSR has worked properly so that any change to the level 1 text needs to be considered thouroughfully.

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

In general, issuers are interested in both understanding the spectrum of short selling strategies and that these strategies are reflected properly in the notification regime. Misleading signals to the market and the issuers should be avoided. This holds also true for strategies that are related to subscription rights or convertible bonds.

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?

ESMA's analysis points out that the locate requirement of Article 12 may – in certain situations – result in a too low level of commitment with respect to the delivery of a shortened stock which ultimately may lead to excessive short selling and settlement disruptions. As Article 12 was once introduced to avoid such situations (which is in the interest of investors and listed companies) we basically support ESMA's proposals to ensure firmer commitments.

ESMA's proposal, should however still keep a good balance between avoiding potential negative consequences of uncovered short selling without restricting existing locating practices too much and without interfering with existing market practices more than necessary.

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.

We agree with ESMA's preliminary view is that the current publication threshold for individual short positions still provides a good compromise between transparency to the market on the one hand and market efficiency on the other.Thus, we see no need to change the publication threshold. However, see also our response to Q 15.

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?

From the perspective of issuers, the transparency of short sales of shares is a logical complement to the existing notification requirements of voting rights. It allows market participants and issuers to assess whether there are investors interested in falling stock prices and, at the very end, their obligation to cover those positions.

Accordingly, rumours can be judged better against this background and possible manipulative behaviour can be identified easier. Furthermore, transparency of short sales can prevent extreme shortenings of certain shares. Each potential short seller will act more cautious if he is aware that there is a high level of short sales in a respective share. This helps to prevent extreme increases in stock prices in a short squeeze situation.

Against this background it could indeed be considered to improve information on the aggregate level of short sales in the market. Under the current regime the aggregate level of short sales is exclusively known to the competent authorities because they receive notifications according to Article 5 and 6. In contrast, market particpants currently do not have a full picture of the aggregate level of short sales because they are only informed about high individual positions on the basis of the notifications of Article 6.

However, we also recognize the potential drawback of aggregate information on short sales, which could provoke speculations against short sellers also in situations where short selling is not excessive. In a similar vain, it appears to be possible that aggregate information could create a momentum for additional short sales if information will be too frequent. Thus, though generally in favour of an aggregate

information to the market, we are of the opinion that the publication threshold and the frequendy of information should be defined in matter that finds a right balance. Also against this reasoning it appears to be preferable to align supervisory practices in that respect instead of changing the level 1 text before experiences will have been made.

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.

No.

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