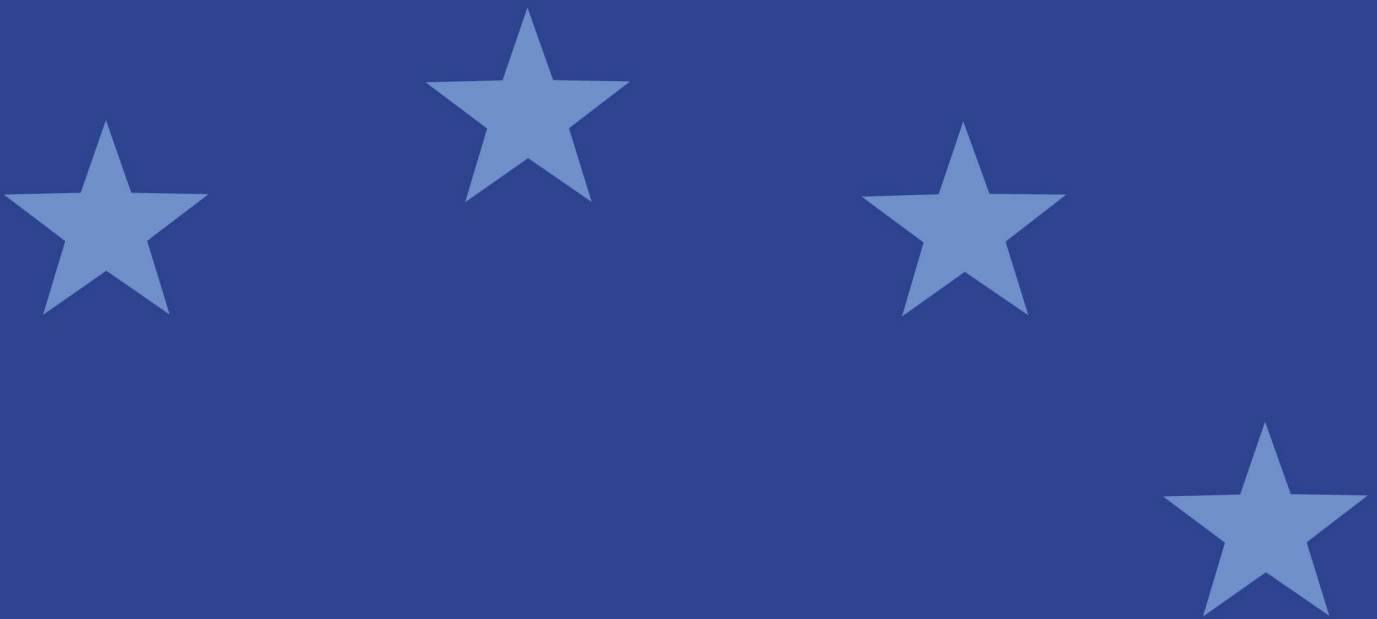




European Securities and  
Markets Authority

# Reply form for the Consultation Paper on market outages



26 September 2022



## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on market outages published on the ESMA website.

### **Instructions**

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type <ESMA\_QUESTION\_OUTA\_0> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

### **Naming protocol**

In order to facilitate the handling of stakeholders’ responses please save your document using the following format:

ESMA\_CP\_OUTA\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

e.g. if the respondent were ESMA, the name of the reply form would be:

ESMA\_CP\_OUTA\_ESMA\_REPLYFORM or

ESMA\_CP\_OUTA\_ANNEX1

### **Deadline**

Responses must reach us by 16 December 2022.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.



### ***Publication of responses***

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### ***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the headings 'Legal notice' and 'Data protection'.



## General information about respondent

Name of the company / organisation	Nordic Securities Association (NSA)
Activity	Investment Services
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Denmark

## Introduction

**Please make your introductory comments below, if any:**

<ESMA\_COMMENT\_CP\_OUTA\_1>

The NSA<sup>1</sup> welcomes ESMA's consultation on Market Outages which follows ESMA's Final Report on algorithmic trading. Deadline for responses is 16 December 2022.

Among other things the report considered that trading venues should do their utmost to ensure continuity of trading during normal trading hours and ensure that an outage does not affect the closing auction. In case the outage prevents the trading venue from running a closing auction, ESMA proposes guidance on how trading venues should act in these circumstances to ensure the market is provided with an official closing price, which we consider relevant and timely.

### General comments

Overall, the NSA agrees to improve the notification process in case of IT incidents and system outages. Furthermore, we agree with the initiative to ensure there is more continuity on trading in case of an outage on the main market, e.g., by requiring algo traders to use more than one reference data point. In this context, we strongly agree – as noted in point 19 - that is a considerable challenge that data show that when the primary market is down, trading on alternative lit venues also drops in the same proportion as that on the primary market, even though these alternative venues could be used to ensure continuity of trading.

It is unlikely to avoid outages completely and these are often directly correlated to a configuration change or a software upgrade with insufficient testing causing unintended and unexpected effects. From this perspective, the mandated testing environments offered by trading venues are not sufficient. It is challenging and sometimes impossible to accurately verify algorithms realistically prior to deployment.

The NSA encourages a regulatory focus on ensuring better testing solutions as this will lead to more stable trading environment.

Furthermore, in an outage situation information regarding the incident is obviously critical. Regular updates of an incident must be sent out even if there are no new information. Of particular importance is information on order status as soon as possible as this will facilitate the re-opening where (we are in particular focused on the closing auction due to its importance) as well as the possibility to execute orders on another trading venue instead.

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<sup>1</sup> The Nordic Securities Association (NSA) is a Nordic cooperation that works to promote a sound securities market primarily in the Nordic region. The NSA is formed by Capital Market Denmark (Kapitalmarked Danmark), Finance Finland (Finanssiala), the Norwegian Securities Dealers Association (Verdipapirforetakenes Forbund) and the Swedish Securities Markets Association (Svensk Värdepappersmarknad), [NSA - Nordic Securities Association \(nsa-securities.eu\)](https://www.nsa-securities.eu). Nordic Securities Association's public ID number in the Transparency Register is: 622921012417-15



That said, although we recognise that uncertainty about order status is a significant problem, we do not believe that it is only about miscommunication between trading venues and market participants which creates uncertainty about order status on the primary market and at which time trading will be resumed as stated by ESMA. We are also of the opinion that it is due to the lack of alternative venues acting as backup venues to the primary Regulated Market. We understand from i.e. point 49 that ESMA does not intend to mandate the use of alternative venues for the operation of i.e. the closing auction.

However, we suggest such initiative should be mandated as a voluntary solution will not materialise since it has not been the case until now.

As the delinking between trading a listing following MiFID I has implied that trading in shares listed on one Regulated Market is traded on other venues, the opening and closing auction takes place on the "incumbent Regulated Market" which has the bulk of the liquidity. Incumbent Regulated Markets often have a rather large share of the trading despite competition from MTFs and SIs as Regulated Markets as a rule do not offer trading with other Regulated Markets shares, which is concerning and demonstrates anti-competitive behavior. Furthermore, other aspects also favor the incumbent Regulated Markets such as the closing auctions which retain flow on the incumbent Regulated Market as the incumbent Regulated Market also hold the monopoly of the so-called "official prices" used for various purposes i.e. tax reporting as there is no legal clarity on the "ownership" of these prices.

<ESMA\_COMMENT\_CP\_OUTA\_1>



**Q1 : Do you agree with the main communication principles identified above?**

<ESMA\_QUESTION\_OUTA\_1>

NSA agrees

<ESMA\_QUESTION\_OUTA\_1>

**Q2 : To promote harmonisation, should the guidance include a template on what trading venues' communication notices should include?**

<ESMA\_QUESTION\_OUTA\_2>

Yes, and within 30 minutes. It must include reason, estimated down-time, estimated re-opening procedure, estimated status on orders. The communication should be updated every 30 min. and fastest possible after new status. Furthermore, it should include that the trading venues must regularly update routines for handling of outages.

What is most important is to get an overview of all orders/executions. It should be mandatory for each venue to have a website where investment firms in real-time can see own executions and download them for reconciliation. Thereafter, investment firms need to be able to pull their orders in order to continue trading on alternative venues.

<ESMA\_QUESTION\_OUTA\_2>

**Q3 : Do you agree that trading venues should have a maximum of one-hour to provide clarity on the status of the orders during an outage? If not, what would be an appropriate timeframe in your view and why?**

<ESMA\_QUESTION\_OUTA\_3>

In principle yes. However, information on status should be provided as soon as technical possible and it should be clear that orders are not flushed, or market is re-opened without prior possibility for members to remove orders.

<ESMA\_QUESTION\_OUTA\_3>

**Q4 : Do you think the possibility to require trading venues to offer an order book purge should be considered in the guidance? If yes, should ESMA provide further guidance on when the integrity of the orders has been largely compromised?**

<ESMA\_QUESTION\_OUTA\_4>

NSA believes that trading venues need to have rules on clear order updates and status of orders. It is very important to get information on which orders have been executed or not before trading re-opens. It is also important to know if order books will be flushed before re-opening. So, guidance should focus on clear communication on order handling.

<ESMA\_QUESTION\_OUTA\_4>

**Q5 : What is your view with regards to the conditions under which a trading venue should re-open trading?**

<ESMA\_QUESTION\_OUTA\_5>

NSA is of the opinion that it is best to open with a pre-opening phase, which is important for verifying order status, trade status and cancellation status before continuous trading starts again. It is also important to give members enough time to ensure trading systems are fully updated with accurate orders/execution states before the trading re-opens. This time should preferably be 60

minutes. If this could conflict with not being able to open for the day, it could be shortened but should at least be 30 minutes.

<ESMA\_QUESTION\_OUTA\_5>

**Q6 : What is your view in relation to the closing auction being affected and the procedures that trading venues should have in place to minimise disruption?**

<ESMA\_QUESTION\_OUTA\_6>

NSA is of the opinion that it is very important to do everything possible in order to execute a closing auction. This is due to the importance of the auction for setting closing price and executing all end of day re-calibration orders of different products and instruments. NSA therefore believes the auction could be slightly delayed after normal closing time, but not more than 30 minutes. This is mainly because of practical reasons with links to other back-office systems that cannot be delayed too much. In case this is not doable, the “last traded” should be the official closing price<ESMA\_QUESTION\_OUTA\_6>

**Q7 : Do you agree not to mandate trading venues to have an alternative trading venue capable of running the closing auction for them? If not, please explain.**

<ESMA\_QUESTION\_OUTA\_7>

To ensure competition, trading venues should have an alternative trading venue capable of running the closing auction for them. However, there are factors which must be taken into account: The variety of members and costs associated with accessing additional venues could be problematic for smaller investment firms. Furthermore, it would also be important to have complete order status to be able to use a back-up trading venue, which could be a challenge in an outage situation.

Additionally, the Regulated Markets monopoly on “official prices” must be handled due to the legal uncertainty on interpretation of “most relevant market” and official closing price in this situation. To run a separate closing auction on another trading venue these legal uncertainties must be clarified

<ESMA\_QUESTION\_OUTA\_7>

**Q8 : Do you agree that trading venues should have a cut off time (30 minutes before the normal schedule) to inform market participants on whether or not they intend to hold a closing auction?**

<ESMA\_QUESTION\_OUTA\_8>

NSA agrees

<ESMA\_QUESTION\_OUTA\_8>

**Q9 : Do you agree that the use of the last traded price is an appropriate solution in those cases that a trading venue cannot run the closing auction? If not, what alternative would you propose?**

<ESMA\_QUESTION\_OUTA\_9>

NSA agrees. Please also see Q7 for need of legal clarity on official closing price. There should also not be any reference to other sources such as for example a future consolidated tape.

<ESMA\_QUESTION\_OUTA\_9>

**Q10 : Is the lack of a reference price an issue in an outage context? If so, please provide details.**

<ESMA\_QUESTION\_OUTA\_10>

NSA believes it is a big issue as dark markets will not be able to continue due to the use of RPW. It is also an issue if trading continues on a back-up trading venue with the legal uncertainties described in Q7 i.e most relevant market and official closing price definitions. In that case the RPW should be abolished.

<ESMA\_QUESTION\_OUTA\_10>

**Q11 : Do you agree with the proposed approach for non-equity instruments? Do you agree that provisions on par. 37-39 can be exempted for those trading venues that do not provide CLOB?**

<ESMA\_QUESTION\_OUTA\_11>

NSA agrees

<ESMA\_QUESTION\_OUTA\_11>

**Q12 : Is there any particular issue relating to trading of non-equity instruments that should be taken into account in the case of an outage? Where possible please differentiate between bonds and derivatives.**

<ESMA\_QUESTION\_OUTA\_12>

NSA does not see any particular separate issue related to bonds since they still to a large extent are traded OTC and if they are traded "on-exchange" the "outage rules" should be applied. The special issues related to equity derivatives are mostly covered in Q13 below. The same applies for fixed income derivatives i.e the underlying is important for hedging purposes.

<ESMA\_QUESTION\_OUTA\_12>

<ESMA\_QUESTION\_OUTA\_0>

<ESMA\_QUESTION\_OUTA\_0>

**Q13 : Is there a direct link/connection between an outage on an equity primary market and those derivatives that have these instruments as underlyings?**

<ESMA\_QUESTION\_OUTA\_13>

NSA sees a direct link since the equity primary market is the main hedging source. If there are no hedging instruments available, it will have a strong negative impact on the turnover for these derivatives. NSA wants to draw special attention on outages that could occur on expiration days. There should be separate routines implemented to deal with outage situations which occur on an expiration day. This is because it potentially could have a huge impact on the closing values of the related derivatives. There should be no uncertainty on what happens with the calculation of the expiry values in different outage scenarios

<ESMA\_QUESTION\_OUTA\_13>

**Q14 : In your view is there any further element ESMA should consider in the proposed guidance?**

<ESMA\_QUESTION\_OUTA\_14>





NSA kindly highlights once again that ESMA should offer more clarity on what happens when most relevant market status shifts from the incumbent exchange to another trading venue. It is also important to legally define official closing price since this is used for many different products and instruments. If there is uncertainty around these issues liquidity will never to any large extent move to another trading venue in an outage situation. It is also important to secure data access for all participants for a set up with back-up trading venue to be successful.

<ESMA\_QUESTION\_OUTA\_14>