Consultation Paper

Draft RTS on package orders for which there is a liquid market

10 November 2016 | ESMA/2016/1562

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. describe any alternatives ESMA should consider.

ESMA will consider all comments received by **3 January 2017.**

Respondents are invited to use the reply form also published on the ESMA website. All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading Legal Notice.

Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. In particular, responses are sought from trading venues offering trading in packages and market participants trading packages.

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Acronyms used

CA	Competent Authority
CEA	Commodity Exchange Act
CCP	Central Counterparty
CDS	Credit Default Swap
CFTC	Commodity Futures Trading Commission
CP	Consultation Paper
DCM	Designated Contract Market
EEA	European Economic Area
EFP	Exchange for Physical
EMIR	European Market Infrastructures Regulation – Regulation (EU) 648/2012 of the European Parliament and Council on OTC derivatives, central counterparties and trade repositories
ESMA	European Securities and Markets Authority
EU	European Union
EUR	Euro
FX	Foreign Exchange
GBP	British Pound
IMM	International Money Market
IRS	Interest Rate Swap
JPY	Japanese Yen
LIS	Large in scale
MAC	Market Agreed Coupon
MAT	Made available to trade
MBS	Mortgage backed securities
MiFID I	Markets in Financial Instruments Directive I – Directive 2004/39/EC of the European Parliament and of the Council
MIFID II	Markets in Financial Instruments Directive II – Directive 2014/65/EU of the European Parliament and the Council
MIFIR	Markets in Financial Instruments Regulation – Regulation (EU) 600/2014 of the European Parliament and of the Council
OTC	Over-the-counter

Quick Fix Regulation	Regulation (EU) 2016/1033 of the European Parliament and of the Council of 23 June 2016 amending Regulation (EU) No 600/2014 on markets in financial instruments (MiFIR), Regulation (EU) No 596/2014 on market abuse and Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories
RTS	Regulatory Technical Standard
RTS 2	Commission Delegated Regulation (EU) …/…. of 14.7.2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives
SEF	Swap Execution Facility
SI	Systematic Internaliser
SSTI	Size specific to the instrument
USD	US Dollar

1 Executive Summary

Reasons for publication

This consultation paper (CP) seeks stakeholders' views on the draft Regulatory Technical Standard (RTS) ESMA is required to draft under Article 9(6) of Regulation (EU) No 600/2014 establishing a methodology for determining whether there is a liquid market for a package order as a whole.

The input from stakeholders will inform ESMA's decision when finalising this draft RTS. Respondents to the consultations are encouraged to provide the relevant data to support their arguments or proposals.

Contents

Section 2 introduces the topic. Section 3 provides an overview of the transparency regime for packages under MiFID II / MiFIR while section 4 presents the treatment of packages in the US. Section 5 discusses the methodology for identifying standardised and frequently traded package orders for which there is a liquid market as a whole. A request for input for the purpose of the future cost and benefit analysis is provided under section 6. The Annex (section 7) contains the draft RTS.

Next Steps

On the basis of the responses to this CP, ESMA will finalise the draft RTS and submit it to the European Commission for endorsement.

2 Introduction

Article 9 of MiFIR

1.Competent authorities shall be able to waive the obligation for market operators and investment firms operating a trading venue to make public the information referred to in Article 8(1) for:

a) orders that are large in scale compared with normal market size and orders held in an order management facility of the trading venue pending disclosure;

b) actionable indications of interest in request-for-quote and voice trading systems that are above a size specific to the financial instrument, which would expose liquidity providers to undue risk and takes into account whether the relevant market participants are retail or wholesale investors;

c) derivatives which are not subject to the trading obligation specified in Article 28 and other financial instruments for which there is not a liquid market;

d) orders for the purpose of executing an exchange for physical;

e) package orders that meet one of the following conditions:

   i. at least one of its components is a financial instrument for which there is not a liquid market, unless there is a liquid market for the package order as a whole;

   ii. at least one of its components is large in scale compared with the normal market size, unless there is a liquid market for the package order as a whole;

   iii. all of its components are executed on a request-for-quote or voice system and are above the size specific to the instrument.

[...]

2a. Competent authorities shall be able to waive the obligation referred to in Article 8(1) for each individual component of a package order.

[…]

6. In order to ensure the consistent application of points (i) and (ii) of paragraph 1(e), ESMA shall develop draft regulatory technical standards to establish a methodology for determining those package orders for which there is a liquid market. When developing such methodology for determining whether there is a liquid market for a package order as a whole, ESMA shall assess whether packages are standardised and frequently traded.

ESMA shall submit those draft regulatory technical standards to the Commission by 28 February 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 and 14 of Regulation (EU) No 1095/2010.

1. Regulation (EU) 2016/1033 of the European Parliament and of the Council of 23 June 2016 amending Regulation (EU) No 600/2014 on markets in financial instruments (MiFIR), Regulation (EU) No 596/2014 on market abuse and Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories[1] ('Quick Fix' Regulation) introduces a pre-trade transparency regime for package orders.

2. According to the newly added paragraph 6 of Article 9 of MiFIR ESMA is required to develop draft regulatory technical standards (RTS) establishing a methodology for determining those package orders for which there is a liquid market. ESMA is mandated to assess, when developing such methodology, whether packages are standardised and frequently traded. ESMA shall submit the draft RTS to the Commission by 28 February 2017.

3. In order to meet this deadline set by co-legislators, ESMA was not able to publish in a first step a Discussion Paper on this empowerment so has decided to immediately publish a Consultation Paper (CP) including a first draft of the RTS which is subject to a shortened consultation period of seven weeks. The proposals in this CP are based on information received from market participants, in particular trading venues, both existing trading venues under MiFID I as well as entities that are expected to fall under the definition of trading venues under MiFID II, as well as on desk research. The desk research undertaken by ESMA includes a liquidity analysis of package orders covering a period of 4 weeks during which ESMA monitored quotes for a selected sample of different types of package orders in EUR, USD, GBP with interest rate derivatives as derivative components.[2]

4. Given the short time available for delivering this draft RTS, it is important to stress that this CP and the draft RTS in the Annex reflect ESMA's preliminary reflections on this topic. ESMA may significantly amend the draft RTS in view of feedback that it receives to this consultation before submitting the draft RTS to the Commission.

5. The CP presents first the treatment of packages for transparency purposes, particularly focusing on the pre-trade transparency regime for package orders in the EU and the US

[1] OJ L 175, 30.6.2016, p. 1–7
[2] Due to intellectual property rights ESMA is not in a position to disclose the details of this analysis.

and then discusses the methodology considered by ESMA for determining package orders for which there is a liquid market.

6. The CP closes with a call for input for the cost benefit analysis that will accompany this draft RTS.

3 The EU transparency regime for packages

7. Article 8(1)(d) of Commission Delegated Regulation (EU) …/…. of 14.7.2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives (RTS 2) allows competent authorities (CAs) to grant a deferral to package transactions that meet one of the following criteria:

    - one or more of its components are financial instruments which do not have a liquid market;

    - one or more of its components are transactions in financial instruments that are large in scale (LIS) compared with the normal market size as determined in RTS 2;

    - the transaction is executed between an investment firm dealing on own account other than on a matched principal basis as per Article 4(1)(38) of Directive 2014/65/EU (MiFID II) and another counterparty, and one or more of its components are transactions in financial instruments that are above the size specific to the instruments as determined in RTS 2.

8. RTS 2 requires that post-trade information related to package transactions should be made public with respect to each component. Finally, RTS 2 introduces definitions for package transactions, including exchange for physicals (EFPs).

9. However, RTS 2 does not include provisions concerning pre-trade transparency for package orders due to the limited mandate in the Level 1 legislation. In September 2015 when submitting its package of RTS[3] to the Commission for endorsement, ESMA therefore recommended to the Commission to amend MiFIR in order to allow for a tailored application of the pre-trade obligations to package orders.

10. The Quick Fix Regulation introduces a pre-trade transparency regime for package orders. Firstly, definitions of “exchange for physical”, “package order” and “package transaction”, are introduced in Article 2(1) of MiFIR:

[3] ESMA/2015/1464

- "(48) 'exchange for physical' means a transaction in a derivative contract or other financial instrument contingent on the simultaneous execution of an equivalent quantity of an underlying physical asset;

- (49) 'package order' means an order priced as a single unit:

  (a) for the purpose of executing an exchange for physical; or

  (b) in two or more financial instruments for the purpose of executing a package transaction;

- (50) 'package transaction' means:

  (a) an exchange for physical; or

  (b) a transaction involving the execution of two or more component transactions in financial instruments and which fulfils all of the following criteria:

    (i) the transaction is executed between two or more counterparties;

    (ii) each component of the transactions bears meaningful economic or financial risk related to all the other components;

    (iii) the execution of each component is simultaneous and contingent upon the execution of all the other components."

11. Furthermore, the possibility to waive package orders from pre-trade transparency was introduced by adding the two new subparagraphs 9(1)(d) and 9(1)(e) to Article 9(1) of MiFIR. According to Article 9(1)(d) of the amended MiFIR orders for the purpose of executing an EFP may be waived from transparency subject to no conditions.

12. Package orders may be waived according to Article 9(1)(e) if one of the following conditions are met:

    - at least one of its components is a financial instrument for which there is not a liquid market, unless there is a liquid market for the package as a whole;

    - at least one of its components is LIS compared with the normal market size, unless there is a liquid market for the package order as a whole;

    - all of its components are executed on a request-for-quote (RFQ) or voice trading system and are above the size specific to the instrument (SSTI).

13. ESMA understands that packages for which there is a liquid market as a whole may not benefit from the "not a liquid market"-waiver (Article 9(1)(e)(i) of MiFIR) and the LIS-waiver (Article 9(1)(e)(ii) of MiFIR). On the other hand, Article 9(1)(e)(iii) does not ban the use of

the SSTI-waiver for package orders for which there is a liquid market as a whole. Hence, package orders for which there is a liquid market as a whole cannot benefit from the waivers under Article 9(1)(e)(i) and 9(1)(e)(ii), but may benefit from the waiver under Article 9(1)(e)(iii) of MiFIR where all of its components are executed on an RFQ or voice trading system and are above the SSTI-threshold.

14. Finally, the Quick Fix Regulation adds a new paragraph 11 to Article 18 of MiFIR specifying the obligations for systematic internalisers (SIs) concerning package orders:

    "11. In respect of package orders and without prejudice to paragraph 2, the obligations in this Article shall only apply to the package order as a whole and not to any component of the package order separately. "

15. While the pre-trade transparency treatment of package orders resembles to some extent the post-trade transparency treatment for packages there are some important differences to highlight:

16. Firstly, the pre-trade transparency regime for package orders is developed in the framework legal text (level 1), whereas the post-trade transparency provisions for packages are only included in delegated legislation (Level 2).

17. Secondly, the treatment for EFPs differs. Where the amended MiFIR allows to waive orders resulting in the execution of an EFP from transparency subject to no conditions (Article 9(1)(d) of MiFIR), EFPs may only benefit from a deferred publication where one of the three criteria in Article 8(1)(d) of RTS 2 is met.

18. ESMA understands that all orders resulting in the execution of an EFP may benefit from the waiver under Article 9(1)(d) of MiFIR. In this context, and since this waiver is not subject to any conditions, it will not be necessary for orders resulting in the execution of an EFP to make use of the waiver under Article 9(1)(e) unless the CA decides not to grant the waiver under Article 9(1)(d) in its jurisdiction. Without prejudice to the discretion for CAs to grant the Article 9(1)(d) waiver, ESMA does not focus on EFPs for the purpose of this draft RTS when assessing the package orders which, as a whole, have a liquid market. As a consequence of the methodology presented in section 5, orders resulting in the execution of an EFP will not have a liquid market as a whole. ESMA is aware that more guidance is needed on the concept of EFPs, and in particular on the definition of "an underlying physical asset" to allow for a frictionless and consistent pre-trade transparency regime for the purpose of package orders.

19. Thirdly, according to the Quick Fix Regulation package orders for which there is a liquid market as a whole may not benefit from the "not a liquid market" or LIS- waiver under Article 9(1)(e)(i) and (ii) of MiFIR. RTS 2 does not provide for a similar provision for the deferred publication of package transactions. Following the publication of the Quick Fix Regulation ESMA received requests from stakeholders to introduce the possibility to waive pre-trade transparency obligations for a package order that is considered liquid as a whole where the package order is "as a whole" large in scale (LIS) compared with normal market

size. ESMA understands the wish of stakeholders to benefit from a waiver to such orders. However, after due consideration of the legal mandate, ESMA does not see any room for developing LIS-thresholds for liquid package orders.

20. Fourthly, concerning the SI obligations in Article 18 of MiFIR, the new Article 18(11) of MiFIR clarifies that concerning package orders the obligations of SIs apply at the level of the package order and not at the component level.

21. While the SI obligations on package orders are not part of this draft RTS, ESMA considers it important to provide guidance on the application of the SI obligations for package orders following the amendments introduced by the Quick Fix Regulation. In particular, it appears necessary to clarify the circumstances when SIs are required to apply their obligation at an instrument level, and when at the level of the package order.

22. ESMA's preliminary view is that where an investment firm is an SI in at least one component instrument of a package order and is prompted for a quote in this package order, Article 18(11) of MiFIR applies and SIs are required to comply with their obligations at the level of the package order. Where the package order has a liquid market as a whole, the obligations for liquid instruments under Article 18(1) of MiFIR apply. Where the package order does not have a liquid market as a whole, the obligations for illiquid instruments under Article 18(2) of MiFIR apply.

23. Article 18(10) of MiFIR states that SIs are not subject to obligations if they deal above the SSTI size. In the package order context and read in conjunction with Article 9(1)(e)(iii) of MiFIR ESMA understands that SIs are also exempted from obligations under Article 18(1) and (2) of MiFIR if all components of package are above SSTI.

Q1: Do you agree with ESMA's proposal to apply the SI obligations at the package order level where the investment firm is an SI in at least one component instrument of the package order? If not, please explain why and propose an alternative.

24. The post-trade transparency regime for package transactions does not provide for a different treatment for SIs but only clarifies that information related to a package transaction should be made available with respect to each component.

25. Given the differences between the pre- and post-trade transparency regime for packages, ESMA considers it appropriate to develop the methodology for identifying liquid package orders in a separate draft RTS and not to integrate it in RTS 2.

4 The treatment of packages in the US

26. The Commodities and Futures Trading Commission (CFTC) in the US already gathered some experience with the treatment of packages in the context of the implementation of the G20 commitment to trade OTC-derivatives on trading platforms ("trade execution

requirement"). ESMA believes that the work undertaken by the CFTC in this context may be helpful for developing this draft RTS.

27. The final rules implementing the trade execution requirement in the US were published on 4 June 2013 and do not include any specific regime for packages. However, in response to various technological and operational challenges surrounding the execution of package transactions for Designated Contract Markets (DCMs) and Swap Execution Facilities (SEFs), the CFTC provided on 10 February 2014 time-limited no-action relief for package transactions[4] from the trade execution requirements. [5]

28. This first no-action relief letter was followed by a series of further letters narrowing down the categories of package transactions for which no-action relief is provided.[6] Table 1 provides an overview of the different categories of package transactions identified by the CFTC and their current treatment for the purpose of the trade execution requirement.

TABLE 1: OVERVIEW OF THE PACKAGE TRANSACTION RELIEF GRANTED BY CFTC

Package Transaction Category	Relief Expiration
MAT/MAT: Each of the components is a swap subject to the trade execution requirement.	Relief expired May 15, 2014 pursuant to CFTC Letter 14-12.
MAT/Non-MAT (Cleared): At least one of the components is subject to the trade execution requirement and each of the other components is subject to the clearing requirement.	Relief expired June 1, 2014 pursuant to CFTC Letter 14-62.
US Dollar Swap Spreads: Each of the swap components is subject to the trade execution requirement and all other components are U.S. Treasury securities.	Relief expired June 15, 2014 pursuant to CFTC Letter 14-62.
MAT/Agency MBS: Each of the swap components is subject to the trade execution requirement and all other components are agency mortgage-backed securities.	Relief expired May 15, 2015 pursuant to CFTC Letter 14-137.

[4] The CFTC defines a "package transaction" for this purpose as a transaction involving two or more instruments: (1) that is executed between two or more counterparties; (2) that is priced or quoted as one economic transaction with simultaneous execution or near simultaneous execution of all components; (3) that has at least one component that is a swap that is MAT and therefore is subject to the trade execution requirement; and (4) where the execution of each component is contingent upon the execution of all other components.
[5] See: http://www.cftc.gov/idc/groups/public/@newsroom/documents/letter/14-12.pdf
[6] Please refer to CFTC Letter 14-12, CFTC Letter 14-62, CFTC Letter14-137 and CFTC Letter 15-55.

MAT/New Issuance Bond: At least one individual swap component is subject to the trade execution requirement and at least one individual component is a bond issued and sold in the primary market.	Relief from CEA section 2(h)(8) until November 15, 2016. Under this relief, the swap components subject to the trade execution requirement are not required to be executed on a SEF or DCM. Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2016, which permits a SEF or DCM to offer any method of execution for the swap components. Relief from Commission Regulation § 37.3(a)(2) until November 15, 2016, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.
MAT/Futures: At least one individual swap component is subject to the trade execution requirement and all other components are contracts for the purchase or sale of a commodity for future delivery, i.e., futures contracts. This category may include: • MAT swap v. Treasury futures; • MAT swap v. Eurodollar futures.	Relief from CEA section 2(h)(8) until November 15, 2016. Under this relief, the swap components subject to the trade execution requirement are not required to be executed on a SEF or DCM. Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2016, which permits a SEF or DCM to offer any method of execution for the swap components. Relief from Commission Regulation § 37.3(a)(2) until November 15, 2016, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.
MAT/Non-MAT (Uncleared): At least one of the swap components is subject to the trade execution requirement and at least one of the components is a CFTC swap that is not subject to the clearing requirement. This category may include: • MAT swap v. swaption; • MAT swap v. uncleared credit default swap.	Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2016, which permits a SEF or DCM to offer any method of execution for the swap components. Relief from Commission Regulation § 37.3(a)(2) until November 15, 2016, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.

MAT/Non-Swap Instruments: At least one of the swap components is subject to the trade execution requirement and at least one of the components is not a swap. This category excludes U.S. Dollar Swap Spreads, MAT/Futures, MAT/Agency MBS, and MAT/New Issuance Bond. This category may include: • MAT swap v. single-name credit default swap; • MAT swap v. bond (secondary market transaction).	Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2016, which permits a SEF or DCM to offer any method of execution for the swap components. Relief from Commission Regulation § 37.3(a)(2) until November 15, 2016, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.
MAT/Non-CFTC Swap: At least one of the swap components is subject to the trade execution requirement and at least one of the components is a swap over which the CFTC does not have exclusive jurisdiction (e.g., a mixed swap).	Relief from Commission Regulation § 37.9 and CEA section 5(d)(9) until November 15, 2016, which permits a SEF or DCM to offer any method of execution for the swap components. Relief from Commission Regulation § 37.3(a)(2) until November 15, 2016, which permits SEFs to not offer an Order Book as a minimum trading functionality for the swap components.

29. It is to be noted that whereas the CFTC in the course of the last two years decided to extend the time-limited no-action relief to certain types of package transactions, for other types of package transactions it considered it not necessary to prolong this relief and brought as a consequence those package transactions back into the scope of the trade execution requirements. This concerns package transactions where:

- Each of the components is a swap subject to the trade execution requirement;
- at least one of the components is subject to the trade execution requirement and each of the other components is subject to the clearing requirement;
- each of the swap components is subject to the trade execution requirement and all other components are US Treasury securities; and
- each of the swap components is subject to the trade execution requirement and all other components are agency mortgage-backed securities.

30. ESMA is aware that the US approach for packages was developed in the context of the trade execution requirements for swaps in the US which are different to the pre-trade transparency requirements introduced by MiFIR.

31. Firstly, the trade execution requirements in the US apply only to swaps whereas the MiFIR pre-trade transparency under MiFIR does apply to all non-equity instruments. Hence the scope of instruments covered under the MiFIR regime is significantly broader, and the package categories developed by the CFTC may not be sufficiently broad for categorising packages for the purpose of MiFIR, e.g. to incorporate packages with option or future contracts as components.

32. Secondly, the packages categories identified by the CFTC may be subject to the trade execution requirements and pre-trade transparency whereas in the EU there is no one-to-one relationship between the MiFIR pre-trade transparency requirements and the trading obligation for derivatives. The scope of the pre-trade transparency regime applying to all non-equity instruments is broader than the scope of the trading obligation under MiFIR since the latter will only apply to certain derivatives7. Derivatives that are not subject to the clearing obligation – such as ETDs – may be covered by the MiFIR pre-trade transparency requirements but not by the trading obligation since they are not subject to the clearing obligation.

33. Thirdly, the concept of pre-trade transparency in the US and the EU is not the same. MiFIR requires trading venues and, for liquid instruments, systematic internalisers to make public current prices or quotes. Pre-trade transparency in the EU is therefore broader than in the US where the swaps that are made available to trade on a DCM or SEF are required to trade on either an order book or, for SEFs only, an RFQ system.

34. Nevertheless, ESMA believes it is worthwhile to reflect on whether some categories of packages for which the CFTC ended the time-limited no-action relief should also be considered as having a liquid market as a whole for the purpose of this draft RTS. These thoughts are further developed in the following section. Such an approach would have the advantage of contributing to international consistency on the treatment of packages.

5 Methodology for identifying standardised and frequently traded package orders

35. The empowerment to develop draft RTS under Article 9(6) of MiFIR requires ESMA to establish a methodology for determining those package orders for which there is a liquid

[7] ESMA published on 20 September 2016 a discussion paper on the trading obligation for derivatives (ESMA/2016/1389) that is available here: https://www.esma.europa.eu/sites/default/files/library/2016-1389_dp_trading_obligation_for_derivatives_mifir.pdf

market as a whole assessing in particular whether packages are (i) standardised and (ii) frequently traded.

36. ESMA assessed different approaches for developing a methodology for identifying package orders that have a liquid market as a whole, including approaches based on quantitative and/or qualitative criteria.

37. With respect to the frequently traded criterion, ESMA notes that the concept echoes the liquidity criteria prescribed under Article 2(1)(17)(a)(i) and 2(1)(17)(b)(ii) of MiFIR for non-equity and equity financial instruments respectively. Although the concepts look similar, they will have, in ESMA's views, to be applied differently in practice.

38. The concept of "package orders for which there is, as a whole, a liquid market" was construed as an exemption from the waiver application. In other words, it should focus primarily on package orders which could potentially be granted a waiver, e.g. as per the provision of Article 9(1)(e)(i) package orders where at least one component is illiquid.

39. A methodology based on quantitative criteria would resemble to some extent the liquidity assessment under RTS 2. However, it appears less clear how to apply this assessment for packages. One approach - that was brought forward to ESMA in the context of developing the post-trade transparency for package transactions – could consist in assessing the liquidity of a package by replacing the components of a package with one transaction replicating the package.

40. For instance, in the case of a package of swaps, the replicating transaction would aggregate the notional over the average maturity and assess the liquidity of this transaction against the relevant segmentation criteria in RTS 2. While this approach appears very simple, it is unclear how it would work for packages that involve more than one asset class. Furthermore, it appears rather arbitrary to use the segmentation criteria for the replicating transaction without having any further look at the particularities of the package as such.

41. More generally, ESMA is concerned that in the case of packages, where infinite combinations of components can be traded, a liquidity assessment based on quantitative criteria which requires the identification of the different types of packages and the development of tailored liquidity criteria per type of package may not be practicable.

42. ESMA is therefore of the view that the "frequently traded" criterion should, for the purpose of this RTS empowerment, be understood in a broader and more abstract manner than for the purposes of Article 2(1)(17)(a)(i) and 2(1)(17)(b)(ii) of MiFIR.

43. ESMA also considered but decided against an approach where an exhaustive list of specific packages traded in the market would be determined at the level of the technical standard.

44. ESMA believes that any such list would quickly be outdated in view of the emergence of new packages which would then trigger the lengthy process of amending a technical standard.

45. As a consequence, ESMA considers that liquid package orders should not be determined based on a pure quantitative approach but on a holistic approach that takes qualitative elements characteristic for packages that are standardised and frequently traded into account.

46. ESMA aims to establish criteria that identify standardised and liquid package orders across asset classes ("general criteria") while also taking into account criteria that reflect specificities of package orders traded in different classes of derivatives ("asset-class specific criteria"). ESMA considers that combining these two sets of criteria allows the identification of package orders that are liquid as a whole across the various asset classes.

47. In a first step, the general criteria would allow to identify those package orders that may be eligible for qualifying as being liquid as a whole. The application of the asset-class specific criteria in the second step allows then to determine from the eligible package orders those that are actually liquid as a whole.

48. As a last step, similar to the approach of the CFTC in the US, ESMA would look at packages in the context of the trading obligation for derivatives and is considering to treat certain combinations of derivatives subject to the trading obligation and the clearing obligation as liquid package orders.

49. ESMA is aware that one major drawback of the criteria-based approach as described above is to leave a level of uncertainty at this stage about whether some packages are going to have a liquid market as a whole, thereby making it more difficult to assess the impact of this RTS.

50. ESMA would consider mitigating potential uncertainties in the future by publishing a non-exhaustive list of specific types of package orders considered as liquid as part of flexible ESMA Level 3 guidance.

Q2: Do you agree with the proposed methodology based on qualitative criteria? Do you consider an alternative methodology as better suited for identifying liquid package orders as a whole?

51. ESMA identified two general criteria that are applicable across all asset classes:

    i. all components of the package are standardised. This includes that the components are admitted to trading or traded on a trading venue (a regulated market, an MTF or an OTF) and that there is a high level of standardisation of the contractual terms of the components of packages. This criterion ensures that only sufficiently standardised packages within the scope of MiFID II/MiFIR are eligible for being liquid as a whole.

ii. a package order should only be considered liquid as a whole where each derivative financial instrument component of the package can be cleared through a CCP. ESMA believes that linking the liquidity of a package to clearing is helpful since requiring pre-trade transparency for package orders composed of uncleared and cleared derivatives might give rise to technical issues.

Q3: Do you agree with the general criteria for identifying package orders that may be eligible for being liquid as a whole? Do you consider necessary to add further criteria or to remove any of the criteria proposed? Please explain.

Q4: Do you consider it necessary to further specify the first criterion on the standardisation of components? If yes, which characteristics should be considered to specify the standardised components of packages?

52. In a second step, the asset-class specific criteria will allow identifying those package orders that are liquid as a whole.

53. For package orders where all derivative components are <u>interest rate derivatives</u>, ESMA identified the following asset-class specific criteria:

- the package order has no more than three components (this allows including the most current packages such as spreads and butterflies);
- the notional currency of the derivative components is in EUR, USD or GBP; and,
- all derivative components of the package order have an unbroken tenor[8] of 2,3,4,5,6,7,8,9,10 or 30 years +/- 5 days.

Q5: Do you agree with the proposed interest rate derivatives specific criteria? If not, please explain why and present your preferred approach. Do you consider it necessary to add further criteria? If yes, please explain.

Q6: Do you consider that derivative components in other currencies (e.g. other EEA currencies, JPY) should be included? If yes, which ones?

Q7: Do you agree that only packages with derivative components with the above mentioned benchmark dates should be considered liquid? If not, please explain. Which other or additional benchmark dates do you suggest?

Q8: Do you consider that for certain types of packages derivative components that have broken dates (e.g. invoice spreads) or which are traded on IMM and MAC dates (e.g. rolls) have a liquid market?

[8] Tenors refer to the difference between the maturity and execution dates, and represent thus the time remaining to maturity at the outset of the contract.

Q9: Do you consider it necessary to specify criteria for non-derivative components of packages? If yes, which criteria would you suggest and why?

54. For package orders where all derivative components are equity derivatives, the following asset-class criteria were identified:

- the package order has no more than four components (this allows including the most current packages such as spreads and butterflies which have four components in the case of equity derivatives); and,

- the notional currency of the derivative components is in EUR, USD or GBP.

Q10: Do you agree with the proposed equity derivatives specific criteria? If not, please explain why and present your preferred approach. Do you consider it necessary to add further criteria? If yes, please explain.

Q11: Do you consider that derivative components in other currencies (e.g. other EEA currencies, JPY) should be included? If yes, which ones?

Q12: Do you consider it necessary to specify that all components of the package order should have the same underlying? If yes, please explain.

55. For package orders where all derivative components are credit derivatives:

- the package order has two components;

- the package order's derivative components have the same underlying index;

- the notional currency of the derivative components is in EUR, USD or GBP; and,

- the package order moves from the latest off-the-run index series into the current on-the-run index series.

Q13: Do you agree with the proposed credit derivatives specific criteria? If not, please explain why and present your preferred approach. Do you consider it necessary to add further criteria? If yes, please explain

Q14: Do you agree that derivative components in USD, EUR or GBP should be considered sufficiently liquid for the purpose of this RTS? Do you consider that derivative components in other currencies (e.g. other EEA currencies, JPY) should be included? If yes, which ones?

Q15: Do you consider it necessary to further specify the indices that are eligible? If yes, please specify which specific indices should be included. Do you consider it necessary to specify the maturity dates of the underlying indices?

56. For package orders where all derivative components are commodity derivatives:

- the package order has two components;
- the notional currency of the derivative components is in EUR, USD or GBP; and,
- the package order moves from a contract expiring on a particular date into another contract with a different expiry date.

Q16: Do you agree with the proposed commodity derivatives specific criteria? If not, please explain why and present your preferred approach. Do you consider it necessary to add further criteria? If yes, please explain.

Q17: Do you consider that derivative components in other currencies (e.g. other EEA currencies, JPY) should be included? If yes, which ones?

Q18: In which types of contracts do package orders in commodity derivatives mostly occur? Do you consider it necessary to provide for asset class specific criteria that take option and future/forward contracts into account? If yes, please explain.

Q19: Do you consider it necessary to develop criteria at a more granular level (e.g. energy derivatives, agricultural derivatives) to better reflect the particularities of package orders in the different sub-asset classes? If yes, please explain.

Q20: Do you consider it necessary to specify that all components of the package order should have the same underlying? If yes, please explain at which level this concept of "same underlying" should apply (e.g. same asset class, same sub-asset class, same sub-class – as per Annex III of RTS 2 – or at or more granular level).

57. Package orders of all other derivatives asset classes are considered not to have a liquid market as a whole. This includes securitised derivatives, contracts for differences, C10 derivatives and emission allowance derivatives.

58. Concerning FX derivatives, while ESMA is aware that packages may also be traded in this asset class, FX derivatives are considered under RTS 2 as not having a liquid market. This implies that all FX derivatives are in any case eligible for a waiver from pre-trade transparency and that developing an FX derivative-specific approach for packages at this stage would not add value. However, should ESMA consider at a later point in time to review the liquidity assessment of FX derivatives under RTS 2, this may in consequence trigger an amendment to this RTS to include FX derivatives specific criteria.

Q21: Are there package orders in other derivative asset classes that are in your view standardised and frequently traded and which should be eligible for having a liquid market as a whole? If yes, what asset class specific criteria do you suggest for those?

Q22: Do you agree with the approach proposed for FX derivatives or do you consider it necessary to include an asset-class specific approach for FX derivatives?

59. ESMA is aware that some categories of packages cover various asset classes. An example for such a package would be spread overs which include an interest rate swap and a sovereign bond. ESMA is interested in receiving feedback from stakeholders on the treatment of such "cross-asset class packages".

Q23: How should ESMA deal with cross-asset class package orders? Should ESMA develop cross-asset class specific criteria? If yes, please specify those. Alternatively, should cross-asset class package orders be allocated to only one asset class? If yes, how?

60. As a last point, ESMA considers establishing an overriding criterion for considering packages as liquid in the context of the assessment of determining classes of derivatives that should be subject to the trading obligation under Article 32(2) of MiFIR.

61. ESMA considers that package orders where all components are subject to the trading obligation for derivatives should always be considered to have a liquid market as a whole and may therefore not benefit from a waiver from pre-trade transparency unless they meet the conditions in Article 9(1)(e)(iii) of MiFIR. ESMA is aware that there is currently uncertainty as to the classes of derivatives that may be subject to the trading obligation, as ESMA is working in parallel on the trading obligation for derivatives9.

62. The clearing obligation is a precondition for the trading obligation and currently applies to certain classes of interest rate derivatives and credit derivatives. Hence, the potential scope of the trading obligation in the short-to-medium term is limited to these classes of derivatives. ESMA expects that there will be legal certainty ahead of the application of MiFID II as to the derivatives that are subject to the trading obligation.

63. ESMA is furthermore reflecting on whether packages where at least one component is subject to the trading obligation for derivatives, and the remaining component(s) are all subject to the clearing obligation under EMIR should also be considered to have a liquid market as a whole. Since a precondition for imposing the clearing obligation under EMIR is that derivatives are sufficiently standardised and liquid, one could take the view that those packages have a liquid market as a whole. In the draft RTS, ESMA decided to incorporate this option for the purposes of this CP.

64. ESMA notes that the two types of package combinations described above are not exempted from the trading mandate of the CFTC in the US and, as a consequence, are also subject to trade execution and pre-trade transparency requirements.

Q24: Do you agree that package orders where all components are subject to the trading obligation for derivatives should be considered to have a liquid market as a whole? If not, please explain.

[9] Please refer to ESMA's discussion paper on the trading obligation for derivatives (ESMA/2016/1389)

Q25: Do you consider that package orders where at least one component is subject to the trading obligation and all other components are subject to the clearing obligation should be considered to have a liquid market as a whole? If not, please explain.

65. Table 2 presents a list of examples of package categories that would be considered to have a liquid market as a whole based on the methodology developed above. This table does not provide a full list of the package categories that have a liquid market as a whole, but helps illustrating the categories of packages which ESMA expects to be considered to have a liquid market as whole under this draft RTS.

66. As explained before, with the application of MiFID II ESMA may use a more elaborate list to provide guidance on the categories of packages that are considered to have a liquid market to provide trading venues and SIs with more certainty for applying the pre-trade transparency regime for packages.

TABLE 2 CATEGORIES OF STANDARDISED AND FREQUENTLY TRADED PACKAGES

Link to trading obligation	
All components of the package are subject to the trading obligation for derivatives	
Interest rate derivatives	
Package category	Description
Interest rate swap (IRS) curves	2 IRS of different maturities where all components are benchmark contracts and traded in either EUR, USD or GBP.
IRS butterflies	3 IRS of different maturities where all components are benchmark contracts and traded in either EUR, USD or GBP.
Invoice spreads	An IRS and an interest rate future on a sovereign bond where all components are benchmark contracts and traded in either EUR, USD or GBP.
CCP basis swaps	2 IRS cleared at different CCPs where all components are benchmark contracts and traded in either EUR, USD or GBP.
Rolls	Trading out of an IRS or future and buying the next longest maturity where all components are benchmark contracts and traded in either EUR, USD or GBP.

Equity derivatives	
Package category	Description
Time spread	2 equity derivatives of different maturities with the same underlying and traded EUR, USD or GBP.
Straddle	Buy/sell Put, buy/sell Call at same exercise price with the same underlying, same expiration date and traded EUR, USD or GBP.
Butterfly	Buy/sell Call (Put) at a low exercise price, buy/sell call (Put) at a high exercise price, sell/buy two Calls (Put) with an exercise price that is halfway between the low and the high exercise price chosen, with the same underlying and traded in EUR, USD or GBP.
Bear Spread	Buy Call (Put), sell Call (Put) at lower exercise price with the same underlying, same expiration date and traded EUR, USD or GBP.
Bull spread	Buy Call (Put), sell Call (Put) at higher exercise price with the same underlying, same expiration date and traded EUR, USD or GBP.
Credit derivatives	
Package category	Description
Index CDS rolls	Moving from the penultimate version of an index CDS into the latest index version. In particular rolls referencing ITRAXX and CDX indices, in either EUR or USD.
Commodity derivatives	
Package category	Description
Commodity derivative rolls	Moving from a commodity derivatives spot-month future into a further out-month future. Only rolls where all components have the same underlying and that are in either EUR, USD or GBP are eligible.

Calendar spreads	Buying a contract expiring on a particular date and selling a contract with the same underlying expiring on another date in either EUR, USD or GBP.

Q26: Do you agree that the categories of packages above should be considered as standardised and frequently traded for the purpose of this RTS empowerment? If not, please explain.

Q27: Are there any categories of packages missing in the above asset classes that should be considered for the purpose of this RTS empowerment? Are there in your view categories of packages in other asset classes that ESMA should consider?

67. Finally, ESMA considered aligning the post-trade transparency regime for package transactions to the pre-trade transparency regime for package orders, and in particular to introduce the concept of liquid packages as a whole also on the post-trade side. However, after due consideration, ESMA decided not to go for such an alignment given the very short time frame for developing the draft RTS and also having in mind the disadvantages of the pre-trade transparency regime for package orders, in particular the absence of the LIS-waiver. Furthermore, ESMA considers that co-legislators took the conscious decision to go for different approaches for the pre-trade and post-trade transparency regimes applicable to packages.

Q28: Do you agree with the draft RTS in annex IV? If not, please explain.

6 Request for input for the cost-benefit analysis

The following questions aim at gathering compliance costs and other costs and benefits, as well as information on any other impact stemming from the draft RTS proposed by ESMA in this Consultation Paper, for a particular firm, trading venue or for the industry as a whole.

All stakeholders affected by ESMA's draft RTS (trading venues, firms trading packages, end-investors) are invited to respond to Q1 to Q10. Trading venues only are invited to respond to Q11 and Q12. The responses provided will help inform the calibration of ESMA's RTS, and better understand their implications for the various stakeholders.

<u>**For all stakeholders**</u>

CBAQ1: Please identify, per asset class and per currency, the total nominal amount traded (including packages). Please also identify what % of this total trading is executed i) through packages (incl. EFPs) and ii) through packages (with only financial instruments as components), on trading venues and OTC. Reference period: September 2015–September 2016.

If you are a trading venue, please fill in the trading venue columns only

If you are an investment firm, please fill in the trading venue and OTC columns as appropriate.

	Total Nominal amount traded, including packages (in euros) Sept 2015-Sept 2016		**% of packages (including EFPs)**		**% of packages (with only financial instruments as components)**	
	Trading venues	OTC	Trading venues	OTC	Trading venues	OTC
Interest rate derivatives						
Euro						
USD						
GBP						
Other currencies						

(please specify)						
Equity derivatives						
Euro						
USD						
GBP						
Other currencies (please specify)						
Credit derivatives						
Euro						
USD						
GBP						
Other currencies (please specify)						
Commodity derivatives						
Euro						
USD						
GBP						
Other currencies (please specify)						

CBAQ2: Based on ESMA draft RTS, out of the package orders (comprised only of financial instruments) that you trade, which percentage of the volume traded do you expect to be considered as having a liquid market as a whole? Please confirm which category the package orders you trade fall under:

- **1= less than 10% of the volume of package orders traded;**
- **2= from 10% to 25% of the volume of package orders traded;**
- **3= from 25% to 50% of the volume of package orders traded;**
- **4= from 50% to 75% of the volume of package orders traded; or,**
- **5= more than 75% of the of the volume of package orders traded.**

CBAQ3: In which area do you anticipate the costs of complying with ESMA' draft RTS to stem from (e.g. IT, training)?

CBAQ4: Could you provide an indication of the expected implementation costs of ESMA' draft RTS (in euros) differentiating between (i) one-off costs and (ii) recurring costs (on an annual basis)?

CBAQ5: In relation to the size of your business, do you expect those costs to be:

- **very low;**
- **low;**
- **medium; or,**
- **high.**

CBAQ6: Do you expect any impact from ESMA's draft RTS on your business model/activity? If so, please explain the drivers and the expected changes to your business model/activity.

CBAQ7: Do you expect you expect broader market changes from the draft RTS in the short or medium term?

CBAQ8: If so, please explain

Expected Impact on	Yes/No/NA	Positive Impact	Negative impact

Market structure (changes in trading models, in trading strategies…)			
Liquidity (please explain how you measure liquidity)			
End users			
Other (specify)			

CBAQ9: Are their specific concerns regarding ESMA's draft RTS you would wish to highlight? Please be as specific as possible in your answer.

CBAQ10; Are there specific benefits arising from ESMA's draft RTS you would wish to mention?

<u>**For trading venues only**</u>

CBAQ11: Do you offer trading in packages?

CBAQ12: If so, please describe, per asset class, the categories of packages for which pre-trade transparency is currently provided. Please also state whether you consider those packages as liquid and the criteria taken into consideration (e.g. spreads, volume traded, number of transactions, number of market participants). If no sufficient space is available to respond, please provide the information in an annex.

Package Categories with pre-trade transparency	Currency	Tenor	Reference index	Other characteristics (please identify)	Liquidity assessment (Y/N) and underlying criteria
Interest rate derivatives					

Equity derivatives					
Credit derivatives					
Commodity derivatives					
Others (please specify)					

7 Annexes

7.1 Annex I – Summary of questions

Summary of questions

Q1: Do you agree with ESMA's proposal to apply the SI obligations at the package order level where the investment firm is an SI in at least one component instrument of the package order? If not, please explain why and propose an alternative.

Q2: Do you agree with the proposed methodology? Do you consider an alternative methodology as better suited for identifying liquid package orders as a whole?

Q3: Do you agree with the general criteria for identifying package orders that may be eligible for being liquid as a whole? Do you consider necessary to add further criteria or to remove any of the criteria proposed? Please explain.

Q4: Do you consider it necessary to further specify the first criterion on the standardisation of components? If yes, which characteristics should be considered to specify the standardised components of packages?

Q5: Do you agree with the proposed interest rate derivatives specific criteria? If not, please explain why and present your preferred approach. Do you consider it necessary to add further criteria? If yes, please explain.

Q6: Do you consider that derivative components in other currencies (e.g. other EEA currencies, JPY) should be included? If yes, which ones?

Q7: Do you agree that only packages derivative components with the above mentioned benchmark dates should be considered liquid? If not, please explain. Which other or additional benchmark dates do you suggest?

Q8: Do you consider that for certain types of packages derivative components that have broken dates (e.g. invoice spreads) or which are traded on IMM and MAC dates (e.g. rolls) have a liquid market?

Q9: Do you consider it necessary to specify criteria to take any requirements on non-derivative components of packages into account? If yes, which criteria would you suggest and why?

Q10: Do you agree with the proposed equity derivatives specific criteria? If not, please explain why and present your preferred approach. Do you consider it necessary to add further criteria? If yes, please explain.

Q11: Do you consider that derivative components in other currencies (e.g. other EEA currencies, JPY) should be included? If yes, which ones?

Q12: Do you consider it necessary to specify that all components of the package order should have the same underlying? If yes, please explain.

Q13: Do you agree with the proposed credit derivatives specific criteria? If not, please explain why and present your preferred approach. Do you consider it necessary to add further criteria? If yes, please explain

Q14: Do you agree that derivative components in USD, EUR or GBP should be considered sufficiently liquid for the purpose of this RTS? Do you consider that derivative components in other currencies (e.g. other EEA currencies, JPY) should be included? If yes, which ones?

Q15: Do you consider it necessary to further specify the indices that are eligible? If yes, please specify which specific indices should be included. Do you consider it necessary to specify the maturity dates of the underlying indices?

Q16: Do you agree with the proposed commodity derivatives specific criteria? If not, please explain why and present your preferred approach. Do you consider it necessary to add further criteria? If yes, please explain.

Q17: Do you consider that derivative components in other currencies (e.g. other EEA currencies, JPY) should be included? If yes, which ones?

Q18: In which types of contracts do package orders in commodity derivatives mostly occur? Do you consider it necessary to provide for asset class specific criteria that take option and future/forward contracts into account? If yes, please explain.

Q19: Do you consider it necessary to develop criteria at a more granular level (e.g. energy derivatives, agricultural derivatives) to better reflect the particularities of package orders in the different sub-asset classes? If yes, please explain.

Q20: Do you consider it necessary to specify that all components of the package order should have the same underlying? If yes, please explain at which level this concept of "same underlying" should apply (e.g. same asset class, same sub-asset class, same sub-class – as per Annex III of RTS 2 – or at or more granular level.

Q21: Are there package orders in other derivative asset classes that are in your view standardised and frequently traded and which should be eligible for having a liquid market as a whole? If yes, what asset class specific criteria do you suggest for those?

Q22: Do you agree with the approach proposed for FX derivatives or do you consider it necessary to include an asset-class specific approach for FX derivatives?

Q23: How should ESMA deal with cross-asset class package orders? Should ESMA develop cross-asset class specific criteria? If yes, please specify those. Alternatively, should cross-asset class package orders be allocated to only one asset class? If yes, how?

Q24: Do you agree that package orders where all components are subject to the trading obligation for derivatives should be considered to have a liquid market as a whole? If not, please explain

Q25: Do you consider that package orders where at least one component is subject to the trading obligation and all other components are subject to the clearing obligation should be considered to have a liquid market as a whole? If not, please explain.

Q26: Do you agree that the categories of packages above should be considered as standardised and frequently traded for the purpose of this RTS empowerment? If not, please explain.

Q27: Are there any categories of packages missing in the above asset classes that should be considered for the purpose of this RTS empowerment? Are there in your view categories of packages in other asset classes that ESMA should consider?

Q28: Do you agree with the draft RTS in annex IV? If not, please explain.

CBA questions

<u>For all stakeholders</u>

CBAQ1: Please identify, per asset class and per currency, the total nominal amount traded (including packages). Please also identify what % of this total trading is executed i) through packages (including EFPs) and ii) through packages (with only financial instruments as components), on trading venues and OTC. Reference period: September 2015–September 2016.

If you are a trading venue, please fill in the trading venue columns only

If you are an investment firm, please fill in the trading venue and OTC columns as appropriate.

	Total Nominal amount traded, including packages (in euros) Sept 2015-Sept 2016		**% of packages (including EFPs)**		**% of Packages (with only financial instruments as components)**	
	Trading venues	OTC	Trading venues	OTC	Trading venues	OTC
Interest rate derivatives						

Euro						
USD						
GBP						
Other currencies (please specify)						
Equity derivatives						
Euro						
USD						
GBP						
Other currencies (please specify)						
Credit derivatives						
Euro						
USD						
GBP						
Other currencies (please specify)						
Commodity derivatives						
Euro						
USD						

GBP						
Other currencies (please specify)						

CBAQ2: Based on ESMA draft RTS, out of the package orders (comprised only of financial instruments) that you trade, which percentage of the volume traded do you expect to be considered as having a liquid market as a whole? Please confirm which category the package orders you trade fall under:

- **1= less than 10% of the volume of package orders traded;**
- **2= from 10% to 25% of the volume of package orders traded;**
- **3= from 25% to 50% of the volume of package orders traded;**
- **4= from 50% to 75% of the volume of package orders traded; or,**
- **5= more than 75% of the of the volume of package orders traded.**

CBAQ3: In which area do you anticipate the costs of complying with ESMA' draft RTS to stem from (e.g. IT, training)?

CBAQ4: Could you provide an indication of the expected implementation costs of ESMA' draft RTS (in euros) differentiating between (i) one-off costs and (ii) recurring costs (on an annual basis)?

CBAQ5: In relation to the size of your business, do you expect those costs to be:

- **very low;**
- **low;**
- **medium; or,**
- **high.**

CBAQ6: Do you expect any impact from ESMA's draft RTS on your business model/activity? If so, please explain the drivers and the expected changes to your business model/activity

CBAQ7: Do you expect you expect broader market changes from the draft RTS in the short or medium term?

CBAQ8: If so, please explain

Expected Impact on	Yes/No/NA	Positive Impact	Negative impact
Market structure (changes in trading models, in trading strategies…)			
Liquidity (please explain how you measure liquidity)			
End users			
Other (specify)			

CBAQ9: Are their specific concerns regarding ESMA's draft RTS you would wish to highlight? Please be as specific as possible in your answer.

CBAQ10; Are there specific benefits arising from ESMA's draft RTS you would wish to mention?

<u>For trading venues only</u>

CBAQ11: Do you offer trading in packages?

CBAQ12: If so, please describe, per asset class, the categories of packages for which pre-trade transparency is currently provided. Please also state whether you consider those packages as liquid and the criteria taken into consideration (e.g. spreads, volume traded, number of transactions, number of market participants). If no sufficient space is available to respond, please provide the information in an annex.

Package Categories with pre-	Currency	Tenor	Reference index	Other characteristics (please identify)	Liquidity assessment (Y/N) and

trade transparency					underlying criteria
Interest rate derivatives					
Equity derivatives					
Credit derivatives					
Commodity derivatives					
Others (please specify)					

7.2 Annex II – Legislative mandate to develop regulatory technical standards

Article 9 of MiFIR

6. In order to ensure the consistent application of points (i) and (ii) of paragraph 1(e), ESMA shall develop draft regulatory technical standards to establish a methodology for determining those package orders for which there is a liquid market. When developing such methodology for determining whether there is a liquid market for a package order as a whole, ESMA shall assess whether packages are standardised and frequently traded.

ESMA shall submit those draft regulatory technical standards to the Commission by 28 February 2017.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 and 14 of Regulation (EU) No 1095/2010.

7.3 Annex III - Draft regulatory technical standard on packages orders for which there is a liquid market

COMMISSION DELEGATED REGULATION (EU) .../...

of [ ]

supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to package orders

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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[10] , and in particular Articles 9(6) thereof,

Whereas:

(1) Regulation (EU) No 600/2014 provides for a pre-trade transparency regime for package orders that are comprised of a number of interlinked and contingent components in derivatives and other financial instruments or physical assets. Regulation (EU) No 600/2014 specifies that the pre-trade transparency requirements apply also to package orders and the conditions under which waivers from such pre-trade transparency requirements could be granted by the competent authorities. At the same time, Regulation (EU) No 600/2014 recognises that for certain package orders it is important to restrict the use of pre-trade transparency waivers available to package orders, and in particular where such package orders are sufficiently standardised and frequently traded to be considered to have a liquid market as a whole.

(2) Package orders are common across different asset classes and may include a multitude of different components within the same asset class or across asset classes. Therefore, the definition of package orders can in practice apply to an unlimited number of combinations of components. It is therefore appropriate to adopt a holistic approach and to establish qualitative criteria identifying those package orders which should be considered as standardised and liquid as a whole. Such qualitative criteria should include general criteria

[10] OJ L 173, 12.6.2014, p. 84

applicable across all asset classes as well as criteria which are more specific to the different asset classes a package order is traded in.

(3) Moreover, the determination of the classes of derivatives subject to the trading obligation under Regulation (EU) No 600/2014 and to a lesser extent for the clearing obligation under Regulation (EU) No 648/2012 of the European Parliament and of the Council [11] presupposes that the derivatives within those classes are sufficiently standardised and liquid. Therefore, it is appropriate to consider a package order liquid as a whole where at least one component is individually subject to the trading obligation and all other components are subject to the clearing obligation.

(4) For package orders where all derivative components are interest rate derivatives, it is appropriate to consider as liquid as a whole only those package orders with derivatives components with tenors where most transactions are concentrated in. However, it is important not to interpret those tenors in a too strict manner but rather as intervals so as to take into account the liquidity pattern of those instruments as well as to avoid regulatory arbitrage.

(5) For package orders where derivative components are credit derivatives, it is appropriate to include strategies consisting in moving from the penultimate version of a derivative (off-the-run) into the most recent version (on-the-run) which are standardised and frequently traded package orders commonly used by market participants to roll their position as soon as the new version of a credit derivative becomes effective.

(6) For reasons of consistency and in order to ensure the smooth functioning of the financial markets, it is necessary that this Regulation and the provisions laid down in Regulation (EU) No 600/2014 apply from the same date.

(7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(8) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the opinion of the Securities and Markets Stakeholder Group established by Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[3],

HAS ADOPTED THIS REGULATION:

[11] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p.1)

Article 1

Package orders for which there is a liquid market as a whole

A package order shall be considered to have a liquid market as a whole where one of the following conditions is satisfied:

(a) the package order is composed of derivatives where at least one component belongs to a class of derivatives that has been declared subject to the trading obligation for derivatives in accordance with the procedure described under Article 32 of Regulation (EU) No 600/2014 and where the remaining components belong to a class of derivatives that has been declared subject to the clearing obligation for derivatives in accordance with the procedure described under Article 5 of Regulation (EU) No 648/2012;

(b) the package order meets the general criteria under Article 2 and the asset-class specific criteria under Article 3.

Article 2

General criteria for identifying package orders for which there is a liquid market as a whole

1. All of the components of a package order shall meet the following general criteria:

(a) they are admitted to trading or traded on a trading venue;

(b) they have standardised contractual terms.

2. The derivative components of a package order shall be available for clearing through a central counterparty.

Article 3

Asset-class specific criteria for identifying package orders for which there is a liquid market as a whole

1. A package order where all derivatives components are interest rate derivatives shall meet the following criteria:

(a) the package order has no more than three components;

(b) the notional currency of the derivative components is in EUR, USD or GBP;

(c) the derivative components of the package order have a tenor of 2, 3, 4, 5, 6, 7, 8, 9, 10 or 30 years.

2. A package order where all derivatives components are equity derivatives shall meet the following criteria:

(a) the package order has no more than four components;

(b) the notional currency of the derivative components is in EUR, USD or GBP.

3. A package order where all derivatives components are credit derivatives shall meet the following criteria:

(a) all the derivative components of the package order have the same underlying index;

(b) the notional currency of the derivative components is in EUR, USD or GBP;

(c) the package order moves from the latest off-the-run index series into the current on-the-run index series.

4. A package order where all derivatives components are commodity derivatives shall meet the following criteria:

(a) the package order has two components;

(b) the notional currency of the derivative components is in EUR, USD or GBP;

(c) The package order moves from a contract with a specified maturity data into another contract with a different maturity date.

5. A package order that includes derivative components outside those classes of derivatives specified in paragraph 1 to 4 shall not be considered to have a liquid market as a whole.

6. For the purpose of paragraph 1(c), a derivative shall be deemed to have a tenor of 2, 3, 4, 5, 6, 7, 8, 9, 10 or 30 years where the termination date of the derivative falls within the time period commencing five days before and ending five days after the specified maturities.

Article 4

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall apply from 3 January 2018.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President

[For the Commission
On behalf of the President

[Position]