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| Reply form for the  Consultation Paper on MiFID II / MiFIR |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on MiFID II / MiFIR (reference ESMA/2014/1570), 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. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

1. use this form and send your responses in Word format (do not send pdf files except for annexes);
2. do not remove the tags of type <ESMA\_QUESTION\_CP\_MIFID\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
3. 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:

1. if they respond to the question stated;
2. contain a clear rationale, and
3. describe any alternatives that ESMA should consider.

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010.

Naming protocol:

In order to facilitate the handling of stakeholders responses please save your document using the following format: ESMA\_CP\_MIFID\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

**E.g.** if the respondent were ESMA, the name of the reply form would be ESMA\_CP\_MIFID \_ESMA\_REPLYFORM or ESMA\_CP\_MIFID\_ESMA\_ANNEX1

Deadline

Responses must reach us by **2 March 2015**.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your in-put/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 under the headings ’Legal notice’ and ‘Data protection’.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | ICE Group |
| Confidential[[1]](#footnote-1) |  |
| Activity: | Other Financial service providers |
| Are you representing an association? |  |
| Country/Region | UK |

# Introduction

Please make your introductory comments below, if any:

< ESMA\_COMMENT\_CP\_MIFID\_1>

We have described ourselves above as “Other Financial Service Provider” because we are a market infrastructure provider with both CCPs and Regulated Markets in the Group. We have submitted a full and detailed response which includes our feedback on the Regulatory Technical Standards (“RTS”) on which ESMA has consulted. One over-arching and recurring theme in the draft RTS to which we would like to draw ESMA’s attention is the necessity to properly distinguish between cash equities and derivatives. These two product classes are completely different in terms of market characteristics and how their risk are transmitted: therefore each RTS should be drafted with this in mind.

We are writing to highlight four notable areas of concern in the draft Level 2 text, which we feel require more attention and further drafting. In our view it is necessary to refine certain technical details as laid out below. We would like to draw ESMA’s attention to flaws that could cause unnecessary and major disruption in to markets if not addressed in the final RTS. More detail on these issues can also be found in our detailed response to ESMA’s specific questions.

**RTS 9: Transparency for Derivatives**

ESMA’s proposed framework for transparency for derivatives (RTS 9) is currently insufficiently graduated and does not take adequate account of the different liquidity profiles of instruments currently traded on regulated derivatives markets. We accept that in this area ESMA concedes that more work needs to be done. However as currently proposed, while not consistent across all derivative products, the draft RTS would not only lead to a significant reduction in market transparency, but also deter the development of liquidity in new markets, which should be encouraged.

**RTS 15: Market Making**

We understand that certain parameters were laid down in Level 1 which imposed constraints on the drafting of RTS 15. However, we take issue with the premise of RTS 15. In particular, the RTS argues that market makers should be expected to continue to provide liquidity even in 'Fast Market' conditions of exceptional volatility. We disagree. To impose such obligations on market makers is to require them to take on undue, and in some cases, almost unquantifiable risk. This is inconsistent with what should be the primary objective of the changes introduced by EMIR, MiFID II and MiFIR, of taking risk out of the financial system.

**RTS 24: Non-discriminatory Access**

In circumstances where clearing for a range of OTC derivatives is mandatory, ensuring non-discriminatory access to clearing services is appropriate. However we do not believe that the current draft RTS are consistent with the Level 1 text. What is proposed by ESMA lacks proportionality and the draft RTS is in danger of obliging CCPs to assume risks, among them legal risks, irrespective of whether they can be mitigated, in contravention of EMIR. It would be a perverse result of MiFID if non-discriminatory access led to a lowering of the high risk management standards that EMIR did so much to establish. We provide more detail on these points in our response.

**RTS 33: Transaction Reporting**

We believe that the current proposals regarding transaction reporting risk imposing a considerable burden on the entire industry for no corresponding gain. We question whether NCAs make effective use of existing transaction reports under MiFID I, let alone the radically enlarged transaction report proposed by ESMA.

We value the opportunity to provide feedback to the draft Level 2 RTS. We hope that our feedback and that of others is carefully considered to ensure that the final RTS do not create unintended consequences resulting in increased systemic risk, market disruption or a reduction in liquidity to markets, which are vitally important in supporting EU growth and the ability to manage risk and invest in a transparent and regulated market.

< ESMA\_COMMENT\_CP\_MIFID\_1>

* Investor protection

1. Do you agree with the list of information set out in draft RTS to be provided to the competent authority of the home Member State? If not, what other information should ESMA consider?

<ESMA\_QUESTION\_CP\_MIFID\_1>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_1>

1. Do you agree with the conditions, set out in this CP, under which a firm that is a natural person or a legal person managed by a single natural person can be authorised? If no, which criteria should be added or deleted?

<ESMA\_QUESTION\_CP\_MIFID\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_2>

1. Do you agree with the criteria proposed by ESMA on the topic of the requirements applicable to shareholders and members with qualifying holdings? If no, which criteria should be added or deleted?

<ESMA\_QUESTION\_CP\_MIFID\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_3>

1. Do you agree with the approach proposed by ESMA on the topic of obstacles which may prevent effective exercise of the supervisory functions of the competent authority?

<ESMA\_QUESTION\_CP\_MIFID\_4>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_4>

1. Do you consider that the format set out in the ITS allow for a correct transmission of the information requested from the applicant to the competent authority? If no, what modification do you propose?

<ESMA\_QUESTION\_CP\_MIFID\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_5>

1. Do you agree consider that the sending of an acknowledgement of receipt is useful, and do you agree with the proposed content of this document? If no, what changes do you proposed to this process?

<ESMA\_QUESTION\_CP\_MIFID\_6>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_6>

1. Do you have any comment on the authorisation procedure proposed in the ITS included in Annex B?

<ESMA\_QUESTION\_CP\_MIFID\_7>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_7>

1. Do you agree with the information required when an investment firm intends to provide investment services or activities within the territory of another Member State under the right of freedom to provide investment services or activities? Do you consider that additional information is required?

<ESMA\_QUESTION\_CP\_MIFID\_8>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_8>

1. Do you agree with the content of information to be notified when an investment firm or credit institution intends to provide investment services or activities through the use of a tied agent located in the home Member State?

<ESMA\_QUESTION\_CP\_MIFID\_9>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_9>

1. Do you consider useful to request additional information when an investment firm or market operator operating an MTF or an OTF intends to provide arrangements to another Member State as to facilitate access to and trading on the markets that it operates by remote users, members or participants established in their territory? If not which type of information do you consider useful to be notified?

<ESMA\_QUESTION\_CP\_MIFID\_10>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_10>

1. Do you agree with the content of information to be provided on a branch passport notification?

<ESMA\_QUESTION\_CP\_MIFID\_11>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_11>

1. Do you find it useful that a separate passport notification to be submitted for each tied agent the branch intends to use?

<ESMA\_QUESTION\_CP\_MIFID\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_12>

1. Do you agree with the proposal to have same provisions on the information required for tied agents established in another Member State irrespective of the establishment or not of a branch?

<ESMA\_QUESTION\_CP\_MIFID\_13>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_13>

1. Do you agree that any changes in the contact details of the investment firm that provides investment services under the right of establishment shall be notified as a change in the particulars of the branch passport notification or as a change of the tied agent passport notification under the right of establishment?

<ESMA\_QUESTION\_CP\_MIFID\_14>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_14>

1. Do you agree that credit institutions needs to notify any changes in the particulars of the passport notifications already communicated?

<ESMA\_QUESTION\_CP\_MIFID\_15>

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<ESMA\_QUESTION\_CP\_MIFID\_15>

1. Is there any other information which should be requested as part of the notification process either under the freedom to provide investment services or activities or the right of establishment, or any information that is unnecessary, overly burdensome or duplicative?

<ESMA\_QUESTION\_CP\_MIFID\_16>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_16>

1. Do you agree that common templates should be used in the passport notifications?

<ESMA\_QUESTION\_CP\_MIFID\_17>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_17>

1. Do you agree that common procedures and templates to be followed by both investment firms and credit institutions when changes in the particulars of passport notifications occur?

<ESMA\_QUESTION\_CP\_MIFID\_18>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_18>

1. Do you agree that the deadline to forward to the competent authority of the host Member State the passport notification can commence only when the competent authority of the home Member States receives all the necessary information?

<ESMA\_QUESTION\_CP\_MIFID\_19>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_19>

1. Do you agree with proposed means of transmission?

<ESMA\_QUESTION\_CP\_MIFID\_20>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_20>

1. Do you find it useful that the competent authority of the host Member State acknowledge receipt of the branch passport notification and the tied agent passport notification under the right of establishment both to the competent authority and the investment firm?

<ESMA\_QUESTION\_CP\_MIFID\_21>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_21>

1. Do you agree with the proposal that a separate passport notification shall be submitted for each tied agent established in another Member State?

<ESMA\_QUESTION\_CP\_MIFID\_22>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_22>

1. Do you find it useful the investment firm to provide a separate passport notification for each tied agent its branch intends to use in accordance with Article 35(2)(c) of MiFID II? Changes in the particulars of passport notification

<ESMA\_QUESTION\_CP\_MIFID\_23>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_23>

1. Do you agree to notify changes in the particulars of the initial passport notification using the same form, as the one of the initial notification, completing the new information only in the relevant fields to be amended?

<ESMA\_QUESTION\_CP\_MIFID\_24>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_24>

1. Do you agree that all activities and financial instruments (current and intended) should be completed in the form, when changes in the investment services, activities, ancillary services or financial instruments are to be notified?

<ESMA\_QUESTION\_CP\_MIFID\_25>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_25>

1. Do you agree to notify changes in the particulars of the initial notification for the provision of arrangements to facilitate access to an MTF or OTF?

<ESMA\_QUESTION\_CP\_MIFID\_26>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_26>

1. Do you agree with the use of a separate form for the communication of the information on the termination of the operations of a branch or the cessation of the use of a tied agent established in another Member State?

<ESMA\_QUESTION\_CP\_MIFID\_27>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_27>

1. Do you agree with the list of information to be requested by ESMA to apply to third country firms? If no, which items should be added or deleted. Please provide details on your answer.

<ESMA\_QUESTION\_CP\_MIFID\_28>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_28>

1. Do you agree with ESMA’s proposal on the form of the information to provide to clients? Please provide details on your answer.

<ESMA\_QUESTION\_CP\_MIFID\_29>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_29>

1. Do you agree with the approach taken by ESMA? Would a different period of measurement be more useful for the published reports?

<ESMA\_QUESTION\_CP\_MIFID\_30>

ICE believes that such reports could be valuable in certain circumstances for users of equity trading venues. For non-equity trading venues, we do not believe this to be the case, and see no reason why the requirements to produce such reports should be extended beyond equity products. This is particularly the case given that from ICE's analysis of the proposals relating to the production of quality of execution reports, it is clear that a very large amount of work will be necessary to produce the required reports. Indeed, without further clarification of the details, it is not possible to determine whether it will even be possible to extract or derive the necessary information in all cases. Without further specification the requirements will not be applied correctly, rendering it inaccurate and either meaningless or misleading. For example, we foresee significant challenges with the complexities of option valuation and reporting on transactions in the value ranges, and similarly we are concerned that without clear currency conversion guidelines the data would not be comparable.

For whichever products such reports are required, we would strongly recommend that realistic standards be drawn up in conjunction with the industry, through the use of appropriate working groups, which result in a reasonable degree of practical usability for users, for non-equity products. This approach will provide the basis for a more cost-effective and manageable set of reports.

<ESMA\_QUESTION\_CP\_MIFID\_30>

1. Do you agree that it is reasonable to split trades into ranges according to the nature of different classes of financial instruments? If not, why?

<ESMA\_QUESTION\_CP\_MIFID\_31>

See our response to Q30.

<ESMA\_QUESTION\_CP\_MIFID\_31>

1. Are there other metrics that would be useful for measuring likelihood of execution?

<ESMA\_QUESTION\_CP\_MIFID\_32>

See our response to Q30.

<ESMA\_QUESTION\_CP\_MIFID\_32>

1. Are those metrics meaningful or are there any additional data or metrics that ESMA should consider?

<ESMA\_QUESTION\_CP\_MIFID\_33>

See our response to Q30.

<ESMA\_QUESTION\_CP\_MIFID\_33>

1. Do you agree with the proposed approach? If not, what other information should ESMA consider?

<ESMA\_QUESTION\_CP\_MIFID\_34>

See our response to Q30.

<ESMA\_QUESTION\_CP\_MIFID\_34>

1. Do you agree with the proposed approach? If not, what other information should ESMA consider?

<ESMA\_QUESTION\_CP\_MIFID\_35>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_35>

1. Do you agree with the proposed approach? If not, what other information should ESMA consider?

<ESMA\_QUESTION\_CP\_MIFID\_36>

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<ESMA\_QUESTION\_CP\_MIFID\_36>

* Transparency

1. Do you agree with the proposal to add to the current table a definition of request for quote trading systems and to establish precise pre-trade transparency requirements for trading venues operating those systems? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_37>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_37>

1. Do you agree with the proposal to determine on an annual basis the most relevant market in terms of liquidity as the trading venue with the highest turnover in the relevant financial instrument by excluding transactions executed under some pre-trade transparency waivers? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_38>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_38>

1. Do you agree with the proposed exhaustive list of negotiated transactions not contributing to the price formation process? What is your view on including non-standard or special settlement trades in the list? Would you support including non-standard settlement transactions only for managing settlement failures? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_39>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_39>

1. Do you agree with ESMA’s definition of the key characteristics of orders held on order management facilities? Do you agree with the proposed minimum sizes? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_40>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_40>

1. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for shares and depositary receipts? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_41>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_41>

1. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for ETFs? Would you support an alternative approach based on a single large in scale threshold of €1 million to apply to all ETFs regardless of their liquidity? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_42>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_42>

1. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for certificates? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_43>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_43>

1. Do you agree with the proposed approach on stubs? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_44>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_44>

1. Do you agree with the proposed conditions and standards that the publication arrangements used by systematic internalisers should comply with? Should systematic internalisers be required to publish with each quote the publication of the time the quote has been entered or updated? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_45>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_45>

1. Do you agree with the proposed definition of when a price reflects prevailing conditions? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_46>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_46>

1. Do you agree with the proposed classes by average value of transactions and applicable standard market size? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_47>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_47>

1. Do you agree with the proposed list of transactions not contributing to the price discovery process in the context of the trading obligation for shares? Do you agree that the list should be exhaustive? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_48>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_48>

1. Do you agree with the proposed list of information that trading venues and investment firms shall made public? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_49>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_49>

1. Do you consider that it is necessary to include the date and time of publication among the fields included in Table 1 Annex 1 of Draft RTS 8? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_50>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_50>

1. Do you agree with the proposed list of flags that trading venues and investment firms shall made public? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_51>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_51>

1. Do you agree with the proposed definitions of normal trading hours for market operators and for OTC? Do you agree with shortening the maximum possible delay to one minute? Do you think some types of transactions, such as portfolio trades should benefit from longer delays? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_52>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_52>

1. Do you agree that securities financing transactions and other types of transactions subject to conditions other than the current market valuation of the financial instrument should be exempt from the reporting requirement under article 20? Do you think other types of transactions should be included? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_53>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_53>

1. Do you agree with the proposed classes and thresholds for large in scale transactions in shares and depositary receipts? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_54>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_54>

1. Do you agree with the proposed classes and thresholds for large in scale transactions in ETFs? Should instead a single large in scale threshold and deferral period apply to all ETFs regardless of the liquidity of the financial instrument as described in the alternative approach above? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_55>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_55>

1. Do you agree with the proposed classes and thresholds for large in scale transactions in certificates? Please provide reasons for your answers

<ESMA\_QUESTION\_CP\_MIFID\_56>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_56>

1. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer for SFPs and for each of type of bonds identified (European Sovereign Bonds, Non-European Sovereign Bonds, Other European Public Bonds, Financial Convertible Bonds, Non-Financial Convertible Bonds, Covered Bonds, Senior Corporate Bonds-Financial, Senior Corporate Bonds Non-Financial, Subordinated Corporate Bonds-Financial, Subordinated Corporate Bonds Non-Financial) addressing the following points:
   1. Would you use different qualitative criteria to define the sub-classes with respect to those selected (i.e. bond type, debt seniority, issuer sub-type and issuance size)?
   2. Would you use different parameters (different from average number of trades per day, average nominal amount per day and number of days traded) or the same parameters but different thresholds in order to define a bond or a SFP as liquid?
   3. Would you define classes declared as liquid in ESMA’s proposal as illiquid (or viceversa)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_57>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_57>

1. Do you agree with the definitions of the bond classes provided in ESMA’s proposal (please refer to Annex III of RTS 9)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_58>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_58>

1. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer per asset class identified (investment certificates, plain vanilla covered warrants, leverage certificates, exotic covered warrants, exchange-traded-commodities, exchange-traded notes, negotiable rights, structured medium-term-notes and other warrants) addressing the following points:
   1. Would you use additional qualitative criteria to define the sub-classes?
   2. Would you use different parameters or the same parameters (i.e. average daily volume and number of trades per day) but different thresholds in order to define a sub-class as liquid?
   3. Would you qualify certain sub-classes as illiquid? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_59>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_59>

1. Do you agree with the definition of securitised derivatives provided in ESMA’s proposal (please refer to Annex III of the RTS)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_60>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_60>

1. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer for each of the asset classes identified (FRA, Swaptions, Fixed-to-Fixed single currency swaps, Fixed-to-Float single currency swaps, Float -to- Float single currency swaps, OIS single currency swaps, Inflation single currency swaps, Fixed-to-Fixed multi-currency swaps, Fixed-to-Float multi-currency swaps, Float -to- Float multi-currency swaps, OIS multi-currency swaps, bond options, bond futures, interest rate options, interest rate futures) addressing the following points:
   1. Would you use different criteria to define the sub-classes (e.g. currency, tenor, etc.)?
   2. Would you use different parameters (among those provided by Level 1, i.e. the average frequency and size of transactions, the number and type of market participants, the average size of spreads, where available) or the same parameters but different thresholds in order to define a sub-class as liquid (state also your preference for option 1 vs. option 2, i.e. application of the tenor criteria as a range as in ESMA’s preferred option or taking into account broken dates. In the latter case please also provide suggestions regarding what should be set as the non-broken dates)?
   3. Would you define classes declared as liquid in ESMA’s proposal as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_61>

1) No

2) ICE agrees that an interest rate derivatives product should be deemed to be liquid on the basis of it satisfying a subset of the liquidity tests which ESMA set out in its 2014 Discussion Paper. However, ICE notes that ESMA has not applied the assessment process consistently because exchange-traded interest rate derivatives and OTC interest rate derivatives are subject to different liquidity tests.

Specifically, for an exchange-traded interest rate derivative to be deemed liquid, ESMA has determined that it must satisfy the following criteria:

an average of 1 trade per day or more; and

an average notional amount per day of €5m or more.

In contrast, an OTC interest rate derivative will only be deemed liquid by ESMA if it satisfies each of the following more stringent tests:

an average notional amount per day greater or equal to €500m;

number of days traded greater or equal to 80% of the available trading days in the period; and

average number of trades per day greater or equal to 100.

These differences in the application of the assessment process are neither explained nor justified in the ESMA Consultation Paper or the accompanying Regulatory Technical Standards. If they cannot be explained or justified, ESMA should apply a consistent process for assessing liquidity. Specifically, provided ESMA’s flawed methodology for establishing LIS and SSTI thresholds is replaced as proposed in the answer to Question 78, the liquidity assessment applicable to exchange-traded interest rate derivatives should be applied both to exchange-traded and OTC interest rate derivatives.

3) ESMA’s inconsistent application of the liquidity assessment process is likely to have led to a significant number of OTC interest rate derivatives being deemed “illiquid”, whereas they would have been deemed “liquid” had they been subject to the same liquidity tests as those which have been applied to exchange-traded interest rate derivatives.

<ESMA\_QUESTION\_CP\_MIFID\_61>

1. Do you agree with the definitions of the interest rate derivatives classes provided in ESMA’s proposal (please refer to Annex III of draft RTS 9)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_62>

Yes. These are classes understood and utilised by the industry.

<ESMA\_QUESTION\_CP\_MIFID\_62>

1. With regard to the definition of liquid classes for equity derivatives, which one is your preferred option? Please be specific in relation to each of the asset classes identified and provide a reason for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_63>

ICE does not support Option 2, namely that all equity derivatives should be categorised as liquid. Whilst ICE supports ESMA’s stated intention of maintaining current levels of transparency, ICE wishes to draw to ESMA’s attention that not all equity derivative contracts have in fact, at present, the level of transparency that would be achieved and required by categorising all equity derivative contracts as liquid and thereby extending full pre-trade and post-trade transparency to those instruments. This is because a Regulated Market makes different exchange-traded equity derivatives available within different trading systems, depending on the liquidity of those products. As a result, many exchange-traded equity derivatives are currently executed within voice, RFQ or hybrid trading systems because the limited liquidity of those products makes them unsuitable for trading in central order books. In contrast, other – more liquid - equity derivatives are executed in central order books.

Furthermore, ICE does not believe Option 1 provides a sufficient level of granularity to produce meaningful results in terms of an assessment as to whether or not particular classes of equity derivatives are liquid or not. For our alternative proposal, please see our response to Q64.

<ESMA\_QUESTION\_CP\_MIFID\_63>

1. If you do not agree with ESMA’s proposal for the definition of a liquid market, please specify for each of the asset classes identified (stock options, stock futures, index options, index futures, dividend index options, dividend index futures, stock dividend options, stock dividend futures, options on a basket or portfolio of shares, futures on a basket or portfolio of shares, options on other underlying values (i.e. volatility index or ETFs), futures on other underlying values (i.e. volatility index or ETFs):
   1. your alternative proposal
   2. which qualitative criteria would you use to define the sub-classes
   3. which parameters and related threshold values would you use in order to define a sub-class as liquid.

<ESMA\_QUESTION\_CP\_MIFID\_64>

ICE believes that in order to achieve a meaningful assessment of the liquidity of equity derivatives, further granularity is required in order to reflect the varying levels of liquidity of the contracts falling within the twelve proposed sub-classes.

ICE suggests that the following parameters should be included in the liquidity assessment of equity derivatives: the average number of transactions per day as well as the average daily volume for the product concerned. Doing so would provide a more accurate assessment of liquidity than the ESMA analysis which is set out in pages 127-131 of the Consultation Paper, given that the latter only measures the distribution of transactions in terms of maturity rather than liquidity per se.

Furthermore, ICE notes that ESMA’s preference is not to include the maturity of an equity derivatives contract as a parameter for the assessment of liquidity. In contrast, ICE observes that maturity is a key determinant of the liquidity of equity derivatives contracts. By way of example, ICE Futures Europe’s short-dated FTSE 100 Index Options are traded in the Exchange’s fully-transparent central order book, whilst the longer-dated versions of those Options are traded in the Exchange’s voice trading system given the different liquidity profiles of the short-dated and long-dated Options.

Lastly, ICE draws to ESMA’s attention the varied levels of liquidity across disparate individual equity options, referred to as “stock options” in RTS 9. Previously, these contracts have been grouped into different bands on the basis of the liquidity of the underlying shares. Such an approach is designed to reflect the ability of the party who is facilitating a Block Trade to manage its options exposure by delta hedging its position using the underlying shares. In other words, an option based on a very liquid share would have a relatively high Block Trade threshold compared with one based on a less liquid share. ICE recommends that in order appropriately to determine which stock options contracts are in fact liquid and in order to set appropriate LIS thresholds for these contracts, ESMA base their analysis on the work that they have done recently in relation to calibrating the MiFID II transparency arrangements for shares.

<ESMA\_QUESTION\_CP\_MIFID\_64>

1. Do you agree with the definitions of the equity derivatives classes provided in ESMA’s proposal (please refer to Annex III of draft RTS 9)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_65>

ICE supports as a starting point the sub-division of equity derivative contracts into the proposed twelve sub-classes (stock options, stock futures, etc.). However, as a caveat, ICE would further sub-divide the stock options category as described in the answer to Question 64. Furthermore, ‘stock futures’ (page 177 of RTS 9 in Annex B of the Consultation Paper) should be sub-divided into: ‘single stock futures’ and ‘dividend adjusted single stock futures’; the latter of the two is significantly less liquid than the former and therefore such division is merited.

<ESMA\_QUESTION\_CP\_MIFID\_65>

1. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer detailed per contract type, underlying type and underlying identified, addressing the following points:
   1. Would you use different qualitative criteria to define the sub-classes? In particular, do you consider the notional currency as a relevant criterion to define sub-classes, or in other words should a sub-class deemed as liquid in one currency be declared liquid for all currencies?
   2. Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?
   3. Would you define classes declared as liquid in ESMA’s proposal as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_66>

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<ESMA\_QUESTION\_CP\_MIFID\_66>

1. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer detailed per contract type, underlying type and underlying identified, addressing the following points:
   1. Would you use different qualitative criteria to define the sub-classes? In particular, do you consider the notional currency as a relevant criteria to define sub-classes, or in other words should a sub-class deemed as liquid in one currency be declared liquid for all currencies?
   2. Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?
   3. Would you define classes declared as liquid in ESMA’s proposal as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_67>

In its response to ESMA’s 2014 MiFID II Discussion Paper, ICE noted ESMA’s preference for the COFIA approach and observed that the disadvantage with that approach is that it could result in products being regarded as “homogenous” and thus being placed in the same category, regardless of the fact that the liquidity of those products differs significantly. ICE further observed that such differences would be masked by the application of an averaging process in the calibration of the transparency requirements. To the extent that the transparency requirements for a category as a whole would be set by reference to the nominal “average” product within the category, products which are significantly higher or lower than the nominal average would be subject to inappropriate transparency requirements.

This is precisely what has happened in the case of oil futures, all of which have been categorised into one of two sub-classes (i.e. “Oil up to 3 months” and “Oil greater than 3 months”) *(Table 23, page 137 of the ESMA Consultation Paper)*. Those categories include an extensive array of heterogeneous products, ranging from highly liquid benchmark products such as the Brent Futures Contract and a myriad of niche and nascent products which, by their very nature, are much less liquid. A much more granular categorisation process is necessary in order to conduct an appropriate liquidity assessment, similar to that which has been applied by ESMA in other sectors.

At a minimum, the sub-classes for oil should distinguish between the many different grades of both crude and refined products, different geographical regions, and different types of futures contracts (drawing an appropriate distinction between contracts based on a single underlying on the one hand, and those which are based on the price differential between two separate underlyings on the other (e.g. a crude product and a refined product). Specifically, the sub-classes should be constructed using the following elements:

o Crude or refined product.

o Region.

o Underlying reference rate/Price Reporting Agency reference rate.

o Outright or differential contract.

o Different types of differential contracts, e.g. spread and crack contracts.

Furthermore, the LIS thresholds calculated by ESMA fail to take account of the potential market impact of an order – as measured by the available pre-trade data – because ESMA’s methodology is based solely on post-trade data. In contrast, ICE Futures Europe’s approach to setting Block Trade thresholds for energy contracts depends chiefly on the current liquidity in the contract – which is assessed using pre-trade data - and the commercial activity that underpins trading in the central order book.

In illiquid contracts, it is probable that even orders of modest size will move the price. Typically the Exchange would consider which size of underlying physical trade might require a futures hedge. For example, fuel oil contracts are not liquid in the central order book, but fuel oil itself is typically traded in tranches of 5,000 to 10,000 tonnes in the physical market. To enable a futures hedge to be executed on-exchange, the Exchange permits Block Trading of equivalent size in lots (in this case 5 lots). This adds to the open interest in the exchange contract, some of which is subsequently extinguished in the central order book, which means there is enough activity in the instrument for other market participants to offer or bid on-screen.

In addition to the above comments, ICE has specific comments relating to the other Energy contracts.

First, ICE notes that coal is not listed in the identified sub-classes (page 137 of the Consultation Paper, Tables 23 and 24) nor has ESMA proposed for coal LIS and SSTI thresholds (pages 180 and 181 of RTS 9 in Annex B of the Consultation Paper - Tables 38, 39 and 40). ESMA should set suitable thresholds for this important asset class.

Secondly, in relation to utility contracts (such as natural gas), maturity (3 months or less) is not a meaningful parameter alone as liquidity is not necessarily concentrated in the front months. Delivery periods would provide an additional parameter that would capture particular contracts in the utilities sector that are in fact more liquid further along the curve (e.g. calendar months or seasons).

Given the serious shortcomings with ESMA’s methodology for calculating LIS and SSTI thresholds, ICE recommends that ESMA adopts a more appropriate methodology and collects pre-trade data from trading venues in order to apply that methodology. ICE recognises that doing so is likely to entail a delay in the process of finalising RTS 9. However, given that the current ESMA methodology is flawed and has produced results which are seriously anomalous, a delay is better than the alternative.

<ESMA\_QUESTION\_CP\_MIFID\_67>

1. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer detailed per contract type and underlying (identified addressing the following points:
   1. Would you use different qualitative criteria to define the sub-classes?
   2. Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?
   3. Would you define classes declared as liquid in ESMA’s proposal as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_68>

As a general matter, ICE supports the proposal put forth in ESMA’s 2014 MiFID II Discussion Paper (p.138 -139) to divide agricultural commodity derivatives into homogenous sub-classes developed on the basis of specific underlying commodities, which resulted in 7 such classes (including cocoa, coffee, sugar, wheat, etc.). Having said that, Feed Wheat and Milling Wheat should be placed into separate sub-classes as they are not homogenous and their liquidity profiles are significantly different.

ICE also agrees with ESMA’s proposal not to include the maturity or the currency of the underlying when seeking to define the sub-classes of instruments.

ESMA has set out (pages 181-182 of RTS 9 in Annex B of the Consultation Paper) proposed LIS thresholds for agricultural markets. ICE notes that the futures contracts have more liquidity than the related options contracts, and therefore it is counterintuitive to have higher thresholds in the less liquid options contracts. Any thresholds set should reflect this fact, with options thresholds being set at either the same or a lower level as those for the related futures.

<ESMA\_QUESTION\_CP\_MIFID\_68>

1. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer per asset class identified (EUA, CER, EUAA, ERU) addressing the following points:
   1. Would you use additional qualitative criteria to define the sub-classes?
   2. Would you use different parameters or the same parameters (i.e. average number of trades per day and average number of tons of carbon dioxide traded per day) but different thresholds in order to define a sub-class as liquid?
   3. Would you qualify as liquid certain sub-classes qualified as illiquid (or vice versa)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_69>

1) No

2) ICE otherwise supports the selected parameters, but we would suggest for one of the parameters not to be included. It is our view that the total turnover of the contract (in EUR) does not provide additional value, and a satisfactory assessment regarding liquidity can be made by the use of the other two parameters, namely the number of trades per day and the average quantity traded (in tonnes of Carbon Dioxide) per day for the class.

ICE also notes that no distinction is made between futures and options and suggests such a distinction is made.

With regards to the thresholds, please see our response below to Q69(3).

3) ICE is of the view that to categorise entire asset classes (ERUs, CERs) as illiquid is overly simplistic and runs the risk of reducing existing transparency. For example, the chosen thresholds could result in the categorisation of certain ICE contracts (in particular CERs, ERUs and EUAAs) as illiquid and therefore as eligible for post-trade deferral periods of up to 48 hours (which is not the case under the current regulatory regime). This in our view would reduce transparency in these markets, and would be an unintended consequence of utilising the COFIA approach (as described in our response to Question 67).

<ESMA\_QUESTION\_CP\_MIFID\_69>

1. Do you agree with ESMA’s proposal with regard to the content of pre-trade transparency? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_70>

In terms of setting the overall framework for transparency, ICE agrees with ESMA that each of the three types of trading venue (RM, MTF and OTF) may operate different types of trading system (quote driven, order book, RFQ, voice etc.). Furthermore, ICE agrees that the type of trading system should be the starting point for determining the appropriate level of pre-trade transparency (page 206, paragraph 2 of the ESMA Consultation Paper). In its 2014 Discussion Paper, ESMA noted that non-equities trading is often characterised by low and episodic trading activity and that, as such, a variety of trading systems are commonly used and need to be defined (page 149, paragraph 8).

ICE endorses ESMA’s approach. Regulated Markets facilitate trading in a broad range of exchange-traded derivatives with different characteristics and liquidity profiles. Over the years, those Regulated Markets have developed a range of different trading systems (e.g. central order book, RFQ, voice or hybrid systems) which are tailored to the exchange-traded derivatives concerned. They must retain the freedom to operate a range of different trading systems in this manner, in order to ensure that they can provide an appropriate trading environment – which is as transparent as possible – for the products concerned.

In relation to hybrid systems (i.e. “Trading systems not covered by the first 5 rows”, as described in Table 1 of Annex I to RTS 9), ICE notes that the information to be made public is described as follows:

“Adequate information as to the level of orders or quotes and of trading interest; in particular, the five best bid and offer price levels and/or the two-way quotes of each market maker in the instrument, if the characteristics of the price discovery mechanism so permit.”

This is problematic because it is drafted on the premise that a hybrid trading system is more akin to an order book trading system – involving continuous quoting by on-screen market makers - than it is to an RFQ or voice trading system. This is often not the case, particularly for option complexes which comprise many hundreds of series and strategies based on the same underlying (e.g. the ICE Futures Europe Three Month Euribor Option complex comprises over 800 separate standard series).

As a result, many hybrid trading systems which are operated by Regulated Markets have a significant voice element (i.e. negotiation between potential counterparties is initiated by voice, with any interaction with additional parties and ultimate execution conducted in an electronic system). ICE therefore recommends that the description set out in Table 1 of Annex I to RTS 9 should be more neutral, to reflect the different types of hybrid system which exist. This could be achieved by deleting the specific requirement concerning “the five best bid and offer price levels and/or the two-way quotes of each market maker in the instrument”.

The transparency requirements for hybrid trading systems which are a composite of some elements of two or more of the other trading systems enumerated by ESMA in Table 1 of Annex I to RTS 9 should be designed on the basis of the requirements for the relevant elements of those other trading systems, subject to the agreement of the National Competent Authority. This will inevitably require some tailoring to ensure that the transparency requirements of those elements, when combined in the hybrid trading system, are as cohesive as possible.

<ESMA\_QUESTION\_CP\_MIFID\_70>

1. Do you agree with ESMA’s proposal with regard to the order management facilities waiver? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_71>

Yes. The “order management facilities” waiver is necessary for the continued usage of, for example, iceberg order, crossing order and stop order functionality. These are important tools which are used to assist market users respectively to avoid price slippage, to achieve price improvement and to limit trading losses.

<ESMA\_QUESTION\_CP\_MIFID\_71>

1. ESMA seeks further input on how to frame the obligation to make indicative prices public for the purpose of the Technical Standards. Which methodology do you prefer? Do you have other proposals?

<ESMA\_QUESTION\_CP\_MIFID\_72>

ICE notes that this requirement applies in relation to voice and RFQ trading systems in circumstances in which an actionable indication of interest is above the relevant Size Specific to the Instrument (“SSTI”) threshold. ICE agrees that indicative prices should be calculated and displayed by the trading venue in a transparent fashion and they should be based on a clear and comprehensive methodology which forms part of the rules of the trading venue (page 212, paragraph 28 of the ESMA Consultation Paper). There are many different ways in which the requirement could be satisfied, depending on the type of product concerned and the manner in which the market in that product functions. ICE therefore agrees with ESMA’s conclusion (as described on page 213, paragraph 30 of the Consultation Paper) that:

“In ESMA’s view, the market operator of the trading venue should determine which methodology to use. However, ESMA considers it essential that a clear and comprehensive description of the methodology is disclosed to the public beforehand”.

<ESMA\_QUESTION\_CP\_MIFID\_72>

1. Do you consider it necessary to include the date and time of publication among the fields included in Annex II, Table 1 of RTS 9? Do you consider that other relevant fields should be added to such a list? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_73>

Yes.

<ESMA\_QUESTION\_CP\_MIFID\_73>

1. Do you agree with ESMA’s proposal on the applicable flags in the context of post-trade transparency? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_74>

ICE is pleased to see that the “Definition” ascribed to “Technical trade flag” explicitly includes Exchange for Physical trades (RTS 9, Annex II, Table 2, page 150). Those transactions are important elements of many exchange-traded derivatives markets – particularly those in commodity futures and bond futures. An Exchange for Physical trade is generally transacted within a trading venue’s voice, RFQ or hybrid trading system, given that it is a composite transaction which involves the simultaneous trading by two counterparties of a standardised exchange-traded futures contract and a non-standardised underlying or off-exchange leg (with one party buying the futures contract and selling the underlying and the other party doing the opposite, thereby achieving a differential between the prices of the two related transactions). As such transactions are non-price forming technical trades, ICE believes that it is unnecessary to publish their price. This reflects current practice in many commodity markets, in which the price of Exchange for Physical trades is not included in the trade details which are published, given that such price “is determined by factors other than the current market valuation of the instrument” (RTS 9, Annex II, Table 2, page 150).

<ESMA\_QUESTION\_CP\_MIFID\_74>

1. Do you agree with ESMA’s proposal? Please specify in your answer if you agree with:
   1. a 3-year initial implementation period
   2. a maximum delay of 15 minutes during this period
   3. a maximum delay of 5 minutes thereafter. Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_75>

ICE believes that in circumstances in which **real time** transparency requirements apply, trade publication should take place as close to real time as possible. As a general principle MiFID II should promote greater efficiency in the trade publication process and encourage an evolution away from manual processes to automated processes.

ESMA’s proposal to set the maximum permissible delay at 15 minutes for **real time** post-trade publication for a period of 3 years is likely to lead to bifurcation and regulatory arbitrage, given that publication will be immediate in automated systems and delayed by 15 minutes in manual systems. Some respondents to ESMA’s 2014 Discussion Paper expressed such concerns, but ESMA has not addressed them:

“Some respondents expressed their concerns about arbitrage opportunities to the disadvantage of electronic platforms, should backstop delays be used routinely to delay the publication of transparency information.” *(Consultation Paper, page 220, paragraph 19.)*

ICE believes that ESMA should significantly reduce the **real time** post-trade publication timeframe by applying a standard which requires publication “as soon as reasonably practicable”, with a maximum delay of 3 minutes to be used in exceptional circumstances only.

<ESMA\_QUESTION\_CP\_MIFID\_75>

1. Do you agree that securities financing transactions and other types of transactions subject to conditions other than the current market valuation of the financial instrument should be exempt from the reporting requirement under article 21? Do you think other types of transactions should be included? Please provide reasons for your answers.

<ESMA\_QUESTION\_CP\_MIFID\_76>

Yes. ICE is pleased to see that “give-up/give-in” trades have been placed into this category. As explained in ICE’s response to ESMA’s 2014 MiFID II Consultation Paper, ICE believes it would give an inflated view of the true level of trading activity if give-ups were to be published (in many voice trading systems the level of duplication could give the impression that trading activity was almost double its true size). “Give-ups” occur during post-trade processing and are part of the clearing and risk management process. This is distinct – and should not be conflated with – the process for post-trade transparency of trading activity.

<ESMA\_QUESTION\_CP\_MIFID\_76>

1. Do you agree with ESMA’s proposal for bonds and SFPs? Please specify, for each type of bonds identified, if you agree on the following points, providing reasons for your answer and if you disagree providing ESMA with your alternative proposal:
   1. deferral period set to 48 hours
   2. size specific to the instrument threshold set as 50% of the large in scale threshold
   3. volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
   4. pre-trade and post-trade thresholds set at the same size
   5. large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA\_QUESTION\_CP\_MIFID\_77>

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<ESMA\_QUESTION\_CP\_MIFID\_77>

1. Do you agree with ESMA’s proposal for interest rate derivatives? Please specify, for each sub-class (FRA, Swaptions, Fixed-to-Fixed single currency swaps, Fixed-to-Float single currency swaps, Float -to- Float single currency swaps, OIS single currency swaps, Inflation single currency swaps, Fixed-to-Fixed multi-currency swaps, Fixed-to-Float multi-currency swaps, Float -to- Float multi-currency swaps, OIS multi-currency swaps, bond options, bond futures, interest rate options, interest rate futures) if you agree on the following points providing reasons for your answer and, if you disagree, providing ESMA with your alternative proposal:
   1. deferral period set to 48 hours
   2. size specific to the instrument threshold set as 50% of the large in scale threshold
   3. volume measure used to set the large in scale and size specific to the instrument threshold as specified in Annex II, Table 3 of draft RTS 9
   4. pre-trade and post-trade thresholds set at the same size
   5. large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1), provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2), provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed (c) irrespective of your preference for option 1 or 2 and, with particular reference to OTC traded interest rates derivatives, provide feedback on the granularity of the tenor buckets defined. In other words, would you use a different level of granularity for maturities shorter than 1 year with respect to those set which are: 1 day- 1.5 months, 1.5-3 months, 3-6 months, 6 months – 1 year? Would you group maturities longer than 1 year into buckets (e.g. 1-2 years, 2-5 years, 5-10 years, 10-30 years and above 30 years)?

<ESMA\_QUESTION\_CP\_MIFID\_78>

1) ICE is concerned that in relation to RFQ and voice trading systems (where the SSTI threshold applies) the deferral period is only available in circumstances in which the transaction concerned is “executed between an investment firm dealing on own account other than on a matched principal basis...and another counterparty” (RTS 9, Article 8(1)(c). This fails to recognise that in interest rate and bond options markets the facilitation of transactions typically involves more than one firm, i.e. it involves a broker (acting on behalf of the client) and one or more market makers. The firms which put their capital at risk (the market makers) have no contractual relationship with the broker’s client.

2) ICE believes that the ESMA methodology for setting LIS thresholds is flawed, for the reasons explained under Q78(5) below. This, in turn, has led to the proposed SSTI thresholds being set at inappropriate levels too.

MiFIR makes it clear that “size specific to the instrument” is intended to identify the size of order/transaction which, if it were fully transparent, would expose liquidity providers to undue risk. This suggests that ESMA should have regard to the size of order that liquidity providers do, in practice, make fully transparent on-screen and compare it with the size of orders which such liquidity providers facilitate off-screen. This would provide a more accurate measure than setting “size specific to the instrument” as an arbitrary percentage of the LIS threshold. Trading venues can provide ESMA with data which would facilitate such an analysis.

3) Please see the answer to Q78(5) below.

4) ICE believes that LIS thresholds should be the same for originating orders (i.e. orders which initiate the search for a potential counterparty or counterparties) and transactions. In order to maximise the extent to which originating orders can be facilitated by liquidity providers and thus ensure that those originating orders are filled in full, it is important – particularly in options markets – that orders can be aggregated on the facilitating side of an LIS trade. This enables an originating LIS order from a customer to be facilitated by a number of orders from separate liquidity providers, whereby the facilitating orders - in aggregate (but not individually) - meet the LIS threshold.

5) The LIS thresholds proposed by ESMA for exchange-traded interest rate and bond derivatives are wholly inappropriate (Tables 5-12 of RTS 9, pages 157-159). In many cases, they are far too low and are likely to lead to a “race to the bottom” which would cause a dramatic reduction in current levels of pre-trade transparency. In other cases, they are far too high and would be inoperable for all but the very largest transactions.

To cite one example, ESMA’s proposed LIS threshold for the Three Month Euribor Future is €10 million (nominal value), whereas the proposed threshold for the Option on the Three Month Euribor Future is €15 billion. In contrast, ICE Futures Europe has the same LIS threshold of €3 billion for both short-dated Three Month Euribor Futures and Options in recognition of the fact that they are not traded in isolation but in conjunction with one another (the LIS thresholds are lower (i.e. €500 million) for longer-dated versions of the contracts, reflecting lower liquidity at the back of the maturity curve).

A €10 million transaction in the Three Month Euribor Future (which equates to 10 lots) is extremely small. In contrast, there are typically many thousands of lots available at the best bid and the best offer in the most active maturities of the Three Month Euribor Futures in the transparent central order book operated by ICE Futures Europe. The LIS threshold calculated by ESMA fails to take account of that liquidity – as measured by the available pre-trade data – because ESMA’s methodology is based solely on post-trade data. However, using post-trade data in isolation is misleading because it fails to take into account that an order which enters the central order book is likely to be matched against many separate countervailing orders, rather than just one. This is particularly true in the case of products which are subject to a trade matching algorithm which is based, wholly or in part, on pro-rata matching rather than price/time matching. As a result, post-trade data will give the false impression that the market comprises a large number of relatively small trading interests, when in fact the reverse is true. The result is that ESMA has proposed that the most liquid interest rate futures in Europe be given LIS thresholds which are artificially low and which bear no relationship with the size of orders which can be easily accommodated into fully transparent central order books without experiencing execution delay or price slippage. This is the case not just for Three Month Euribor Futures, but also for all other interest rate futures and bond futures which are included in Tables 5-8 of RTS 9.

Given the seriousness of this matter, ICE recommends that ESMA adopts a more appropriate methodology and collects pre-trade data from trading venues in order to apply that methodology. ICE recognises that doing so is likely to entail a delay in the process of finalising RTS 9. However, given that the current ESMA methodology is flawed and has produced results which are seriously anomalous, a delay is better than the alternative.

For interest rate futures and bond futures contracts, ICE believes that – and as is the case today - calibration of LIS thresholds should be undertaken in a manner which takes account of the liquidity available at the best bid and best offer for the product in question. Doing so ensures that the LIS threshold is not set below that level (in which case Block Trades could cannibalise business within the central order book and thereby reduce transparency) or significantly above that level (in which case a liquidity gap would develop, whereby orders below LIS but above the volume available at the best on-screen price would face execution delay and/or price slippage).

The LIS threshold for options based on such futures should be set in a way which reflects the manner in which those products are traded in conjunction with each other. The Exchange originally set interest rate option Block Trade thresholds on the basis of a ratio of two options contracts to one underlying futures contract in order to reflect the 50% delta of an at-the-money option. This was later changed to a one-to-one ratio, in part to reflect the fact that there was a liquidity gap between the options Block Trade threshold and the size of order which could, in practice, be executed in the options central order book without experiencing significant execution delay and/or price slippage.

<ESMA\_QUESTION\_CP\_MIFID\_78>

1. Do you agree with ESMA’s proposal for commodity derivatives? Please specify, for each type of commodity derivatives, i.e. agricultural, metals and energy, if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:
   1. deferral period set to 48 hours
   2. size specific to the instrument threshold set as 50% of the large in scale threshold
   3. volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
   4. pre-trade and post-trade thresholds set at the same size
   5. large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA\_QUESTION\_CP\_MIFID\_79>

1) ICE believes the deferral period is acceptable.

2) ICE believes that the ESMA methodology for setting LIS thresholds is flawed, for the reasons explained under Q79(5) below. This, in turn, has led to the proposed SSTI thresholds being set at inappropriate levels.

3) ESMA has expressed the LIS thresholds for all commodities (and indeed, for other asset classes) in terms of nominal value rather than number of lots. For commodity contracts – whose nominal value is typically determined by the price of the underlying multiplied by the contract size – the size of a Block Trade (in lots) will vary with the price of the underlying and, for contracts which are not denominated in euro, with the exchange rate. Given that exchange-traded derivatives are traded in lots rather than in nominal value, this will be an additional, unnecessary complication in the operation of the LIS regime.

4) no comment.

5) As explained in the answer to Question 67, it is not appropriate to classify all oil derivatives into one of two sub-classes (i.e. “Oil up to 3 months” and “Oil greater than 3 months”) (*Table 23, page 137 of the ESMA Consultation Paper*). Those categories include an extensive array of heterogeneous products, ranging from highly liquid benchmark products such as the Brent Futures Contract to a myriad of niche and nascent products which, by their very nature, are much less liquid.

ESMA has proposed a single LIS threshold of €1 million (or about 20 lots for ICE Brent Futures) for all oil derivatives. This is far too low for benchmark products such as the Brent Futures Contract (for which ICE Futures Europe has an LIS threshold of 100 lots (i.e. €5 million using the current market value and exchange rate) and far too high for less liquid niche and nascent products (for which ICE Futures Europe typically has an LIS threshold of 5 lots, i.e. around €200,000).

A much more granular categorisation process is necessary in order to determine appropriate LIS thresholds for oil derivatives.

Turning to agricultural commodities, the proposed LIS thresholds for futures contracts (RTS 9, Table 41, page 181) appear to be broadly acceptable, albeit this may be as a result of coincidence rather than design given the concerns which ICE has expressed about the methodology that ESMA has applied (please see the answer to Question 78(5) for more details). These misgivings appear to be borne out when considering the proposed LIS thresholds for options on agricultural commodity futures (RTS 9, Table 43, page 182). Those options are significantly less liquid than the underlying futures contracts, yet ESMA has proposed that the LIS thresholds for the options should be up to 19 times greater than for the underlying futures. This is counterintuitive.

<ESMA\_QUESTION\_CP\_MIFID\_79>

1. Do you agree with ESMA’s proposal for equity derivatives? Please specify, for each type of equity derivatives [stock options, stock futures, index options, index futures, dividend index options, dividend index futures, stock dividend options, stock dividend futures, options on a basket or portfolio of shares, futures on a basket or portfolio of shares, options on other underlying values (i.e. volatility index or ETFs), futures on other underlying values (i.e. volatility index or ETFs)], if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:
   1. deferral period set to 48 hours
   2. size specific to the instrument threshold set as 50% of the large in scale threshold
   3. volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
   4. pre-trade and post-trade thresholds set at the same size
   5. large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA\_QUESTION\_CP\_MIFID\_80>

1) In some cases this will result in less transparency than currently exists, namely when a particular contract falls into a category where information is published to the market directly after the trade has matched. For other products, a deferral period set to 48 hours is acceptable.

2) ICE strongly encourages ESMA to re-evaluate the metrics it has used to set the LIS and SSTI thresholds and does not believe meaningful results can be achieved by relying solely on notional values. Notional value is a function of the underlying stock price, the lot size and the number of lots traded. Using this one metric as a measure for liquidity of the product, assumes all underlying stocks are as liquid as each other, which is not the case. A stock ranked 20th in the French, German or UK main benchmark index might be deemed to be liquid, but the same cannot be said for some equities represented in (for example) the equivalent Portuguese, Belgian or Irish benchmark index. Furthermore, some single equity derivatives products do not trade every day, so time to maturity of the product is not a definitive factor for all underlying equities, unless the product has passed additional liquidity tests.

Further to the above and as per the response made by ICE to Question 78(2), ICE recommends ESMA assess appropriate thresholds based on order level information, and more specifically the size of order that liquidity providers in practice make available to the market on-screen in comparison to the size of orders which such liquidity providers facilitate off-screen. This would provide a more accurate measure than setting “size specific to the instrument” as an arbitrary percentage of the LIS threshold. Trading venues can provide ESMA with data which would facilitate such an analysis.

3) ESMA has expressed the Block Trade thresholds for equity contracts (and indeed, for other asset classes) in terms of nominal value rather than number of lots. For equity contracts – whose nominal value is typically determined by the price of the underlying multiplied by the contract size – the size of a Block Trade (in lots) will vary with the price of the underlying and, for contracts which are not denominated in euro, with the exchange rate. Given that exchange-traded derivatives are traded in lots rather than in nominal value, this will be an additional complication in the operation of the LIS regime.

4) Yes. ICE agrees in general with setting pre-trade and post-trade thresholds at the same level. This would result in those contracts deemed liquid receiving full levels of transparency, both in terms of pre-trade and post-trade thresholds, and this reflects the current stance on ICE. However, as per the response to Question 78(4), ICE believes that ESMA should utilise order level information, and this is something trading venues can provide to ESMA. More specifically, ICE is of the view that LIS thresholds should be the same for originating orders (i.e. orders which initiate the search for a potential counterparty or counterparties) and transactions, as this will maximise the extent to which orders are filled in full by enabling an originating LIS order from a customer to be facilitated by a number of orders from separate liquidity providers, whereby the facilitating orders - in aggregate (but not individually) - meet the LIS threshold.

5) ICE disagrees with ESMA’s methodology for determining LIS thresholds for the reasons explained in the answers to Questions 67 and 78.

ICE’s standard approach is to set Block Trade minimum volume thresholds for equity derivatives by estimating the aggregate volume which market makers and other liquidity providers typically quote in the central order book at the best bid and offer. Doing so helps the Exchange to establish a baseline above which it is likely to prove difficult for members to execute business in the central order book without experiencing price slippage, execution delay or both. The baseline will indicate where the Block Trade minimum volume threshold should be set. If that threshold were to be set significantly above the baseline, a liquidity gap would develop in which it would be difficult for business to be executed in an efficient manner (i.e. business caught within the liquidity gap would be too large to be matched by on-screen market makers on the one hand and would not qualify for execution within the Block Trade facility on the other). Alternatively, if the threshold were set significantly below the baseline, there would be a concern that business would be drawn away from the central order book and into the Block Trade facility instead, thus reducing transparency.

Whilst ICE employs the standard approach in relation to most equity derivatives contracts, it has applied alternative approaches for some contracts – notably stock options contracts. Previously, these contracts have been grouped into different bands on the basis of the liquidity of the underlying shares. Such an approach is designed to reflect the ability of the party who is facilitating a Block Trade to manage its options exposure by delta hedging its position using the underlying shares. In other words, an option based on a very liquid share would have a relatively high Block Trade threshold compared with one based on a less liquid share. Such an approach would be consistent with the approach taken by ESMA in calibrating the MiFID II transparency requirements for shares. ICE recommends that in order to set appropriate LIS thresholds for these contracts, ESMA should base their analysis on the work that they have done recently in relation to calibrating the MiFID II transparency arrangements for shares. ICE is willing to assist ESMA in applying that work to the stock options based on those shares.

<ESMA\_QUESTION\_CP\_MIFID\_80>

1. Do you agree with ESMA’s proposal for securitised derivatives? Please specify if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:
   1. deferral period set to 48 hours
   2. size specific to the instrument threshold set as 50% of the large in scale threshold
   3. volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
   4. pre-trade and post-trade thresholds set at the same size
   5. large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA\_QUESTION\_CP\_MIFID\_81>

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<ESMA\_QUESTION\_CP\_MIFID\_81>

1. Do you agree with ESMA’s proposal for emission allowances? Please specify if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:
   1. deferral period set to 48 hours
   2. size specific to the instrument threshold set as 50% of the large in scale threshold
   3. volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
   4. pre-trade and post-trade thresholds set at the same size
   5. large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA\_QUESTION\_CP\_MIFID\_82>

1) As with Equity derivatives, in some cases this will result in less transparency than currently exists. For all ICE emissions contracts, all relevant post-trade information is published directly after a trade has matched.

2) As per the responses to questions 78(2), (5) and 80(2), ICE recommends that ESMA utilise order level data to set appropriate thresholds. Trading venues, such as ICE, will be in a position to provide ESMA this data. Whilst setting the SSTI levels at 50% of the LIS thresholds would have the benefit of simplicity, ICE believes without adequate consideration of the true liquidity of a contract (as assessed through the use of order level data) this approach runs the risk of exposing liquidity providers to undue risk, which is against the intended result, as stated in MiFIR, of the introduction of the “size specific to the instrument” thresholds.

3) These appear appropriate, with one caveat. As stated in our response to Q69 (2), ICE notes that no distinction is made between futures and options, whilst in the Emissions markets options are less liquid than the futures contracts. On this basis, ICE proposes that such a distinction is made and lower thresholds should be applied to the options markets.

4) ICE agrees in general with setting pre-trade and post-trade thresholds at the same level. This would result in those contracts deemed liquid receiving full levels of transparency, both in terms of pre-trade and post-trade thresholds, and this reflects the current stance on ICE.

5) Please see response to Question 82(3)

<ESMA\_QUESTION\_CP\_MIFID\_82>

1. Do you agree with ESMA’s proposal in relation to the supplementary deferral regime at the discrection of the NCA? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_83>

No comment.

<ESMA\_QUESTION\_CP\_MIFID\_83>

1. Do you agree with ESMA’s proposal with regard to the temporary suspension of transparency requirements? Please provide feedback on the following points:
   1. the measure used to calculate the volume as specified in Annex II, Table 3
   2. the methodology as to assess a drop in liquidity
   3. the percentages determined for liquid and illiquid instruments to assess the drop in liquidity. Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_84>

No comment.

<ESMA\_QUESTION\_CP\_MIFID\_84>

1. Do you agree with ESMA’s proposal with regard to the exemptions from transaprency requirements in respect of transactions executed by a member of the ESCB? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_85>

No comment.

<ESMA\_QUESTION\_CP\_MIFID\_85>

1. Do you agree with the articles on the double volume cap mechanism in the proposed draft RTS 10? Please provide reasons to support your answer.

<ESMA\_QUESTION\_CP\_MIFID\_86>

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<ESMA\_QUESTION\_CP\_MIFID\_86>

1. Do you agree with the proposed draft RTS in respect of implementing Article 22 MiFIR? Please provide reasons to support your answer.

<ESMA\_QUESTION\_CP\_MIFID\_87>

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<ESMA\_QUESTION\_CP\_MIFID\_87>

1. Are there any other criteria that ESMA should take into account when assessing whether there are sufficient third-party buying and selling interest in the class of derivatives or subset so that such a class of derivatives is considered sufficiently liquid to trade only on venues?

<ESMA\_QUESTION\_CP\_MIFID\_88>

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<ESMA\_QUESTION\_CP\_MIFID\_88>

1. Do you have any other comments on ESMA’s proposed overall approach?

<ESMA\_QUESTION\_CP\_MIFID\_89>

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<ESMA\_QUESTION\_CP\_MIFID\_89>

1. Do you agree with the proposed draft RTS in relation to the criteria for determining whether derivatives have a direct, substantial and foreseeable effect within the EU?

<ESMA\_QUESTION\_CP\_MIFID\_90>

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<ESMA\_QUESTION\_CP\_MIFID\_90>

1. Should the scope of the draft RTS be expanded to contracts involving European branches of non-EU non-financial counterparties?

<ESMA\_QUESTION\_CP\_MIFID\_91>

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<ESMA\_QUESTION\_CP\_MIFID\_91>

1. Please indicate what are the main costs and benefits that you envisage in implementing of the proposal.

<ESMA\_QUESTION\_CP\_MIFID\_92>

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<ESMA\_QUESTION\_CP\_MIFID\_92>

* Microstructural issues

1. Should the list of disruptive scenarios to be considered for the business continuity arrangements expanded or reduced? Please elaborate.

<ESMA\_QUESTION\_CP\_MIFID\_93>

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<ESMA\_QUESTION\_CP\_MIFID\_93>

1. With respect to the section on Testing of algorithms and systems and change management, do you need clarification or have any suggestions on how testing scenarios can be improved?

<ESMA\_QUESTION\_CP\_MIFID\_94>

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<ESMA\_QUESTION\_CP\_MIFID\_94>

1. Do you have any further suggestions or comments on the pre-trade and post-trade controls as proposed above?

<ESMA\_QUESTION\_CP\_MIFID\_95>

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<ESMA\_QUESTION\_CP\_MIFID\_95>

1. In particular, do you agree with including “market impact assessment” as a pre-trade control that investment firms should have in place?

<ESMA\_QUESTION\_CP\_MIFID\_96>

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<ESMA\_QUESTION\_CP\_MIFID\_96>

1. Do you agree with the proposal regarding monitoring for the prevention and identification of potential market abuse?

<ESMA\_QUESTION\_CP\_MIFID\_97>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_97>

1. Do you have any comments on Organisational Requirements for Investment Firms as set out above?

<ESMA\_QUESTION\_CP\_MIFID\_98>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_98>

1. Do you have any additional comments or questions that need to be raised with regards to the Consultation Paper?

<ESMA\_QUESTION\_CP\_MIFID\_99>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_99>

1. Do you have any comments on Organisational Requirements for trading venues as set out above? Is there any element that should be clarified? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_100>

**Outsourcing**

ICE notes Recital 12 which states that the provisions on outsourcing should be read in conjunction with the IOSCO Principals on Outsourcing by Markets. In order to ensure that the principals are considered and taken into account under the Level 2 text, ICE suggests clarifying Articles 7(8) and (9), to note that where it is necessary to adopt the requirements, it may be appropriate to adopt them with some modifications.

**Due diligence for members or participants of trading venues** -

ICE supports the ESMA proposals in relation to due diligence of participants of trading venues, but would like to make these additional comments.

There are several places within the MiFID II text where certain criteria or standards apply to specific groups of firms or members of a venue e.g. due diligence standards and criteria relating to the provision of direct access and high frequency trading firms. In order to ensure consistency and efficiency when assessing compliance with these requirements, and to reduce the burden on firms which trade on multiple venues, we are supportive of developing an industry standard which firms can utilise.

With respect to Article 8(3), ICE reiterates the point it made in the summer consultation relating to the risk based approach to the compliance reviews it undertakes. Currently, ICE has 471 Members based across multiple jurisdictions, operating diverse and distinct lines of business. To undertake an annual review of each of those members against the draft standards would require significant resource and costs for the trading venue to implement. ICE would rather support the application of a risk based review process, one which concentrates resources and assessment on the Members which are higher risk to us, or could have the greatest impact in the event of a failure. Such approach would be consistent with the supervision method applied by the Financial Conduct Authority (FCA) to authorised firms for which it is responsible. The FCA recognises that different levels of supervision and assessment are required depending on a firm’s size, the number of retail customers a firm has, its wholesale market presence, and the impact that the disorderly failure of a firm could have on markets and consumers. ICE recommends that this same approach be applicable to trading venues under MiFID II, and to reflect that view.

ICE would then support an amendment of the current drafting of this article to the following:

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| **Article 8**  At least once a year, a trading venue shall ~~assess~~ conduct a risk-based assessment of the compliance of its members with the standards in paragraph 1 and check whether its members remain registered as investment firms.” |

**Testing the member’s capacity to access the trading systems**

We believe that the primary responsibility for testing of algorithms lies with the member. Trading venues should provide conformance testing facilities, and require such testing to be conducted for new algorithms and for substantive changes to existing algorithms. Conformance testing is an important part of a trading venue process. The primary objective of which should be to ensure that all client systems, regardless of whether they are algorithmic or otherwise, which connect to the trading platform software, are robust, and do not have an adverse effect on the functioning of the trading venue’s systems.

As part of an on boarding process, it is appropriate for trading venues to test members’ applications against a range of functionality offered by the trading platform. In addition, trading venues should conduct technical testing with the member systems, where market data is played back at high rates to confirm the firm’s ability to consume this data without any issues. The process should not be designed to test a specific algorithm but rather how a system conforms to the functionality and controls supported by the trading venue.

Conformance testing should also be required whenever there is a substantive change to the functionality or infrastructure supported by the platform. We would expect the firms themselves to test any changes that are done on their side due to substantive changes to algorithm or infrastructure, in addition to anything the venue requires. A trading venue conformance testing process should not therefore be regarded as a substitute for a firm’s own controls or testing process, and to expect that firms undergo a full functionality and technical test in each scenario under Article 10(1) would not be realistic, or necessary. We suggest therefore that firms, where Article 1(b) or 1(c) applies, undertake functional and technical testing with a more focused scope. We recommend that draft text be amended to the following:

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| ***Article 10***  ***Testing the member’s capacity to access trading systems***  *1. Trading venues shall pre-determine and require their members to undertake conformance testing of their trading infrastructure appropriate to the nature, scale and complexity of their business:*  *(a) before accessing the market for the first time and shall encourage participants/members to perform testing in a testing environment;*  *(b) before deploying new algorithms on the trading venue ~~or, algorithms used in other trading venues~~; and*  *(c) before deploying any material changes to the core elements of a pre-existing algorithm.*  *2. The conformance testing in paragraph 1 (a) shall include both technical and functional level testing at least:*  *(a) In respect of the functional test, the most basic functionalities such as submission, modification or cancellation of an order or an indication of interest and include at least static and market data. ~~download and all business data flows (such as trading, quoting and trade reporting)~~;*  *(b) ~~In respect of the technical test, the connectivity (including cancel/don’t cancel on disconnect, market data feed loss, and throttles), recovery (including cold intra-day starts) and the handling of suspended instruments or stale market data.~~*  *In respect of the technical test, the connectivity, recovery and the handling of suspended instruments.*  *3. The conformance testing in relation to paragraph 1 (b) and (c) should include technical and functional level testing that the trading venue considers appropriate to protect its integrity and the orderliness of trading.* |

Furthermore, clarity on Article 10(1)(b) is required such that any parametric change or other such immaterial change would not be required to undergo conformance testing before deployment. It is also ICE’s view that where a system is new to a particular venue, but has been used on other venues, it must undergo testing as a new system, and would therefore be covered under Article 10(1)(a).

Under Article 10(3)(b), we recommend that the text be amended to clarify that a subset of instruments rather than full product list is acceptable. Exchanges for example will make available a range of products that are representative of the full suite, but will not list everything.

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| **Article 10**  4. Trading venues shall provide a conformance testing environment to its actual or prospective members with the following characteristics:  (b) the list of financial instruments available for testing shall be a representative subset of the ones available in the live environment covering each instrument class; |

**Testing the member´s algorithms to avoid disorderly trading conditions**

A trading venue cannot realistically test all scenarios that can potentially impact the member and monitor every change to the member system that might have a potential to disrupt the market. It also has no visibility to algorithms that are used by the member system to generate a given sequence of orders based on market events and their capacity to handle all the events without any issue hence trading venues need to rely on controls implemented at the member firm to avoid disruption to the market.

ICE therefore reiterates its response made in the summer, which stated that it would not be realistic for venues to design a set of scenarios that replicate the live testing environment completely or are designed to replicate particular market events. Likewise, it cannot make available a self-certification front-end which firms can utilise to confirm it does not create or contribute to disorderly trading conditions. There are several issues with this proposal; 1) to properly test a firms’ system requires full coordination with the firm, an ICE testing team and process to ensure that any issues are identified; and an uninterrupted testing environment i.e. no other firm activity is carried out which may interfere with the results; 2) liability issues arise should a firm then go on to create disorderly trading conditions (further consideration of this is provided below); and 3) there are unnecessary costs associated with this which we would not support, given that a testing environment is already available and required to be utilised, and firms are also obliged to have all necessary controls in place. Our recommendation is therefore that this requirement to have a self-certification front-end be removed.

It is also, in ICE’s view, a high risk approach to take and potentially makes venues liable, or at least complicit, in the event an algorithm subsequently went on to create disorderly trading conditions for which they were held accountable. It would be extremely unwise of ESMA to create such risk with the implementation of these proposals. ICE therefore proposes that ESMA amend Articles 11(1) - 11(4), as per our suggestion below, to better reflect that venues are not in a position to guarantee by providing a self-certification front end available that a firm could not create nor contribute to disorderly trading conditions, and that the testing environment a venue must have in place is appropriate for the venue and the specific marketplace it covers.

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| **Article 11**  3. ~~Trading venues shall also provide a self-certification front-end so as to permit unusual scenarios to be simulated where the member can test a selection of scenarios that it considers suitable to its activity.~~ In accordance with 11.1 and 11.2 above, the trading venues should provide a front-end testing environment. |

Trading venues should, as part of the testing requirement, also seek to confirm what controls firms have in place that will avoid impact to the market due to un-expected or errant behavior of algorithm. These controls should be those minimum standards set by the venue itself, and those required under RTS 13 for investment firms. The firm must be required to certify that these are in place and tested before conformance can be passed and before the system accesses the live environment.

**Trading venues’ capacity**

We believe that the proposal relating to trading venue capacity contained in Article 12.1 is overly simplistic, and will not produce the desired results. A situation in which a trading venue collapses immediately volumes reach twice historical peak volumes would not be desirable. Similarly a trading venue which amends its trading methodology or trading profile should not be tested on message characteristics which are obsolete. Minimum standards should be based on ability to gracefully degrade the response time as load on the system increases without the loss of transaction integrity. Specifically, we believe therefore that trading venues should ensure a gradual degradation when the load on the system increases to twice the historical peak of messages, and beyond. In addition, this test should only be applied to the extent that a doubling of the historical peak for type of message in question is plausible.

Given our view, we would support the following amendments to the text:

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| **Article 12**  1. Trading venues shall ensure that they have the necessary controls in place to manage a gradual degradation in system performance when the message load on their trading systems increases to twice the historical peak and beyond. This test should be applied only where the doubling of the historical peak in a particular message type is plausible. ~~have sufficient capacity to accommodate at least twice the highest number of messages per second and per value as the maximum recorded on that system in one day (historical peak).~~ |

**Periodic review of the performance and capacity of the trading systems**

ICE is concerned that firms would be obliged to participate in any stress test under Article 15(2) and suggests excluding reference to imposing fines.

**Business continuity**

Our comments on business continuity relate specifically to Article 17(3).

We consider including natural disasters within a business continuity plan as neither advisable nor possible to implement. The main requirements from a business continuity perspective is, as noted in the text, to ensure that disruptive incidents are effectively dealt with and business is resumed in a timely manner. ICE therefore considers 3 “impacts” - loss of people, loss of facility or loss of technology rather than a range of specific scenarios. This approach ensures that, regardless of the scenario, we are able to effectively deal with the incident and resume business, plus it is a wiser use of time.

To give an example on this, there is likely to be little change in business impact between a building having been destroyed by a fire and a building having been destroyed by a flood; in either case BCP needs to be invoked. We would implement our immediate safety provisions around mustering in a safe location then move to our recovery strategy which will involve sending some staff to our BCP facilities and others to work from home. The reaction will be based on the impact not on the cause.

We would therefore suggest to ESMA that the language in Article 17(3) be amended to require that the BCP take account of the ‘consequences of natural disasters’, rather than natural disasters specifically, allowing trading venues to provide for loss of people, loss of facility or loss of technology in such events.

**Mechanisms to manage volatility**

With respect to Article 20(3)(e) ICE would note that it is not possible for venues to obtain such history in all cases. It would therefore not be feasible for venues to take this into account in every assessment where such information is not available, or if such similar instruments were available for trading on another venue. ICE therefore suggests amending Article 20(3)(e) to note that venues will take such volatility into account where the information is available.

**Pre-trade controls**

Trading venues, under Article 8, shall require that members have in place pre-trade controls. Article 21(1) should be amended therefore to reflect that it will be an obligation on the Member to have such controls in place. For example:

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| **Article 21**  Trading venues shall ensure under their Rules that their members implement and operate the pre-trade risk limits and controls described in the Regulation on the organisational requirements for investment firms engaged in algorithmic trading…. |

Furthermore, ICE notes the importance of restricting business in the event a limit is breached, however we think that Article 21(2)(b) is somewhat restrictive and perhaps is not what ESMA was intending. We therefore suggest amending the language to better reflect reality where orders from an individual trader, account, or Member be restricted once a limit is breached; for example:

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| **Article 21**  (b) order submission in relation to an affected instrument, trading desk, trading firm, member or client (as appropriate) is entirely stopped once a limit is breached and if orders continue to be submitted in breach; and |

**Systems and controls of DEA providers and trading venues permitting DEA through their systems**With respect to Article 24(3), ICE would request that the language be amended to:

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| **Article 24**  Trading venues shall under its Rules have the power to cancel the provision of Sponsored Access to those users which have, beyond all unreasonable doubt, infringed a requirement of Directive 2014/65/EU, Regulation (EU) No 600/2014 and, Regulation (EU) No 596/2014 or the trading venue’s internal rules. |

<ESMA\_QUESTION\_CP\_MIFID\_100>

1. Is there any element in particular that should be clarified with respect to the outsourcing obligations for trading venues?

<ESMA\_QUESTION\_CP\_MIFID\_101>

Please note response to Q100 on outsourcing.

<ESMA\_QUESTION\_CP\_MIFID\_101>

1. Is there any additional element to be addressed with respect to the testing obligations?

<ESMA\_QUESTION\_CP\_MIFID\_102>

Please see response to Q100.

<ESMA\_QUESTION\_CP\_MIFID\_102>

1. In particular, do you agree with the proposals regarding the conditions to provide DEA?

<ESMA\_QUESTION\_CP\_MIFID\_103>

In addition to the response made under Q100, ICE would also note the restriction that has been imposed on trading venues and their members with respect to the provision of DEA. The Level 1 text (Article 48(7) of Directive 2014/65/EU) requires that venues only permit members which are authorised as investment firms or credit institutions to provide direct electronic access. The equivalence provisions of the Regulation (Article 46) go on to state that third-country firms may provide investment services to ECPs and to professional clients without the establishment of a branch where it is registered with ESMA. The text therefore relating to DEA provision is not clear as to whether third-country firms could provide access. The text would benefit from some additional clarification on provision of such services by third-country firms, and we would urge ESMA, in any modifications it makes, to ensure the provision is not restrictive in any way. This is important to address as the provisions as drafted would create an unnecessary restriction to competitive business being conducted on European trading venues.

ICE also notes its agreement with the text in Article 23(1)(e) that DEA providers remain responsible for the trades being done under their membership. This requirement should be extended further to cover activity relating to the submission of orders on venues. This should also be reflected in the organisational requirements for investment firms in draft RTS 13.

<ESMA\_QUESTION\_CP\_MIFID\_103>

1. Do you agree with the proposed draft RTS? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_104>

No. As a general statement, it is unrealistic and ill-advised to attempt to force market makers to make active markets in products for which the fundamental market rationale for the prices which must be quoted are no longer valid. Historic experience clearly supports this view. For example, they will not take positions at a price which they do not have reasonable confidence that they are able to hedge. This is the case irrespective of the categorisation of the state of a market by a trading venue or by ESMA. It is necessary for market making arrangements to recognise this situation. Without unrealistically draconian penalties, designed to force an organisation to take risks in stressed market conditions which they are not otherwise prepared to take (leading potentially to severe unintended consequences), it is not feasible to force a market maker to make a market at a price which is out of line with the market.

At a specific level, ICE proposes the following amendments to the draft RTS:

Recital 6 - remove reference to fast market. This has not been previously defined. The recital should therefore refer only to conditions that have been defined in MiFID I, or other relevant legislation.

Recital 10 - ICE does not think it is ESMA’s intention to create gaps in application of the market making obligations between trading venues by virtue of this provision. ESMA should therefore clarify its intentions here, as we would expect the position to be that whilst a market making scheme is not required for algorithmic trading firms on venues that do not permit it, such venues may nonetheless have such schemes in place which should encompass the same requirements in the MiFID Level 2 as proposed.

With reference to Recital 12 and other such provisions which mention members, investment firms and participants in the draft RTS. ICE considers it important to be clear on the distinction between such entities for the purposes of this text, and to note that clients of members may also participate in market making schemes, including when they are not investment firms or operating an algorithmic trading system.

The definition of ‘disorderly trading conditions’ should be consistent in usage across the text, RTS 13, 14 and 15. In that, the reference to ‘including cases where orders are not resting for sufficient time to be executed’ should be removed. This is ambiguous and does not add anything additional to the effect multiple erroneous orders or transactions has on trading conditions. The definition should also include disruptions to the price formation process, and failure of a venue’s risk controls as situations which may cause such disorderly conditions.

The definition of ‘stressed market conditions’ should also be consistently used across the Level 2 text and should exclude reference to an impairment of the performance of the trading systems of a trading venue or of the members and participants. This would imply that in the event that one member has issues, then a stressed market condition should be declared. It is ICE’s view that an impairment of a member’s systems, which is so significant to affect the systems of ICE would fall under the definition of a disorderly trading condition.

Article 2(2) - It is the preferred approach for firms to notify the venues when they are pursuing a market making strategy. The way in which this provision is worded would suggest that firms could knowingly pursue a strategy until such time as the venue notifies them that they must sign the agreement. The provision could benefit therefore with being clarified to ensure the main responsibility lies with the firms to notify the venue when engaging in such activity.

Reiterating the comments made in the summer, we agree with the principle that market making arrangements should be formalised and documented, however we have concerns with the ‘one size fits all’ determination of what percentage of trading hours should be covered by market making arrangements. In particular, ICE has concerns with the minimum presence threshold of 30% proposed by ESMA to be obliged to sign a market making agreement, resulting in more onerous requirements to be present 50% of trading hours. This risks capturing firms that are not legitimately pursuing a market making strategy and which are not structured to continuously submit two-sided quotes to the market for a set period of time, and furthermore would not be comfortable with being present in stressed market conditions.

A range of minimum presence thresholds under Articles 3(1) and 4(2) should be determined for groups of financial instruments, and these thresholds should be aligned with the minimum presence thresholds that must be adhered to under the agreement. In that regard the requirement is only requiring those firms that are legitimately pursuing market making strategies and can provide liquidity in those required hours.

To further make this point, which ICE made in the summer, to be present in a market for 80% of a trading day may be reasonable for products which trade only during business hours in a single time zone (including many cash equity products). However, for products which trade across multiple time zones and which trade for 20+ hours per day, such as commodity derivative products and equity derivative products, such a requirement would be unreasonable for any potential market maker to adhere to.

ICE is willing to work with ESMA in determining those thresholds to ensure that an appropriate level is adopted for the different asset classes and financial instruments.

Article 4(2)(b) - Requiring a firm to indicate if a given order is part of the market making agreement is very onerous and will require retooling of all systems and incur high cost for the industry. Our recommendation is to support this as a reporting measure where the trading venue would indicate the rebates that are offered to market making participants and transactions that were eligible for this rebate. This would be consistent with RTS 34.

ICE understands that it was not ESMA’s intention to infer that an investment firm under a market making agreement, when operating in stressed market conditions, be ‘compensated’ for any losses it might occur. In the interests of clarity and avoidance of future challenges on this provision, ICE proposes that Article 8(1)(iii) be amended to exclude this term.

Article 10(3)(1) - With reference to Article 2, this provision should be amended to cover a venue’s ability to oblige a firm to enter into an agreement when a notification has not been made.

Article 10(3)(iv) - If a firm does not meet its obligations under a market making agreement, then they will not receive the incentives under the scheme. ICE views this as sufficient penalty in such circumstances. Market making schemes are arranged on a commercial basis, and are in place to generate liquidity and interest in particular products. Firms that no longer wish to participate due to extreme market uncertainty, or where the risk in participating in such markets is too high by their own standards, should not be penalised for making necessary risk management decisions. ICE therefore thinks it would be appropriate to remove ‘but also risk a significant fine’ from this provision.

<ESMA\_QUESTION\_CP\_MIFID\_104>

1. Should an investment firm pursuing a market making strategy for 30% of the daily trading hours during one trading day be subject to the obligation to sign a market making agreement? Please give reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_105>

No. As noted above under Q104, ICE proposes that the minimum presence threshold be reconsidered to take account of the different asset classes, financial instruments, and market environments. This threshold should then be aligned with the minimum presence threshold required under the market making agreement for that financial instrument.

<ESMA\_QUESTION\_CP\_MIFID\_105>

1. Should a market maker be obliged to remain present in the market for higher or lower than the proposed 50% of trading hours? Please specify in your response the type of instrument/s to which you refer.

<ESMA\_QUESTION\_CP\_MIFID\_106>

As per our response under Q104, the 50% minimum presence threshold should be reconsidered to take account of the different asset classes, financial instrument and market environments. The requirement therefore to remain present, depending on the particular contract, could reasonably be higher or lower.

<ESMA\_QUESTION\_CP\_MIFID\_106>

1. Do you agree with the proposed circumstances included as “exceptional circumstances”? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_107>

Broadly ICE is in agreement with the exceptional circumstances as set out in the text. ICE however would like to make the following comments:

Article 5(2)(a) - The language here suggests that an exceptional circumstance would be declared only when extreme volatility is observed across all contracts. We do not think that this was ESMA’s intention to be so restrictive in this sense, but rather the provision should make reference to extreme volatility in a specific instrument, which consequently may be the subject of a market making scheme. ICE proposes that ESMA amend this provision to clarify the circumstances.

Article 5(2)(c) - It would not be wise for the trading venue to declare situations that ‘imply’ disorderly trading conditions, as it may turn out that they are not, but the declaration itself may create or contribute to disorderly trading conditions. It is not in ESMA’s or the market place’s interests for venues to declare such situation without certainty. ICE proposes therefore that the provision be amended to refer to ‘….situations which are deemed to be disorderly trading conditions as defined under Article 1’.

<ESMA\_QUESTION\_CP\_MIFID\_107>

1. Have you any additional proposal to ensure that market making schemes are fair and non-discriminatory? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_108>

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<ESMA\_QUESTION\_CP\_MIFID\_108>

1. Do you agree with the proposed regulatory technical standards? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_109>

ICE broadly supports the RTS 16 as drafted; we would however like to make the following comments:

ICE requests that reference to setting a maximum OTR be removed from Recital 7 and Article 3(4). ESMA’s mandate is to specify the methodology that should be utilised by trading venues, not the maximum limit. The control over what limit shall be applied should rest with the trading venue directly.

ICE requests that consistency be applied when referring to voice trading models and systems across the Level 2 text. The term is used in the following draft RTS: 16, ITS 27; RTS 34, and RTS 26.

In addition, the term hybrid system has not previously been defined in the draft RTS. As it is referred to in Article 1, it is suggested that this term be included in the definitions under Article 2 and elsewhere where required.

<ESMA\_QUESTION\_CP\_MIFID\_109>

1. Do you agree with the counting methodology proposed in the Annex in relation to the various order types? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_110>

Yes.

<ESMA\_QUESTION\_CP\_MIFID\_110>

1. Is the definition of “orders” sufficiently precise or does it need to be further supplemented? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_111>

Yes.

<ESMA\_QUESTION\_CP\_MIFID\_111>

1. Is more clarification needed with respect to the calculation method in terms of volume?

<ESMA\_QUESTION\_CP\_MIFID\_112>

We would suggest amending the calculation under Article 3(4)(b) to reference only filled transactions and not partially filled transactions.

<ESMA\_QUESTION\_CP\_MIFID\_112>

1. Do you agree that the determination of the maximum OTR should be made at least once a year? Please specify the arguments for your view.

<ESMA\_QUESTION\_CP\_MIFID\_113>

Yes - at least on this basis. We support having the flexibility to recalculate the ratio if we see an increase in the number of unexecuted orders to trades on the back of the monthly monitoring.

<ESMA\_QUESTION\_CP\_MIFID\_113>

1. Should the monitoring of the ratio of unexecuted orders to transactions by the trading venue cover all trading phases of the trading session including auctions, or just the continuous phase? Should the monitoring take place on at least a monthly basis? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_114>

ICE would suggest it includes all phases, enhancing the venue’s ability to detect disruptive trading.

ICE agrees with monthly monitoring to coincide with the billing cycle.

<ESMA\_QUESTION\_CP\_MIFID\_114>

1. Do you agree with the proposal included in the Technical Annex regarding the different order types? Is there any other type of order that should be reflected? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_115>

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<ESMA\_QUESTION\_CP\_MIFID\_115>

1. Do you agree with the proposed draft RTS with respect to co-location services? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_116>

Article 1(4) - Definitions: ICE flags the definition of rebates which only references refunds paid with respect to market making activities in shares or a basket of shares. ICE considers it important to extend this definition to other financial instruments such that it is consistent with Article 48 which does not differentiate between shares and other financial instruments in any other provision. It shall also be consistent when considering its application within market making arrangements.

<ESMA\_QUESTION\_CP\_MIFID\_116>

1. Do you agree with the proposed draft RTS with respect to fee structures? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_117>

We agree.

<ESMA\_QUESTION\_CP\_MIFID\_117>

1. At which point rebates would be high enough to encourage improper trading? Please elaborate.

<ESMA\_QUESTION\_CP\_MIFID\_118>

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<ESMA\_QUESTION\_CP\_MIFID\_118>

1. Is there any other type of incentives that should be described in the draft RTS?

<ESMA\_QUESTION\_CP\_MIFID\_119>

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<ESMA\_QUESTION\_CP\_MIFID\_119>

1. Can you provide further evidence about fee structures supporting payments for an “early look”? In particular, do you agree with ESMA’s preliminary view regarding the differentiation between that activity and the provision of data feeds at different latencies?

<ESMA\_QUESTION\_CP\_MIFID\_120>

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<ESMA\_QUESTION\_CP\_MIFID\_120>

1. Can you provide examples of fee structures that would support non-genuine orders, payments for uneven access to market data or any other type of abusive behaviour? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_121>

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<ESMA\_QUESTION\_CP\_MIFID\_121>

1. Is the distinction between volume discounts and cliff edge type fee structures in this RTS sufficiently clear? Please elaborate

<ESMA\_QUESTION\_CP\_MIFID\_122>

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<ESMA\_QUESTION\_CP\_MIFID\_122>

1. Do you agree that the average number of trades per day should be considered on the most relevant market in terms of liquidity? Or should it be considered on another market such as the primary listing market (the trading venue where the financial instrument was originally listed)? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_123>

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<ESMA\_QUESTION\_CP\_MIFID\_123>

1. Do you believe a more granular approach (i.e. additional liquidity bands) would be more suitable for very liquid stocks and/or for poorly liquid stocks? Do you consider the proposed tick sizes adequate in particular with respect to the smaller price ranges and less liquid instruments as well as higher price ranges and highly liquid instruments? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_124>

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<ESMA\_QUESTION\_CP\_MIFID\_124>

1. Do you agree with the approach regarding instruments admitted to trading in fixing segments and shares newly admitted to trading? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_125>

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<ESMA\_QUESTION\_CP\_MIFID\_125>

1. Do you agree with the proposed approach regarding corporate actions? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_126>

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<ESMA\_QUESTION\_CP\_MIFID\_126>

1. In your view, are there any other particular or exceptional circumstances for which the tick size may have to be specifically adjusted? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_127>

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<ESMA\_QUESTION\_CP\_MIFID\_127>

1. In your view, should other equity-like financial instruments be considered for the purpose of the new tick size regime? If yes, which ones and how should their tick size regime be determined? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_128>

No. Such regulation is not needed to ensure an orderly market for instruments other than equities. Specifically for equity derivatives there are no significant differences on tick sizes used by different European trading venues and no problems which need to be resolved relating to tick sizes for these products. Similarly, do not believe that there are issues in interest rate or commodity derivatives that need to be addressed by this regime.

<ESMA\_QUESTION\_CP\_MIFID\_128>

1. To what extent does an annual revision of the liquidity bands (number and bounds) allow interacting efficiently with the market microstructure? Can you propose other way to interact efficiently with the market microstructure? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_129>

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<ESMA\_QUESTION\_CP\_MIFID\_129>

1. Do you envisage any short-term impacts following the implementation of the new regime that might need technical adjustments? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_130>

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<ESMA\_QUESTION\_CP\_MIFID\_130>

1. Do you agree with the definition of the “corporate action”? Please provide reasons for your answer.

<ESMA\_QUESTION\_CP\_MIFID\_131>

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<ESMA\_QUESTION\_CP\_MIFID\_131>

1. Do you agree with the proposed regulatory technical standards?

<ESMA\_QUESTION\_CP\_MIFID\_132>

We would like to bring to ESMA’s attention that the draft RTS are not consistent with the proposals as set out in the consultation paper. Firstly, the RTS makes reference to the Regulation rather than the Directive in which Article 48(12)(e) is contained. Secondly, the provisions in Article 1 do not correspond with the options that ESMA puts forward in the consultation:

|  |
| --- |
| *ESMA proposes that material market in terms of liquidity in a financial instrument are:*  *i. the trading venue where the financial instrument was first admitted to trading, including all the venues where the instrument was simultaneously admitted to trading in case of multiple listing; or,*  *ii. the most relevant market in terms of liquidity for a financial instrument as verified during the preceding year.”* |

We do not think it was ESMA’s intention to provide an alternative suggestion for point (ii) in the RTS based on the proposal that was set out in the consultation paper. In ICE’s view however, more than just turnover should be taken into account and that the following elements would give a better reflection of materiality in terms of liquidity for these purposes.

1. Number of unique participants in the market;
2. Volume traded (both screen and voice); and
3. Bid/offer spread and size offered on the screen.

The materiality determination, based on the above data, will need to be made for each asset class or sub-set of products separately.

The RTS are silent on how regulated markets become aware that they are material in terms of liquidity. It is important to include Recitals or provisions to this effect, to ensure that regulated markets are aware and can take the required action under Article 48(12)(e).

<ESMA\_QUESTION\_CP\_MIFID\_132>

1. Which would be an adequate threshold in terms of turnover for the purposes of considering a market as “material in terms of liquidity”?

<ESMA\_QUESTION\_CP\_MIFID\_133>

See response above on what aspects should be considered.

<ESMA\_QUESTION\_CP\_MIFID\_133>

1. Data publication and access
2. Do you agree with ESMA’s proposal to allow the competent authority to whom the ARM submitted the transaction report to request the ARM to undertake periodic reconciliations? Please provide reasons.

<ESMA\_QUESTION\_CP\_MIFID\_134>

Whilst there is no consultation question on the subject of the most appropriate reasonable commercial basis for market data, ICE wishes to highlight that it is generally supportive of the approach proposed: namely Option A+. However, ICE disagrees with the proposal to centralise information on a central web-site that is not under the control of the venue. This will be time consuming, with the potential to create delay and error. A number of similar centralisation exercises conducted in the past which have attempted to create a central web-site with consolidated information have resulted in publication of out-of-date information, inaccurate attempts to standardise terms that differ across venues and/or asset classes, or differing interpretations, compounded at times by use of different languages. A more effective requirement is for all information to be posted publically on the venue’s site, and further to establish links to the required page(s) on a centralised site.

Regarding the proposals concerning reconciliation, periodic checks in technical controls and processes are not unreasonable and should be encouraged.

<ESMA\_QUESTION\_CP\_MIFID\_134>

1. Do you agree with ESMA’s proposal to establish maximum recovery times for DRSPs? Do you agree with the time periods proposed by ESMA for APAs and CTPs (six hours) and ARMs (close of next working day)? Please provide reasons.

<ESMA\_QUESTION\_CP\_MIFID\_135>

In general the proposals, including the proposed times, are appropriate. However, the inclusion of natural disasters in the list of scenarios which business continuity arrangements should cover is not appropriate. Data service agreements typically contain allowances for force majeure, including natural disasters. The expectation that any DRSP will be able to ensure a recovery within 6 hours or 24 hours from an unknown natural disaster is unreasonable. As an example, during the Northeast Blackout in the US in 2003, eight states were impacted and over 2 days were required to restore all access to the US power grid.

<ESMA\_QUESTION\_CP\_MIFID\_135>

1. Do you agree with the proposal to permit DRSPs to be able to establish their own operational hours provided they pre-establish their hours and make their operational hours public? Please provide reasons. Alternatively, please suggest an alternative method for setting operating hours.

<ESMA\_QUESTION\_CP\_MIFID\_136>

Operational hours for DSRPs should at a minimum be sufficient to fully meet their regulatory requirements. For example, if CTPs or APAs are allowed to establish their own operational hours, it is difficult to understand how they will meet the obligations of article 14 to ensure no incomplete information. For data disseminated real time there is limited time to react to loss of information if not processed within a short period of time: differing operational hours creates the risk of longer response times.

<ESMA\_QUESTION\_CP\_MIFID\_136>

1. Do you agree with the draft technical standards in relation to data reporting services providers? Please provide reasons.

<ESMA\_QUESTION\_CP\_MIFID\_137>

Please refer to our responses to Questions 135 and 136. In addition, data publication controls of DRSPs should mirror that of the sources, relating to time, exceptions to data publications and other considerations. Finally, RTS 20 states that information should be stored for a sufficiently long period: it should be confirmed what the minimum storage period is.

<ESMA\_QUESTION\_CP\_MIFID\_137>

1. Do you agree with ESMA’s proposal?

<ESMA\_QUESTION\_CP\_MIFID\_138>

The consultation paper on this subject relates to ‘equity and equity-like instruments’. Prior to extension to non-equity instruments in 2018, the issues relating specifically to non-equity instruments should be revisited, and adapted accordingly where necessary to accommodate the particular characteristics relating to data services for such products.

The proposed period of 3 months is likely to be reasonable for most products, but may need to be further extended depending on liquidity of the products.

<ESMA\_QUESTION\_CP\_MIFID\_138>

1. Do you agree with this definition of machine-readable format, especially with respect to the requirement for data to be accessible using free open source software, and the 1-month notice prior to any change in the instructions?

<ESMA\_QUESTION\_CP\_MIFID\_139>

It is not appropriate to stipulate that the data must always be accessible through publicly available software with openly shared source code. In some cases data is provided using standard protocols such as FIX; in other cases, an exchange may need to develop a feed to supply the required content. In either case ensuring the source code is openly shared is outside of the control of a DRSP, though they should be responsible for ensuring clear specification documents are available for handling the feed. In the case of API use this ensures the use of recognised libraries but not the supply of source code.

A one month notice for changes to instructions in change is acceptable. However, since there may be exceptional circumstances that prevent such notice always being possible, the text of the RTS should stipulate that best endeavours be used to provide such a one month notice period.

<ESMA\_QUESTION\_CP\_MIFID\_139>

1. Do you agree with the draft RTS’s treatment of this issue?

<ESMA\_QUESTION\_CP\_MIFID\_140>

The consultation paper on this subject relates to ‘equity and equity-like instruments’. Prior to extension to non-equity instruments in 2018, the issues relating specifically to non-equity instruments should be revisited, and adapted accordingly where necessary to accommodate the particular characteristics relating to data services for such products.

ICE agrees that ESMA is correct to focus on the issue of duplicates. However the solution to this issue is not for the APA to be able to request the venue to use an exclusive APA. Such an approach would risk restricting competition, and could prohibit future technological advancements such as back-up procedures, the ability to switch between APA, etc. A potential solution is that a venue primarily uses a specified APA for a limited business area; e.g. for particular regions, but has alternative APAs that are available as a back-up or as migration options.

<ESMA\_QUESTION\_CP\_MIFID\_140>

1. Do you agree that CTPs should assign trade IDs and add them to trade reports? Do you consider necessary to introduce a similar requirement for APAs?

<ESMA\_QUESTION\_CP\_MIFID\_141>

The consultation paper on this subject relates to ‘equity’ CTPs. Prior to extension to non-equity instruments in 2018, the issues relating specifically to non-equity instruments should be revisited, and adapted accordingly where necessary to accommodate the particular characteristics relating to data services for such products.

We believe a preferred approach to trade identification is for a CTP to use the venue’s trade ID. This id would be unique by venue / product / day and would be consistent in format regardless of CTP. This ID could in turn be used by APAs. Where a unique trade id is assigned by a CTP which is not referenced to the ID supplied by a venue, there will be no means to cross reference this ID to any other transaction information, as it is not initiated by the venue and has no applicable metadata.

Furthermore, as highlighted on page 445 of the Consultation Paper, there may be circumstances where a CTP may not be available for a particular market. This fact highlights the dangers of a CTP being the creator of trade IDs.

<ESMA\_QUESTION\_CP\_MIFID\_141>

1. Do you agree with ESMA’s proposal? In particular, do you consider it appropriate to require for trades taking place on a trading venue the publication time as assigned by the trading venue or would you recommend another timestamp (e.g. CTP timestamp), and if yes why?

<ESMA\_QUESTION\_CP\_MIFID\_142>

ICE agrees with the proposal. However, it should be highlighted that irrespective of the granularity of transaction time, such an assignment process will not always result in consecutive trading being reported in the same order, since a liquid product may trade multiple times in the same time period.

<ESMA\_QUESTION\_CP\_MIFID\_142>

1. Do you agree with ESMA’s suggestions on timestamp accuracy required of APAs? What alternative would you recommend for the timestamp accuracy of APAs?

<ESMA\_QUESTION\_CP\_MIFID\_143>

ICE agrees with the proposal. However, it is appropriate for APAs to have maximum delays between transactions being reported to the APA and publication time.

<ESMA\_QUESTION\_CP\_MIFID\_143>

1. Do you agree with ESMA’s proposal? Do you think that the CTP should identify the original APA collecting the information form the investment firm or the last source reporting it to the CTP? Please explain your rationale.

<ESMA\_QUESTION\_CP\_MIFID\_144>

The consultation paper on this subject relates to ‘equity’ CTPs. Prior to extension to non-equity instruments in 2018, the issues relating specifically to non-equity instruments should be revisited, and adapted accordingly where necessary to accommodate the particular characteristics relating to data services for such products.

It should be the responsibility of the CTP to state the source reporting to the CTP. It should not be the responsibility of the CTP to state the original APA, as in the event of system issues or other unexpected events it is possible that the original APA may change. Furthermore, requiring the CTP to be responsible for reporting the original APA would further complicate what could be a time sensitive process to ensure obligations are met.

<ESMA\_QUESTION\_CP\_MIFID\_144>

1. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that you envisage in case of implementation of the proposal.

<ESMA\_QUESTION\_CP\_MIFID\_145>

ICE agrees with the proposal. However it should be highlighted that there will inevitably be an increase in costs to implement these changes. In particular, the requirement that ‘each venue must also disaggregate by further criteria’ will result in many unique requests, since clients will have differing opinions of how this disaggregation might work. This will lead to time consuming analysis for both the venue and the client.

<ESMA\_QUESTION\_CP\_MIFID\_145>

1. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that you envisage in case of implementation of the proposal.

<ESMA\_QUESTION\_CP\_MIFID\_146>

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<ESMA\_QUESTION\_CP\_MIFID\_146>

1. With the exception of transaction with SIs, do you agree that the obligation to publish the transaction should always fall on the seller? Are there circumstances under which the buyer should be allowed to publish the transaction?

<ESMA\_QUESTION\_CP\_MIFID\_147>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_147>

1. Do you agree with the elements of the draft RTS that cover a CCP’s ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

<ESMA\_QUESTION\_CP\_MIFID\_148>

Set out below are a number of points on which we do not agree with the provisions of the draft RTS dealing with a CCP’s ability to deny access, together with some proposed drafting amendments setting out an alternative approach.

**1) Differences Between Financials and Commodities and other non-financial Derivatives**

Recital (2) of the draft RTS states that “differences between financial and commodities and other non-financial derivatives have also to be taken into account”. However, the RTS do not include provisions clearly differentiating between different classes of financial instrument. We assume that this is an interpretive provision to the effect that such differences should be taken into account when an access request is being considered. Recital (2) should therefore be amended to clarify this. We also consider that the RTS should contain provisions expressly differentiating between different types of financial instrument (see further our response to Question 154).

**Proposed RTS 24 Text Changes:**

***Recital (2)***

*Articles 35 and 36 of Regulation (EU) 600/2014 mandate granting non-discriminatory access in relation to financial instruments. The application of the requirements in this Regulation has to take into account the differences resulting from the whole spectrum of different financial instruments. For example, managing risks in relation to derivatives may be more complex and challenging than in relation to securities. The differences between financial and commodities and other non-financial derivatives ~~have~~ should also ~~to~~ be taken into account when considering an access request.*

**2) Changes to Business Models and Scope**

In accordance with accepted EU law principles, non-discriminatory access means a CCP is required to treat two different trading venues in the same manner unless any different treatment is objectively justified (Sermide, Case 106/83). Certain provisions of the RTS would require changes to be made to existing business models in order to grant access requests. This goes beyond the requirement to provide non-discriminatory access as set out in the Level 1 text. As a result, we consider that these provisions are ultra vires. They may also infringe on a European company’s freedom to conduct business and right to property (CFR, Arts 16 and 17).

See further our response to Question 154.

A CCP will not necessarily have the operational capacity, know-how, resources or regulatory or other permissions in place to clear products that do not already form part of its service offering. Mandating CCPs to offer a clearing service under such circumstances would lead to increased risk. This is the case whether or not a CCP is authorised to clear a particular product, since such authorisation is granted according to broadly defined asset classes, rather than for particular products. Accepting such requests within the timeframes specified under Article 35(3) of MiFIR (nine months in total in the case of exchange-traded derivatives) would not necessarily permit the CCP to ensure that adequate arrangements are in place to clear such products in accordance with its regulatory obligations. We note that ESMA’s decision not to impose a clearing obligation for FX non-deliverable forwards was in part based on the fact that only one European CCP is authorised to clear these products. This implicitly recognises that making arrangements for the clearing of a new asset class is a complex process and should not be imposed upon CCPs.

Furthermore, the requirement for a CCP to clear products that do not already form part of its clearing service effectively results in CCPs being treated as public utilities. This is not appropriate for a number of reasons, including their systemic importance. A CCP must be permitted to make its own business decisions in line with sound risk management practices.

**Proposed RTS 24 Text Changes:**

**Recital (3)**

*According to Articles 35(3) and 36(3) of Regulation (EU) No 600/2014 the party denying access has to provide full reasons for that decision and this includes identifying how the relevant risks arising from granting access would in the concrete situation be unmanageable such that there would be significant undue risk remaining. An appropriate way of doing this is for the party denying access to clearly outline the changes that would arise from granting access, how it would have to manage the risk associated with the changes, and explain the impact on its structures such as necessary compliance measures. A CCP or trading venue would not be obliged to change its existing business model in order to enable access. ~~In particular, a CCP using an open offer trade acceptance model that receives a request for access from a trading venue using a novation trade acceptance model would either have to grant that access or identify how precisely the simultaneous use of an open offer and a novation trade acceptance model would give rise to significant undue risks that cannot be managed.~~*

**Recital (7)**

*When a trading venue requests access to a CCP concerning instruments currently not ~~covered under the CCP’s authorisation~~ cleared by the CCP and the CCP does not deny the access request on an applicable ground, the latter should launch a clearing service for such instruments, including where necessary requesting an extension of its authorisation to the competent authority of the Member State where it is established, which should in turn immediately transmit all information received from the applicant CCP to the college of the CCP. The relevant competent authority should duly consider the opinion of the college on the extension of authorisation according to Regulation (EU) No. 648/2012.*

**Article 1 (4) - New**

*A CCP shall be entitled to deny an access request relating to a class or sub-class of financial instruments if it does not provide a clearing service for that class or sub-class of financial instruments.*

**Article 4.1**

*In addition to the circumstances identified in Articles 2 and 3 of this Regulation, a CCP may deny an access request, only when it cannot adopt arrangements to adequately manage any of the following risks arising from granting access such that there would be significant undue risk remaining:*

*(a) The CCP does not currently clear financial instruments of the class or sub-class for which access is being requested*

*~~(a)~~ (b) the CCP does not have, nor is it able to ~~get in due~~ obtain in time for the proposed start of clearing by the CCP of the financial instruments for which access is being sought, the necessary authorisations consistent with meeting the relevant requirements set out in Title IV of Regulation (EU) No 648/2012 regarding the financial instruments in question;*

*~~(b)~~ (c) granting access would threaten the economic viability of the CCP or its ability to meet minimum capital requirements under Article 16 of Regulation (EU) No 648/2012;*

*~~(c)~~ (d) legal risks; or*

*~~(d)~~ (e) there is an incompatibility of CCP and trading venue rules that the CCP cannot remedy in cooperation with the trading venue.*

**3) Legal Risks**

The legal risks identified in Article 4.2 are extremely narrow, and do not include the range of legal risks that a CCP is required to analyse pursuant to EMIR or the CPMI-IOSCO PFMIs. Examples of the types of legal risks which a CCP must analyse and ensure are manageable before agreeing with a trading venue to clear a financial instrument include the legal basis for contract formation, including compatible rules for account allocation, error trades, voiding contracts, trade reporting and position management, as well as compatibility of the termination dates or termination rights in relation to the contracts, and dispute resolution. A CCP would also need to ensure compatible arrangements between the CCP and trading venue relating to anti-money laundering, sanctions policies, permissible jurisdictions of participants, timing of irrevocability of transactions, governing law, licensing arrangements, required public procurement processes, etc. Further details on these legal risks are set out in Appendix to this response. Of particular importance is the need for a CCP to ensure that granting access would not result in the CCP being unable to comply with existing laws. For example, if granting access would result in a CCP being unable to meet European or US laws (resulting in it no longer qualifying as a US DCO) then this should be a valid ground for denial of access. This should include, for example, US restrictions on netting for FCMs and EMIR CCP authorisation, capital or risk management requirements. The existence of legal risks can have a profound impact on systemic risks and risks to individual market participants, as correctly identified within EMIR and the CPMI-IOSCO Principles for Financial Market Infrastructures.

**Proposed RTS 24 Text Changes:**

**Article 4.2**

*A CCP may refuse an access request based on legal risk as referred to in subparagraph (c) of the previous paragraph. Such legal risks would include situations where, as a result of granting access the CCP:*

*(a) would not be able to enforce its rules relating to close out netting and default procedures; or*

*(b) cannot manage the risks arising from the simultaneous use of different trade acceptance models; or*

*(c) would be in breach of any applicable legal requirements.*

**Appendix to Response to Q148**

**Examples of possible legal risk arising from access, to support response to Q148**

| **Legal risk issue** | **Potential problems & impact on systemic risks** |
| --- | --- |
| There needs to be a sound legal basis for contract formation in the rules of the trading venue, including compatible rules for account allocation, error trades, voiding contracts, trade reporting and position management, as well as compatibility of the termination dates or termination rights in relation to the contracts. | The contracts formed pursuant to the rules of the applicant trading venue must be legally enforceable and contain terms allowing them to be accepted by the CCP’s clearing mechanism. The CCP and trading venue will have to reach a view on whether they can obtain sufficient comfort on this issue to grant an access request. Otherwise increased systemic risks would be the outcome. |
| The dispute resolution or jurisdiction provisions in the contracts or rules of the trading venue may be incompatible with those of the CCP. | The CCP must have a clear procedure founded on a valid legal basis for resolving any disputes that may arise in relation to the transactions it clears. Dispute resolution procedures therefore need to be made consistent. |
| Risks may arise in relation to the anti-money laundering, counter-terrorist financing and sanctions policies and procedures of the trading venue. | Legal uncertainty could arise if a CCP were to grant access in circumstances which create increased exposure to risk, including of financial crime. |
| Legal uncertainty could arise if the applicant trading venue:   * has any physical presence or grants access to users in any jurisdiction designated by the United Nations, European Union or any Member State, under legislation relating to financial sanctions regimes or in any jurisdiction where in the CCP’s reasonable opinion there is an increased risk of the relevant financial instruments being subject to fraudulent or corrupt practice; or * is not required to operate to the same supervisory standards as existing venues cleared by the CCP. | The CCP should not take on business which it considers likely to affect either its own compliance with relevant financial sanctions regimes or anti-money laundering or anti-corruption requirements, or which may expose the CCP to increased reputational risk. This would be contrary to the objectives of EMIR to ensure that “CCPs are safe and sound, and comply at all times with the stringent organisational, business conduct and prudential requirements established by (Recital 49) [EMIR].” |
| Legal uncertainty could arise if the applicant trading venue:   * has any physical presence or grants access to users in any jurisdiction which is not within the current scope of the CCP’s geographical coverage; or * is subject or is likely to be subject to third country law or regulation with a potential for extra-territorial application adversely affecting the CCP as a result of granting access or which would threaten the smooth and orderly functioning of the CCP. | Becoming subject or potentially subject to obligations pursuant to another legal regime would increase a CCP’s legal risk and add to administrative complexity. It could also create an uneven playing field as EU CCPs could become subject to varying and potentially conflicting legal requirements, resulting in compliance risks. |
| Legal uncertainty could arise if:   * the moment of finality or irrevocability of the transaction is inconsistent with the rules of the trading venue; or * derivative contracts are governed by a different governing law than the governing law governing law applicable to the trading venue under its rules. | A CCP should be able to mitigate the risks of becoming involved in contractual disputes with the applicant trading venue and its users, and any increased risks arising from potential conflicts of laws. Differences in choice of law for derivative contracts could jeopardise a CCP’s “designated system” status. |
| Appropriate licensing arrangements may be required with respect to the relevant contract or underlying deliverable. | A CCP will need to obtain all relevant IP rights and licences in order to perform clearing services for the applicant trading venue in accordance with its legal obligations towards third parties. This may not be straightforward given the potential involvement of third parties. |
| A product may be offered by the trading venue pursuant to a public procurement process. | Regulation (EU) 1031/2010 establishes the regime for the auctioning of carbon emission allowances. Such auctions can only be held by auction platforms pursuant to public procurement processes which include, inter alia, establishing satisfactory clearing and settlement services, in many cases requiring procurement contracts between CCPs and governmental authorities. A CCP would need to ensure it does not infringe the terms of such public procurement processes were it to clear such products. |

<ESMA\_QUESTION\_CP\_MIFID\_148>

1. Do you agree with the elements of the draft RTS that cover a trading venue’s ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

<ESMA\_QUESTION\_CP\_MIFID\_149>

We do not understand the rationale for not including legal risk as a ground on which a trading venue could potentially refuse an access request. Any venue (CCP or trading venue) should be able to deny access based upon legal risks. For reasons of systemic integrity and market stability, it is not appropriate for execution or clearing venues to be required to take on significant undue legal risks that cannot be managed. This has been reflected for CCPs in Article 4(1)(c), but also needs to be included in Article 6 for trading venues.

**Proposed RTS 24 Text Changes:**

***Article 6.1***

*In addition to the circumstances identified in the previous article a trading venue may deny an access request only when it cannot, in time for the proposed start of clearing by the CCP of the financial instruments for which access is being sought, adopt arrangements to adequately manage any of the following risks arising from granting access such that there would be significant undue risk remaining:*

*(a) threat to the economic viability of the trading venue or its ability to meet minimum capital requirements under Article 47(1)(f) of Directive 2014/65/EU; ~~and~~*

*(b) incompatibility of trading venue and CCP rules that the trading venue cannot remedy in cooperation with the CCP; or*

*(c) legal risks.*

<ESMA\_QUESTION\_CP\_MIFID\_149>

1. In particular, do you agree with ESMA’s assessment that the inability to acquire the necessary human resources in due time should not have the same relevance for trading venues as it has regarding CCPs?

<ESMA\_QUESTION\_CP\_MIFID\_150>

We do not agree with this assessment and note that no rationale is provided for it in the Consultation Paper. Under MiFID II, regulated markets have a number of obligations including ensuring fair and orderly trading, effective settlement, carrying out market surveillance, monitoring compliance with the rules of the regulated market and, for commodity derivatives, applying position management controls. Compliance with these requirements would become more complex, if not impossible, in view of the current drafting of the requirements on netting by CCPs. Non-compliance would substantially increase risks and threaten financial stability.

**Proposed RTS 24 Text Changes:**

***Article 5***

*1. A trading venue may deny an access request on the grounds of operational risk and complexity arising from such access only when it cannot adopt arrangements to adequately manage those risks such that there would be significant undue risk remaining.*

*2. For the purposes of paragraph 1, types of relevant risk are, among others,:*

*(a) the incompatibility of CCP and trading venue IT systems such that the trading venue cannot provide for connectivity between the systems.;*

*(b) the trading venue does not have, nor is it able to get in due time, the necessary human resources with the necessary knowledge, skills and experience to perform its functions in accordance with Directive 2014/65/EU.*

<ESMA\_QUESTION\_CP\_MIFID\_150>

1. Do you agree with the elements of the draft RTS that cover an CA’s ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

<ESMA\_QUESTION\_CP\_MIFID\_151>

The grounds specified in the RTS are significantly narrower than the provisions of the Level 1 text, as set out below. They should be broadened to ensure consistency.

1. MiFIR Article 35(4)(b) states that “The competent authority of a CCP or that of the trading venue shall grant a trading venue access to a CCP only where such access…would not threaten the smooth and orderly functioning of the markets, in particular due to liquidity fragmentation, ***or*** would not adversely affect systemic risk.”

In order to be consistent with this provision it is important to clarify that any one of the conditions set out in Article 7 would constitute sufficient grounds by itself to justify a competent authority denying access.

2. In addition, in order to be consistent with MiFIR Article 35(4), a competent authority must be satisfied that there would not be an adverse effect on systemic risk, i.e., it needs to have a degree of certainty as to this. A competent authority should therefore be empowered to refuse an access request where granting access would create significant undue risks for the CCP or the trading venue in a way that may have a wider negative impact on the market.

**Proposed RTS 24 Text Changes:**

***Article 7***

*Granting access will threaten the smooth and orderly functioning of the markets or adversely affect systemic risk, apart from the situations identified in Regulation (EU) No 600/2014, where:*

*(a) one of the parties to the agreement is not meeting its legal obligations, or would be unlikely to meet its legal obligations as a consequence of granting access; or*

*(b) granting access would create significant undue risks for the CCP or the trading venue in a way that ~~would~~ may have a wider negative impact on the market; ~~and~~ or*

*(c) there is no remedial action that would allow the relevant party to meet its legal obligations with reasonable effort prior to the access arrangement being put in place according to Article 35(3) and 36(3) of Regulation (EU) No 600/2014.*

<ESMA\_QUESTION\_CP\_MIFID\_151>

1. Do you agree with the elements of the draft RTS that cover the conditions under which access is granted? If not, please explain why and, where possible, propose an alternative approach.

<ESMA\_QUESTION\_CP\_MIFID\_152>

For reasons of market transparency, it is important that access requests are made public. In our view, this should be specified in the RTS.

**Proposed RTS 24 Text Changes:**

***Article 8***

*[…]*

*4. A CCP or trading venue shall notify the market as soon as practicable when it receives any access request.*

<ESMA\_QUESTION\_CP\_MIFID\_152>

1. Do you agree with the elements of the draft RTS that cover fees? If not, please explain why and, where possible, propose an alternative approach.

<ESMA\_QUESTION\_CP\_MIFID\_153>

We broadly agree with these provisions.

<ESMA\_QUESTION\_CP\_MIFID\_153>

1. Do you agree with the proposed draft RTS? Please indicate which are the main costs and benefits that do you envisage in case of implementation of the proposal.

<ESMA\_QUESTION\_CP\_MIFID\_154>

We consider that a number of changes (as shown in our proposed drafting revisions) are required to the draft RTS, for the reasons set out below.

Definition of “economically equivalent”

1. We agree with paragraph 72 of the Consultation Paper, which states: ‘*In ESMA’s view, it is the CCP that shall determine whether a contract traded on the trading venue to which it has granted access is economically equivalent to those contract it clears, with the understanding that any such a contract shall belong to the class(es) of financial instruments for which the CCP was authorised under Article 14 of EMIR*.’ However, the definition included in Article 11(1) of the RTS is inconsistent with this, and could create economically nonsensical outcomes. For example an oil futures contract could be deemed economically equivalent to a sugar futures contract. It also results in a disproportionate requirement compared to the original intention of the Level 1 measure. Furthermore, the broad definition of “economically equivalent” and the approval requirement for excluding contracts from netting could interfere with a CCP’s ability to comply with the EMIR requirement to “*adopt models and parameters in setting its margin requirements that capture the risk characteristics of the products cleared*” (EMIR, Article 41(2)).

“Non-discriminatory” treatment

1. Article 35(6)(e) of MiFIR states that *“ESMA shall develop draft regulatory technical standards to specify…the conditions for non-discriminatory treatment in terms of how contracts traded on that trading venue are treated in terms of collateral requirements and netting of economically equivalent contracts”*. In Article 11(2) ESMA propose*s* thatthe samecollateral requirements and margin methodologies must be applied to economically equivalent contracts. This is inconsistent with Level 1, which requires “non-discriminatory” access. Non-discrimination means that things that are the same must be treated in the same way (see our response to Q148). As explained in paragraph 1 above, although two contracts may be economically equivalent, this does not make them the same. Similarly in Article 12(1) ESMA proposes the same netting processes must be applied to economically equivalent contracts. This is similarly inconsistent with Level 1.

In any case, a proposal to mandate the same collateral and margin requirements, as opposed to non-discriminatory requirements, would lead to highly perverse outcomes. Specifically, there are a range of circumstances in which collateral and margining requirements for similar contracts should not be the same, but in which it would be important to be non-discriminatory.  Two relatively simple examples are as follows:

* 1. A CCP which clears a DAX futures contract may get an access request to clear a very similar contract, but with half the size - a 'DAX mini'. It would be inappropriate for the CCP to charge the SAME margin - it should instead be stipulated that the CCP's margin requirements should be non-discriminatory (eg half the margin level).
  2. Another example would be where a CCP which clears a deliverable commodities contract gets an access request to clear a contract with a very similar contract specification except for the method of settlement: namely that it would be cash-settled rather than physically settled. The collateral and margin requirements for the two contracts would not be the same. Specifically, they would differ in so far as the collateral and margin requirements relating to the delivery process would not apply to the cash settled contract. Nevertheless it should be a requirement that the collateral and margin requirements are non-discriminatory (e.g. the same collateral and margin levels prior to entry of the settlement / delivery mechanism, with different requirements thereafter).

Similarly, the application of the same netting processes, as opposed to non-discriminatory netting processes, would also lead to perverse outcomes. It could lead for example in the above examples to the need to net contracts in totally inappropriate circumstances.

Classes of financial instrument

1. The netting treatment of exchange-traded derivatives should be distinguished from OTC derivatives, transferrable securities and other instruments, for a number of reasons, as follows:
2. Cash equities are generally admitted to trading on an exchange and are created in accordance with prospectus or listing rules which are independent of the trading venue. In contrast, exchange-traded derivatives are not traded independently of the exchanges which design and oversee the rules under which they trade.
3. Exchange-traded derivatives are subject to the rules of a particular exchange. This is in contrast to OTC derivatives (where contracts are primarily subject to ISDA agreements) and cash equities which are subject to corporate and securities laws and listing rules. The value of an exchange-traded derivative which is subject to the rules of one regulated market is different from the value of an exchange-traded derivative which is subject to the rules of another regulated market, and, as such, they are not economically identical, although their economic value may be similar.
4. Certain types of netting, when applied to exchange-traded derivative contracts executed on one trading venue against derivative contracts executed on other trading venues would cause the contracts to be commingled so that the data would not be readily accessible on an individual basis. This would:
   1. prevent the relevant trading venues (including existing trading venues) from being able to properly carry out their position limit and position monitoring functions; and
   2. prevent relevant trading venues (including existing trading venues) from being able to meet their obligations as to market oversight and ensuring orderly settlement under MiFID II and national law. This would be a particular issue for physically-settled commodity derivative contracts, as regulated markets would not be able to adequately supervise delivery arrangements to provide for orderly settlement as they are required to do by MiFID II. This is explained further in Annex 2.

As provided in recital (2) of the draft RTS, “*[t]he application of the requirements in this Regulation has to take into account the differences resulting from the whole spectrum of different financial instruments. For example, managing risks in relation to derivatives may be more complex and challenging than in relation to securities*.” Basis risk cannot be fully eliminated in relation to exchange-traded derivatives (because of the requirements for regulated markets to maintain an orderly market and facilitate orderly settlement). Each exchange has its own legal need for emergency powers which cannot be separately exercised in an inconsistent fashion. For this reason, CCPs should have an increased degree of flexibility as to the manner in which they apply non-discriminatory netting treatment (which they are obliged to offer pursuant to the Level 1 text) to exchange-traded derivatives.

Further, under EU competition law, promoting effective competition requires companies to be able to prevent free-riding on their investments and the need to preserve incentives to innovate.

For example, EU competition law permits the appointment of exclusive distributors (subject to conditions) because the intrinsic restriction of competition is necessary to achieve efficiencies which benefit consumers in the form of reduced prices, improved product offers, etc.

For similar reasons, EU competition law confirms that the owner of an essential facility /IP rights should only be obliged to grant access to the facility/IP rights in “exceptional circumstances”, a pre-condition for which is that the access will be used to provide a new product and not simply to duplicate an existing product.

In the case of exchange-traded derivatives, it is essential that the RTS takes into account the innovation and investment by exchanges which warrant protection from ‘free-riding’ by competitors, i.e. unfair competition.

Miscellaneous

1. Article 35(1) (a) explicitly specifies that netting procedures should not be adopted which would ‘*endanger the smooth and orderly functioning, the validity or enforceability of such procedures’.* The RTS do not provide for the possibility of a CCP not applying netting processes on this basis. The RTS should accordingly be amended to avoid inconsistency with the Level 1 requirement. In addition, it should be made clear that the netting arrangements should not endangerclearing, market surveillance or position management functions for the reasons set out above.

The Appendix to this response sets out a range of circumstances under which there could otherwise be such a danger.

1. Article 12 refers in places to ‘*netting processes’*, in places to ‘*netting process’* and in places to *‘netting’*. In practice, there are a range of netting processes, each with their particular considerations, all of which should be subject to non-discriminatory treatment. All references to netting in Article 12 should be made plural to encompass all these processes.
2. The approval process proposed in Article 12(3) is unduly onerous and disproportionate. It would lead to the highly disruptive outcome that all decisions by a CCP not to apply netting to economically equivalent contracts (of which there would potentially be a large number, given the definition of economic equivalence proposed by ESMA) would be subject to the review procedure referred to in Article 49 of EMIR. This is especially true given the numerous potential situations, as illustrated by examples in 2(a) and (b) above, where there will be an obvious necessity not to net materially different contracts in the same way. Conversely, the RTS would not require any decisions to apply the same netting treatment to any two contracts, despite such decisions having the potential to involve substantially greater systemic risk and risk to the CCP than any decision not to apply the same netting treatment. If an access request would increase risks to CCPs which they are not able to mitigate, granting access may be inconsistent with EMIR’s objective to ensure the safety of CCPs. The approval requirement hinders CCPs’ ability to manage risk and could increase systemic risk. Systemic risk is an overarching factor for ESMA to consider in the furtherance of its objectives. Moreover, all CCPs are bound by Article 49 of EMIR, and as such we do not believe that the proposed Article 12(3) is necessary.
3. The definition of ‘basis risk’ in Article 12(4) is inadequate. It does not for example cover the obvious differences in value between two contracts with identical specifications except for a difference in contract size (as highlighted in paragraph 2(a) above). In practice, an access request would require an analysis of the specific contract, and the implications of netting. There are many variables involved and a definition would necessarily be limiting. We believe that there is sufficient understanding of the issue among CCPs and trading venues to not necessitate a definition.

**Proposed RTS 24 Text Changes:**

***Recital (11)***

*Pursuant to Regulation (EU) No. 648/2012, a CCP wishing to extend its business to additional services or activities not covered by the initial authorisation should submit a request for an extension of authorisation. An extension of authorisation is needed where a CCP intends to offer clearing services on financial instruments with a different risk profile or that have material differences from the CCP’s existing product set. ~~When a contract traded on a trading venue to which a CCP has granted access is covered by the scope of the CCP's current authorisation, such a contract is to be considered as economically equivalent to the contracts already cleared by the CCP.~~*

***Recital (12)***

*~~In order to ensure that a CCP does not apply discriminatory collateral and margining requirements to economically equivalent contracts traded on a trading venue that has been granted access to the CCP, any change to the margining methodology and operational requirements regarding margining and netting applied to economically equivalent contracts already cleared by the CCP should be subject to a review by the Risk Committee of the CCP and be considered as a significant change to the model and parameters for the purpose of the review procedure as provided for under Regulation (EU) No 648/2012. Such a review should validate that the new models and parameters are non-discriminatory and based on relevant risk considerations.~~*

***Art 11 - Non-discriminatory treatment of collateral methodologies and margining requirements of economically equivalent contracts***

1. *A CCP shall ~~consider~~ determine whether contracts with the same terms and conditions should be treated as economically equivalent, with the understanding that any such contracts shall belong to the same class of financial instruments for which the CCP is authorised under Articles 14 or ~~all contracts traded on the trading venue to which it has granted access, which are covered by the CCP’s initial authorisation referred to in Article 14 of regulation (EU) No. 648/2012, or by any subsequent extension of authorisation referred to in Article~~ 15 of Regulation (EU) No. 648/2012.*
2. *The CCP shall apply to economically equivalent contracts referred to in paragraph 1 ~~the same~~ non-discriminatory and transparent margin and collateral methodologies, irrespective of where the contracts are executed****,*** *provided it has the consent of all relevant trading venues. A CCP may introduce changes to margin or collateral models or parameters regarding the clearing of economically equivalent contracts referred to in paragraph 1, in order to mitigate the respective risk factors of that trading venue or the contracts traded thereon. ~~These changes shall be considered as~~ Any**significant changes to**margin or collateral models or parameters ~~that~~ shall be subject to a review by the Risk Committee of the CCP and be subject to the review procedure referred to in Article 49 of Regulation (EU) No 648/2012.*

***Art. 12 - Non-discriminatory treatment of ~~N~~netting of economically equivalent contracts***

1. *A CCP shall apply to economically equivalent contracts referred to in paragraph 1 of Article 11**that are transferable securities or any other financial instrument that is not a derivative,**~~the same~~ non-discriminatory and transparent netting processes~~, irrespective of where the contracts were executed,~~ provided that the applied netting processes**are~~is~~ valid, binding and enforceable in compliance with Directive 98/26/EC of the European Parliament, of the Council on settlement finality in payment and securities settlement systems and the relevant applicable insolvency law and would not endanger the smooth and orderly functioning of the netting processes, or clearing, market surveillance or position management functions, such that differential treatment is objectively justified.*
2. *Where the CCP otherwise than for reasons set out in paragraph 1 considers that the legal risk or the basis risk related to the ~~a~~ netting processes applied to an economically equivalent contract that is a transferable security,**traded on different trading venues is not sufficiently mitigated, the CCP may exclude such contracts from those~~at~~ netting processes.*
3. *~~Where,  in  accordance  with  paragraph  2  above,  a  CCP  excludes  from netting~~**~~economically equivalent contracts traded on different trading venues, this shall be considered as a significant change to its netting processes that shall be subject to a review by the Risk Committee of the CCP and be subject to the review procedure referred to in Article 49 of Regulation (EU) No 648/2012.~~*
4. *~~For the purpose of this Article “basis risk” means the risk arising from less than perfectly correlated movements between two or more assets or contracts cleared by the CCP.~~*
5. *A CCP shall apply to economically equivalent OTC derivative contracts referred to in paragraph 1 of Article 11 non-discriminatory and transparent netting processes provided that the applied netting processes are valid, binding and enforceable in compliance with Directive 98/26/EC of the European Parliament, of the Council on settlement finality in payment and securities settlement systems and the relevant applicable insolvency law and would not endanger the smooth and orderly functioning of the netting processes, or clearing, market surveillance or position management functions, such that differential treatment is objectively justified.*
6. *Where the CCP otherwise than for reasons set out in paragraph 3 considers that the legal risk or the basis risk related to the netting processes applied to an economically equivalent OTC derivative contract traded on different trading venues is not sufficiently mitigated, the CCP may exclude such contracts from those netting processes.*
7. *A CCP may apply to economically equivalent exchange-traded derivative contracts referred to in paragraph 1 of Article 11 non-discriminatory and transparent netting processes, provided that it has the consent of all relevant trading venues and the applied netting processes are valid, binding and enforceable in compliance with Directive 98/26/EC of the European Parliament, of the Council on settlement finality in payment and securities settlement systems and the relevant applicable insolvency law and would not endanger the smooth and orderly functioning of the netting processes, or clearing, market surveillance or position management functions, such that differential treatment is objectively justified.*

*Where the CCP otherwise than for reasons set out in paragraph 5 considers that the legal risk or the basis risk related to the netting processes applied to an economically equivalent exchange-traded derivative contract traded on different trading venues is not sufficiently mitigated, the CCP may exclude such contracts from those netting processes.*

**Appendix to Response to Q154**

**Situations in which netting may not be feasible for derivatives from more than one regulated market, to support response to Q154**

**Background**

1. A regulated market on which derivatives are traded (“**derivatives exchange**”) is responsible for the design of the derivatives products which it offers. This includes admission to trading of a specific product, and the rules applying to its trading over the entire duration of that product until expiry. In this regard, the exchange-traded derivatives market structure differs fundamentally from that of the OTC derivatives market (where contracts are generally designed by ISDA) and the securities market (where the products are designed and maintained by a third party (subject to corporate and securities laws and listing rules).
2. The exposures accumulated through the combination of several exchange-traded derivatives are known as ‘open interest’ in that particular product. This open interest will be renewed through the creation of fresh contracts, or wound down as the existing contracts expire, as the user chooses.
3. At the CCP which provides clearing for the derivatives exchange where the open interest accumulates, the open interest can be terminated through buying or selling the products exactly mirroring the profile of the open position. In order for the position to be truly terminated (in other words, for there to be no residual exposure) the corresponding derivative contract must be capable of full economic substitution and be on identical terms, so that the CCP may ‘net’ one against the other with complete overlap and zero exposure remaining.
4. It follows that, for exchange-traded derivatives it is not possible for the CCP to net any derivatives other than those that exist under the same rules for the life of that derivative. A CCP cannot agree to net derivatives which are anything less than 100% identical or it would assume the exposure arising from the difference between the contracts.

**Diverging values of exchange-traded derivatives**

1. A number of routine situations can occur that cause the value of apparently identical exchange-traded derivatives to diverge, as set out below:
2. the most obvious case is an event affecting the underlying index, asset or reference, which forces the regulated market trading the derivative to clarify for its own market how that event will affect the derivative linked to that underlying index, asset or reference. For example, when there were thefts of emissions permits from registries in early 2011, some derivatives exchanges and trading venues allowed previously ‘stolen’ permits still circulating in the emissions markets to be delivered legitimately at expiry of a derivatives position consistent with EU policies at the time. Other derivatives exchanges published lists of permits which they deemed unacceptable for delivery. Netting exchange-traded derivatives which are traded on different derivatives exchanges is incompatible with this scenario, as the open interest in the CCP from one derivatives exchange would be indistinguishable from that of another, yet different treatment of the derivative by the regulated market of origin might give rise to pricing anomalies which would cause the CCP to bear that risk;
3. like other derivatives exchanges, ICE Futures Europe regularly updates the specification of its contracts to keep pace with market developments. For instance it changed the Brent contract’s expiry calendar from its current 15-day basis to a month-ahead basis in order to ensure proper convergence with the underlying physical market, and migrated the market to a low-sulphur specification for its Gasoil product. These changes affected the price for ICE Futures’ regulated market derivative contracts on a one-off basis but not any similar contracts offered for trading on other derivatives exchanges.
4. A counterparty’s open interest in a CCP derives from a mixture of exposures over a variety of time horizons, with a constant or gradually shifting profile depending on trading activity and the remaining time to expiry of positions. It is critical that this open interest be truly consistent over the whole of its life. Any event affecting the underlying interest which could open up a variation in value between the derivatives being netted at the CCP would expose the CCP to that residual risk.

**The obligation of regulated markets to continually fulfil their regulatory obligations under MiFID cannot be jeopardised**

1. Article 47(1)(d) of MiFID II requires regulated markets to have transparent and non-discretionary rules and procedures that provide for fair and orderly trading. Article 47(1)(e) of MiFID II requires regulated markets to have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under their systems. Article 51(1) of MiFID II requires regulated markets to have clear and transparent rules regarding the admission of financial instruments to trading. In the case of derivatives, these rules must ensure in particular that the design of the derivative contract allows for its orderly pricing as well as for the existence of effective settlement conditions. Article 54(1) of MiFID II requires that regulated markets establish and maintain effective arrangements and procedures for the regular monitoring of the compliance by their members or participants with their rules. Among other tools, regulated markets may make use of delivery procedures under exchange rules to this end. These procedures are distinguished from position limits and position management pursuant to Article 57 of MiFID II, which apply only to commodity derivatives. Delivery procedures may be used by regulated markets to ensure an orderly relationship between the derivative contract and the underlying market especially regarding the settlement conditions at the time of expiry of the derivative. For physically delivered contracts it is essential that there is a clearly identifiable responsible party to oversee deliveries. An exchange’s ability to comply with the position management control requirements for commodity derivatives under Article 57(8) of MiFID II would also be impaired, as certain forms of netting mean that positions cannot be attributed to particular participants.
2. In order to ensure the ongoing integrity of markets provided by market operators, MiFID rules applying to regulated markets must be observed at all times. Non-discriminatory access provisions in MiFIR must be implemented by derivatives exchanges in a manner consistent with the legal and regulatory obligations of regulated markets. Certain forms of cross-market netting of exchange-traded derivatives would threaten the ability of both the incoming derivatives exchange and the existing derivatives exchange connected to the CCP to ensure fair and orderly trading over the full life of the contract until expiry. Neither exchange would know what open interest was derived from the trading originating on its platform – and as a result would not be able to comply with the above provisions of MiFID II.

**Other routine situations in which certain forms of cross-exchange netting are not feasible**

1. It is also possible that changes may occur to an equity which is the underlying of a derivative, especially a single stock option or future. For example, on the insolvency of Northern Rock, organisations which had admitted to trading or otherwise created derivatives on that equity were forced to decide how the derivative would be treated. In such situations, different organisations may take different views, as was the case for the emissions permits. Some settled the contract upon the insolvency of Northern Rock. In contrast, LIFFE suspended settlement until the end of the recent litigation on valuation. This has an impact on the pricing of the derivative. Contractual netting (i.e. contractual offset and close-out) in that environment would have given rise to unquantifiable risk to the CCP.
2. A mini-contract is created to offer a comparable type of economic exposure as a fully-fledged contract, except that it is a fraction of the size of the main contract (for example, the S&P 500 mini and other e-mini products). It would be absurd to apply contractual netting to the mini version against the full version. Although there may be a pricing correlation, the contract size difference means that they are not equivalent for the purposes of contractual netting.

<ESMA\_QUESTION\_CP\_MIFID\_154>

1. Do you agree with the elements of the draft RTS specified in Annex X that cover notification procedures? If not, please explain why and, where possible, propose an alternative approach.

<ESMA\_QUESTION\_CP\_MIFID\_155>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_155>

1. Do you agree with the elements of the draft RTS specified in [Annex X] that cover the calculation of notional amount? If not, please explain why and, where possible, propose an alternative approach.

<ESMA\_QUESTION\_CP\_MIFID\_156>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_156>

1. Do you agree with the elements of the draft RTS that cover relevant benchmark information? If not, please explain why and, where possible, propose an alternative approach. In particular, how could information requirements reflect the different nature and characteristics of benchmarks?

<ESMA\_QUESTION\_CP\_MIFID\_157>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_157>

1. Do you agree with the elements of the draft RTS that cover licensing conditions? If not, please explain why and, where possible, propose an alternative approach.

<ESMA\_QUESTION\_CP\_MIFID\_158>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_158>

1. Do you agree with the elements of the draft RTS that cover new benchmarks? If not, please explain why and, where possible, propose an alternative approach.

<ESMA\_QUESTION\_CP\_MIFID\_159>

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<ESMA\_QUESTION\_CP\_MIFID\_159>

* Requirements applying on and to trading venues

1. Do you agree with the attached draft technical standard on admission to trading?

<ESMA\_QUESTION\_CP\_MIFID\_160>

ICE agrees with the draft technical standard on admission to trading relating to derivatives. The proposed RTS are the same as those included within MiFID I, which have proved effective.

<ESMA\_QUESTION\_CP\_MIFID\_160>

1. In particular, do you agree with the arrangements proposed by ESMA for verifying compliance by issuers with obligations under Union law?

<ESMA\_QUESTION\_CP\_MIFID\_161>

ICE believes that regulated markets which admit to trading derivatives based on instruments which are themselves admitted to trading on European regulated markets should rely on the primary market on which the underlying securities are admitted to trading satisfying the relevant regulatory requirements in relation to disclosure information.

<ESMA\_QUESTION\_CP\_MIFID\_161>

1. Do you agree with the arrangements proposed by ESMA for facilitating access to information published under Union law for members and participants of a regulated market?

<ESMA\_QUESTION\_CP\_MIFID\_162>

ICE welcomes ESMA’s proposal that there is no need for detailed, prescriptive requirements for regulated markets to facilitate access of members or participants to information being made public under Union law. ICE believes that regulated markets which admit to trading derivatives based on instruments which are themselves admitted to trading on European regulated markets should rely on the primary market on which the underlying securities are admitted to trading satisfying the relevant regulatory requirements in relation to access to information.

<ESMA\_QUESTION\_CP\_MIFID\_162>

1. Do you agree with the proposed RTS? What and how should it be changed?

<ESMA\_QUESTION\_CP\_MIFID\_163>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_163>

1. Do you agree with the approach of providing an exhaustive list of details that the MTF/OTF should fulfil?

<ESMA\_QUESTION\_CP\_MIFID\_164>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_164>

1. Do you agree with the proposed list? Are there any other factors that should be considered?

<ESMA\_QUESTION\_CP\_MIFID\_165>

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<ESMA\_QUESTION\_CP\_MIFID\_165>

1. Do you think that there should be one standard format to provide the information to the competent authority? Do you agree with the proposed format?

<ESMA\_QUESTION\_CP\_MIFID\_166>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_166>

1. Do you think that there should be one standard format to notify to ESMA the authorisation of an investment firm or market operator as an MTF or an OTF? Do you agree with the proposed format?

<ESMA\_QUESTION\_CP\_MIFID\_167>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_167>

* Commodity derivatives

1. Do you agree with the approach suggested by ESMA in relation to the overall application of the thresholds? If you do not agree please provide reasons.

<ESMA\_QUESTION\_CP\_MIFID\_168>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_168>

1. Do you agree with ESMA’s approach to include non-EU activities with regard to the scope of the main business?

<ESMA\_QUESTION\_CP\_MIFID\_169>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_169>

1. Do you consider the revised method of calculation for the first test (i.e. capital employed for ancillary activity relative to capital employed for main business) as being appropriate? Please provide reasons if you do not agree with the revised approach.

<ESMA\_QUESTION\_CP\_MIFID\_170>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_170>

1. With regard to trading activity undertaken by a MiFID licensed subsidiary of the group, do you agree that this activity should be deducted from the ancillary activity (i.e. the numerator)?

<ESMA\_QUESTION\_CP\_MIFID\_171>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_171>

1. ESMA suggests that in relation to the ancillary activity (numerator) the calculation should be done on the basis of the group rather than on the basis of the person. What are the advantages or disadvantages in relation to this approach? Do you think that it would be preferable to do the calculation on the basis of the person? Please provide reasons. (Please note that altering the suggested approach may also have an impact on the threshold suggested further below).

<ESMA\_QUESTION\_CP\_MIFID\_172>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_172>

1. Do you consider that a threshold of 5% in relation to the first test is appropriate? Please provide reasons and alternative proposals if you do not agree.

<ESMA\_QUESTION\_CP\_MIFID\_173>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_173>

1. Do you agree with ESMA’s intention to use an accounting capital measure?

<ESMA\_QUESTION\_CP\_MIFID\_174>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_174>

1. Do you agree that the term capital should encompass equity, current debt and non-current debt? If you see a need for further clarification of the term capital, please provide concrete suggestions.

<ESMA\_QUESTION\_CP\_MIFID\_175>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_175>

1. Do you agree with the proposal to use the gross notional value of contracts? Please provide reasons if you do not agree.

<ESMA\_QUESTION\_CP\_MIFID\_176>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_176>

1. Do you agree that the calculation in relation to the size of the trading activity (numerator) should be done on the basis of the group rather than on the basis of the person? (Please note that that altering the suggested approach may also have an impact on the threshold suggested further below)

<ESMA\_QUESTION\_CP\_MIFID\_177>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_177>

1. Do you agree with the introduction of a separate asset class for commodities referred to in Section C 10 of Annex I and subsuming freight under this new asset class?

<ESMA\_QUESTION\_CP\_MIFID\_178>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_178>

1. Do you agree with the threshold of 0.5% proposed by ESMA for all asset classes? If you do not agree please provide reasons and alternative proposals.

<ESMA\_QUESTION\_CP\_MIFID\_179>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_179>

1. Do you think that the introduction of a de minimis threshold on the basis of a limited scope as described above is useful?

<ESMA\_QUESTION\_CP\_MIFID\_180>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_180>

1. Do you agree with the conclusions drawn by ESMA in relation to the privileged transactions?

<ESMA\_QUESTION\_CP\_MIFID\_181>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_181>

1. Do you agree with ESMA’s conclusions in relation to the period for the calculation of the thresholds? Do you agree with the calculation approach in the initial period suggested by ESMA? If you do not agree, please provide reasons and alternative proposals.

<ESMA\_QUESTION\_CP\_MIFID\_182>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CP\_MIFID\_182>

1. Do you have any comments on the proposed framework of the methodology for calculating position limits?

<ESMA\_QUESTION\_CP\_MIFID\_183>

ICE agrees with ESMA that deliverable supply is the most appropriate basis for the EU position limits regime, both for the spot month and for other months. This is because undue influence and control over deliverable supply, coupled with holding a significant futures position, is the key factor which can give rise to a disorderly market. In contrast, holding a significant proportion of open interest in the futures contract in isolation does not raise this issue.

Furthermore, ICE agrees that trading venues are the best placed organisations to source and provide data in relation to deliverable supply to the relevant National Competent Authority. This is because trading venues:

• have ready access to such data;

• are independent of the trading interests of the participants which are active in the market; and

• have legal obligations to apply associated position management controls in relation to the commodity derivatives concerned *(Article 57(8), MiFID II (Directive 2014/65/EU)).*

Those deliverable supply data can then be used by National Competent Authorities in order to calculate the baseline levels for determining the position limits for the commodity contracts in question.

<ESMA\_QUESTION\_CP\_MIFID\_183>

1. Would a baseline of 25% of deliverable supply be suitable for all commodity derivatives to meet position limit objectives? For which commodity derivatives would 25% not be suitable and why? What baseline would be suitable and why?

<ESMA\_QUESTION\_CP\_MIFID\_184>

A 25% baseline level is a suitable starting point for calculating the position limits which will be applicable to commodity derivatives within the EU. Having established the baseline for each commodity derivative, it will of course be necessary to consider the extent to which the seven factors enumerated in the MiFID Level 1 text should increase or decrease that level in order to establish the spot month and other months position limits for each commodity derivative.

<ESMA\_QUESTION\_CP\_MIFID\_184>

1. Would a maximum of 40% position limit be suitable for all commodity derivatives to meet position limit objectives. For which commodity derivatives would 40% not be suitable and why? What maximum position limit would be suitable and why?

<ESMA\_QUESTION\_CP\_MIFID\_185>

Yes, 40% of deliverable supply should be an appropriate maximum level.

<ESMA\_QUESTION\_CP\_MIFID\_185>

1. Are +/- 15% parameters for altering the baseline position limit suitable for all commodity derivatives? For which commodity derivatives would such parameters not be suitable and why? What parameters would be suitable and why?

<ESMA\_QUESTION\_CP\_MIFID\_186>

Yes, the adjustment parameters are set at the appropriate level, albeit some of the factors which ESMA may use to alter the baseline level should be given greater weight than others, given their greater relevance to orderly markets and pricing considerations (please see the answer to Question 187 for further details).

<ESMA\_QUESTION\_CP\_MIFID\_186>

1. Are +/- 15% parameters suitable for all the factors being considered? For which factors should such parameters be changed, what to, and why?

<ESMA\_QUESTION\_CP\_MIFID\_187>

The factors in question should not carry equal weight. Instead, most weight should be ascribed to deliverable supply and maturity as these are the key factors which are relevant to the design of position limits which support orderly pricing and settlement conditions and prevent market abuse. A second category of factors should be given a medium weighting (i.e. number and size of participants, characteristics of the underlying market and new contracts), as they are also relevant to calibrating the application of position limits to the market in question. A third category should be given a low weighting (i.e. open interest and volatility) for the reasons explained below.

Open interest should not be viewed in isolation. It is unavoidably backward-looking and it further presupposes a certain number of participants in the market in order to work. For instance, a per-participant limit of 5% of the open interest would require there to be at least 20 participants. This cannot be assumed always to be the case. Indeed, in the interests of the efficacy of nascent or niche markets – in which there may be only a handful of active market participants – it might be necessary to introduce a threshold level below which the application of position limits would be suspended.

Turning to “volatility”, that term can be a misnomer for the pricing distortions which can occur in commodity markets as a contract approaches maturity. Rather than volatility per se (which implies that the price of the spot month is rising and falling sharply during a short space of time), it is more likely that any pricing distortions would be characterised by increases or decreases in price in a clear direction and/or a change in the pricing relationship between the spot month and the next delivery month (i.e. a move from contango to backwardation).

Such distortions may occur as a contract approaches maturity and they would be mitigated by the maturity factor which ESMA articulates in the present Consultation Paper, and which it described in paragraph 96(i) of its 2014 Discussion Paper by noting that “the longer the maturity, the higher the limit may be as this gives market participants time to adjust to ensure an orderly meeting of their settlement obligations”.

<ESMA\_QUESTION\_CP\_MIFID\_187>

1. Do you consider the methodology for setting the spot month position limit should differ in any way from the methodology for setting the other months position limit? If so, in what way?

<ESMA\_QUESTION\_CP\_MIFID\_188>

As ESMA has proposed, the baseline level for both the spot month position limit and the other months position limit should be based on deliverable supply. This is because it is undue influence and control over deliverable supply, coupled with holding a significant futures position, which can give rise to a disorderly market.

The only distinctions which the methodology needs to permit – and already does permit - between the spot month position limit and the other months position limit is to recognise the facts that:

* the other months position limit is likely to cover many production/harvest periods, rather than just one, and thus will be based on a wider measure of deliverable supply than the spot month position limit; and
* the other months position limit is a single limit covering multiple delivery months, rather than just one.

As a result, position limits will be broader in relation to positions which are further from maturity (where the “other months” limit will apply) and will become narrower and more restrictive in the period immediately prior to the point at which delivery obligations crystallise (where the spot limit will apply). This will reflect the availability of deliverable supply during two distinct phases in the life cycle of the position. By doing so, the level of position limits during those different phases will reflect the extent to which the contract price is susceptible to distortion or manipulation.

<ESMA\_QUESTION\_CP\_MIFID\_188>

1. How do you suggest establishing a methodology that balances providing greater flexibility for new and illiquid contracts whilst still providing a level of constraint in a clear and quantifiable way? What limit would you consider as appropriate per product class? Could the assessment of whether a contract is illiquid, triggering a potential wider limit, be based on the technical standard ESMA is proposing for non-equity transparency?

<ESMA\_QUESTION\_CP\_MIFID\_189>

Care needs to be taken in applying the position limits regime to nascent or niche markets, in which there may be only a handful of active market participants either at the outset or on an ongoing basis. It might be necessary to apply a threshold test – possibly expressed as a number of active market participants - below which the application of position limits would be suspended until such time as participation increased. If such a measure is not introduced, it is possible that many nascent and niche markets will not be able to co-exist with the position limits regime.

ICE does not regard ESMA’s non-equity liquidity analysis as a suitable basis for determining the applicability of position limits to nascent or niche products because the product classes which have been devised under ESMA’s COFIA approach are too broad for this purpose. For example, under the COFIA approach “Oil” is regarded as a single class (split into two maturities). That class covers an extremely broad complex of products, some of which are established, liquid benchmarks and others of which are nascent or niche products.

<ESMA\_QUESTION\_CP\_MIFID\_189>

1. What wider factors should competent authorities consider for specific commodity markets for adjusting the level of deliverable supply calculated by trading venues?

<ESMA\_QUESTION\_CP\_MIFID\_190>

In relation to the “other months”, the key factor is the number of production/harvest periods between the time at which the position limit is set and the maturity date of the relevant contracts. In most cases, the trading venue should have considered this in calculating a deliverable supply measure for the “other months”.

In relation to the spot month, the key factor will vary depending on the product concerned (again, the trading venue should have already taken this into account in calculating a deliverable supply measure for the spot month). For commodities which are delivered on an “in store” basis, the key factor might be the amount of physical stock which has been certified as meeting the contract standard or which could readily be certified. In contrast, for commodities which are delivered on a “Free on Board” basis, the key factor might be whatever supply is potentially available at the delivery points. This would be, at minimum, the capacity of the local storage infrastructure and, at maximum, some multiple of that based on whatever delivery volume the infrastructure could ultimately support.

<ESMA\_QUESTION\_CP\_MIFID\_190>

1. What are the specific features of certain commodity derivatives which might impact on deliverable supply?

<ESMA\_QUESTION\_CP\_MIFID\_191>

The trading venue and National Competent Authority will need to consider the impact of scheduled maintenance periods (e.g. in relation to oil production) and seasonality in relation to the harvesting, processing and shipment of agricultural and soft commodities. They will also need to consider the likely impact of any exogenous events or longer-term trends, which could affect future deliverable supply positively or negatively.

<ESMA\_QUESTION\_CP\_MIFID\_191>

1. How should ‘less-liquid’ be considered and defined in the context of position limits and meeting the position limit objectives?

<ESMA\_QUESTION\_CP\_MIFID\_192>

Open interest should not be viewed in isolation. It is unavoidably backward-looking and it further presupposes a certain number of participants in the market in order to work. For instance, a per-participant limit of 5% of the open interest would require there to be at least 20 participants. This cannot be assumed always to be the case. Moreover, holding a significant proportion of open interest in isolation dos not raise orderly markets issues.

Instead, the open interest in a contract should be compared with the deliverable supply of the physical commodity in order to ascertain whether it would be feasible, from a practical perspective, for a market participant to hold a significant proportion of each. Where this is the case, position limits should apply on the basis of deliverable supply. Where it is not the case (e.g. where the open interest in a contract is small relative to deliverable supply and where the ownership of the deliverable supply is diverse), there would be a strong case for treating the product as a nascent or niche product as described in the answers to Questions 189 and 193.

<ESMA\_QUESTION\_CP\_MIFID\_192>

1. What participation features in specific commodity markets around the organisation, structure, or behaviour should competent authorities take into account?

<ESMA\_QUESTION\_CP\_MIFID\_193>

Care needs to be taken in applying the position limits regime to nascent or niche markets, in which there may be only a handful of active market participants either at the outset or on an ongoing basis. It might be necessary to apply a threshold test – for instance, expressed as a number of active market participants - below which the application of position limits would be suspended until such time as participation increased. If such a measure is not introduced, it is possible that many nascent and niche markets will not be able to co-exist with the position limits regime.

<ESMA\_QUESTION\_CP\_MIFID\_193>

1. How could the calculation methodology enable competent authorities to more accurately take into account specific factors or characteristics of commodity derivatives, their underlying markets and commodities?

<ESMA\_QUESTION\_CP\_MIFID\_194>

ESMA has correctly identified the main features of the underlying commodity markets which would need to be taken into account by National Competent Authorities in establishing position limits.

<ESMA\_QUESTION\_CP\_MIFID\_194>

1. For what time period can a contract be considered as “new” and therefore benefit from higher position limits?

<ESMA\_QUESTION\_CP\_MIFID\_195>

It is not possible to quantify a meaningful time period because:

• contracts mature at different rates;

• once they are mature, some contracts will become benchmark products whilst others will remain niche products that are characterised by limited participation.

Furthermore, ICE believes that applying an arbitrary cut-off point beyond which a contract is no longer regarded as “new” – at which point lower position limits would automatically apply - may have the effect of stifling the development of nascent products and damaging the viability of niche products. Instead of applying an arbitrary quantitative cut-off point, National Competent Authorities will need to consider qualitative factors (such as those mentioned in the previous paragraph) when determining whether a contract should continue to be regarded as “new”.

Please also see the answer to Question 193, which is related to this issue.

<ESMA\_QUESTION\_CP\_MIFID\_195>

1. Should the application of less-liquid parameters be based on the age of the commodity derivative or the ongoing liquidity of that contract.

<ESMA\_QUESTION\_CP\_MIFID\_196>

Please see the answer to Question 195.

<ESMA\_QUESTION\_CP\_MIFID\_196>

1. Do you have any further comments regarding the above proposals on how the factors will be taken into account for the position limit calculation methodology?

<ESMA\_QUESTION\_CP\_MIFID\_197>

No.

<ESMA\_QUESTION\_CP\_MIFID\_197>

1. Do you agree with ESMA’s proposal to not include asset-class specific elements in the methodology?

<ESMA\_QUESTION\_CP\_MIFID\_198>

Yes. ICE agrees that the factors enumerated under Article 57(3)(a)-(g) of MiFID II, and the manner in which ESMA proposes to frame the methodology, provides National Competent Authorities with sufficient scope to take into account the specificities of different markets without incorporating asset-class specific elements into the methodology.

<ESMA\_QUESTION\_CP\_MIFID\_198>

1. How are the seven factors (listed under Article 57(3)(a) to (g) and discussed above) currently taken into account in the setting and management of existing position limits?

<ESMA\_QUESTION\_CP\_MIFID\_199>

The main factors which are taken into account in the design and application of existing limits and controls by EU trading venues (e.g. delivery limits and accountability levels) are deliverable supply, the length of time to contract maturity, and – during the delivery period itself – the size of position which is capable of being delivered without causing logistical problems or delivery failure.

<ESMA\_QUESTION\_CP\_MIFID\_199>

1. Do you agree with the proposed draft RTS regarding risk reducing positions?

<ESMA\_QUESTION\_CP\_MIFID\_200>

ICE agrees with ESMA’s proposed approach of defining “risk reducing positions” in a manner which is consistent with the relevant definition under EMIR (EMIR (Regulation (EU) 638/2012), Article 10(4)(a), and Commission Delegated Regulation (EU) No. 149/2013, Article 10). The purpose of EMIR Article 10(4)(a) is to identify a non-financial counterparty’s positions which are “objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of the non-financial counterparty”. Such positions are disregarded for the purposes of calculating whether the non-financial counterparty’s overall position in OTC derivatives exceeds the EMIR clearing threshold. This is analogous to the process under MiFID II whereby position limits in respect of commodity derivatives shall be dis-applied to the positions of a non-financial entity which are “objectively measurable as reducing risks related to that entity’s commercial activity”. In both cases, ESMA has been requested to produce RTS which define the hedging activities of non-financial entities and it is appropriate that those RTS are consistent.

<ESMA\_QUESTION\_CP\_MIFID\_200>

1. Do you have any comments regarding ESMA’s proposal regarding what is a non-financial entity?

<ESMA\_QUESTION\_CP\_MIFID\_201>

In its 2014 MiFID II Discussion Paper, ESMA noted that “non-financial entity” is not defined in MiFID II, and that it proposed to consider “non-financial entities” to be any entities which are not financial institutions under MiFID II or other relevant EU legislation. ICE observed that such an approach may not work effectively in the context of MiFID II position limits, given that the participants in commodity markets are located across the globe. For example, a strict application of such an approach would suggest that an investment firm or bank located in a third country would be treated as a “non-financial entity” rather than a financial entity.

In the present MiFID II Consultation Paper (page 544, paragraph 14), ESMA states that it agrees with the concern expressed by ICE and others:

“A number of comments were received that highlighted that the definition of a financial entity, and hence its inverse of a non-financial entity should include entities that are outside the EU but would be a financial entity under the various directives if their activities were performed in the EU. ESMA agrees with this proposal on what should be considered a financial entity and non-financial entity.”

However, the draft Regulatory Technical Standards appear to be silent on this point, so it is unclear how ESMA’s conclusion will be given practical effect.

<ESMA\_QUESTION\_CP\_MIFID\_201>

1. Do you agree with the proposed draft RTS regarding the aggregation of a person’s positions?

<ESMA\_QUESTION\_CP\_MIFID\_202>

Please see the answer to Question 203.

<ESMA\_QUESTION\_CP\_MIFID\_202>

1. Do you agree with ESMA’s proposal that a person’s position in a commodity derivative should be aggregated on a ‘whole’ position basis with those that are under the beneficial ownership of the position holder? If not, please provide reasons.

<ESMA\_QUESTION\_CP\_MIFID\_203>

ICE believes that the methodology for aggregating positions - in a situation in which one company has an ownership interest in another - should be based on a discrete percentage threshold which is used as a proxy for “control”. It suggests that the threshold should be set at 50%. Where the threshold is met, the totality of the position of the controlled entity should be added to the position of the controlling entity for the purposes of calculating the overall net position.

<ESMA\_QUESTION\_CP\_MIFID\_203>

1. Do you agree with the proposed draft RTS regarding the criteria for determining whether a contract is an economically equivalent OTC contract?

<ESMA\_QUESTION\_CP\_MIFID\_204>

Yes. ESMA’s proposed approach is similar to the CFTC’s proposal in relation to economic equivalence of swaps and futures contracts, which is designed to identify an entity’s overall influence on the demand and supply conditions in a particular commodity sector, whilst recognising that the component contracts of that entity’s position are not necessarily legally identical. Given the global nature of many commodity markets, there would be clear benefits in the EU and US applying consistent definitions of “economically equivalent” for the purposes of operating their position limits regimes.

<ESMA\_QUESTION\_CP\_MIFID\_204>

1. Do you agree with the proposed draft RTS regarding the definition of same derivative contract?

<ESMA\_QUESTION\_CP\_MIFID\_205>

Care needs to be taken when using the term “same derivatives contract”. The purpose of the term (as it is used in Article 57(12)(d) of MiFID II) is to manage a situation whereby a single position limit needs to be set in relation to the trading of commodity derivatives at competing trading venues. In that context, ICE has no further comment on the proposed approach.

<ESMA\_QUESTION\_CP\_MIFID\_205>

1. Do you agree with the proposed draft RTS regarding the definition of significant volume for the purpose of article 57(6)?

<ESMA\_QUESTION\_CP\_MIFID\_206>

Yes.

<ESMA\_QUESTION\_CP\_MIFID\_206>

1. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

<ESMA\_QUESTION\_CP\_MIFID\_207>

Please see the answer to Question 204.

<ESMA\_QUESTION\_CP\_MIFID\_207>

1. Do you agree with the proposed draft RTS regarding the procedure for the application for exemption from the Article 57 position limits regime?

<ESMA\_QUESTION\_CP\_MIFID\_208>

The draft Regulatory Technical Standards (Article 7 of RTS 30) state that a National Competent Authority shall have up to 30 calendar days to approve an application for an exemption. This is a significant period, during which the non-financial entity will face uncertainty about whether or not an exemption will be available to it. In contrast, ICE Futures Europe approves or rejects applications for delivery limit exemptions within a week of receiving a complete application.

<ESMA\_QUESTION\_CP\_MIFID\_208>

1. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

<ESMA\_QUESTION\_CP\_MIFID\_209>

Please see the answer to Question 204.

<ESMA\_QUESTION\_CP\_MIFID\_209>

1. Do you agree with the reporting format for CoT reports?

<ESMA\_QUESTION\_CP\_MIFID\_210>

No. The requirement to report positions by type as either risk-reducing or not within participant categories (Table 1 of the Annex) does not reflect how trades are captured or recorded now, so participants are not equipped to report positions in this way. It is unclear how trading venues would receive and compile this information - ICE receives one position report file per day, which does not split positions by intent. Established CFTC practice is to rely on participant categorisation for this purpose. Achieving intelligible consistency is challenging. If a participant wishes to buy 100 lots as a risk reducing position and to sell 85 as a non-risk reducing position, typically they will execute only the net buy of 15 lots. It is then unclear how that net 15 lot position should be reported.

ESMA’s proposed approach will also test acutely its definition of a risk-reducing trade. A pension fund that needs to pay out rising annuities to its pensioners, based on an indexed basket of goods such as wheat, petrol, and gas, might hold long positions in wheat, gasoline and gas futures. These are necessary to reduce its risk versus its payment exposures but they are not risk-reducing vis-à-vis strict physical or treasury exposures. Illustratively, all stock market tracker funds would be deemed to be speculators.

ICE presumes that the netting requirement means that a long in one month should not be netted against a short in another, and endorses this.

<ESMA\_QUESTION\_CP\_MIFID\_210>

1. Do you agree with the reporting format for the daily Position Reports?

<ESMA\_QUESTION\_CP\_MIFID\_211>

Partly. The scope of the information called for is right, but is a different structure to the well-established CFTC format for reporting that is already in place, that ICE has applied to all its reportable contracts, and with which most of the industry is already familiar. ICE therefore suggests that ESMA adopt the CFTC format running scripts on it as required to generate the analysis required.

<ESMA\_QUESTION\_CP\_MIFID\_211>

1. What other reporting arrangements should ESMA consider specifying to facilitate position reporting arrangements?

<ESMA\_QUESTION\_CP\_MIFID\_212>

We note the requirement that on-exchange and off-exchange positions be reported for CoT and position reporting purposes to exchanges and direct to regulators. It is unclear how similar contracts will be identifiable as such and we suggest that ESMA give thought to develop a naming convention or other methodology to enable easy cross comparison of similar instruments across different venues.

<ESMA\_QUESTION\_CP\_MIFID\_212>

* Market data reporting

1. Which of the formats specified in paragraph 2 would pose you the most substantial implementation challenge from technical and compliance point of view for transaction and/or reference data reporting? Please explain.

<ESMA\_QUESTION\_CP\_MIFID\_213>

ICE prefers to use XML for as the technical format for MiFIR transaction reporting and for financial instruments reference data. ICE Trade Vault Europe, a registered trade repository under EMIR, currently uses XML, the most customisable format, for EMIR and Dodd-Frank Reporting. ICE believes that FpML is the most cumbersome and challenging technical format to implement.

<ESMA\_QUESTION\_CP\_MIFID\_213>

1. Do you anticipate any difficulties with the proposed definition for a transaction and execution?

<ESMA\_QUESTION\_CP\_MIFID\_214>

ICE generally agrees with the definition of “transaction” and “execution” as outlined in draft Article 3, “Transaction and execution of a transaction” of RTS 32. In particular, ICE agrees that “contracts arising solely and exclusively for clearing or settlement purposes” and “post-trade assignments and novations in derivatives where one of the parties to the derivative contract is replaced by a third party” should not be considered transactions for the purposes of transaction reporting.

<ESMA\_QUESTION\_CP\_MIFID\_214>

1. In your view, is there any other outcome or activity that should be excluded from the definition of transaction or execution? Please justify.

<ESMA\_QUESTION\_CP\_MIFID\_215>

ICE believes the following scenarios should not be considered “transactions” for the purposes of transaction reporting under MiFIR:

* *Paragraph 15* - ICE disagrees that increases and decreases in notional should be reported as new transactions. Under other global regulatory reporting regimes, these changes are reported as modifications to the original contract and are interpreted by traders as such.
* *Paragraph 16* - ICE believes that reporting increases and decreases in notional as modifications to the original contract will provide Competent Authorities sufficient detail at the transaction level to enable the Competent Authorities to fulfil their respective legislative mandates. Furthermore, reporting these changes as modifications is current industry practice pursuant to Article 9 of EMIR.
* *Paragraph 21 -* ICE believes that the exercise of options should not be reportable. A majority of option exercises are conducted automatically. The reporting of option exercises would be a significant burden on market participants. Furthermore, the reporting of options would be a significant change from other reporting regimes and could cause duplicative reporting (e.g. an option that exercises into a futures transaction would be reported twice.)

<ESMA\_QUESTION\_CP\_MIFID\_215>

1. Do you foresee any difficulties with the suggested approach? Please justify.

<ESMA\_QUESTION\_CP\_MIFID\_216>

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<ESMA\_QUESTION\_CP\_MIFID\_216>

1. Do you agree with ESMA’s proposed approach to simplify transaction reporting? Please provide details of your reasons.

<ESMA\_QUESTION\_CP\_MIFID\_217>

ICE appreciates ESMA’s goal in simplifying transaction reporting under MiFIR. Today, market participants report often report one transaction under several global reporting regimes with varying rules and procedures. Therefore, further simplification and alignment of these reporting regimes, including MiFIR, will promote greater consistency in transaction reports, reduces costs associated with transaction reporting and increase the accuracy of the data reported.

ICE generally agrees with ESMA’s proposal to reformat the buy/sell indicator to two distinct fields denoting the buyer and seller, respectively. However, please note that this differs from the proposal set forth by ESMA in its Consultation Paper on the review of the technical standards on reporting under Article 9 of EMIR. ICE recommends that ESMA amend its proposal in the Consultation Paper on Article 9 to follow the proposed format set forth in paragraph 52 herein.

ICE agrees with ESMA’s proposal to for trading capacity to be independent of the determination of who is busying and who is selling. This field is particularly problematic for some counterparties who report under EMIR. ICE recommends, however, that ESMA add further designations in this field, such as “H = house business” and “S = client business.”

<ESMA\_QUESTION\_CP\_MIFID\_217>

1. We invite your comments on the proposed fields and population of the fields. Please provide specific references to the fields which you are discussing in your response.

<ESMA\_QUESTION\_CP\_MIFID\_218>

ICE has significant concerns relating to transaction reporting and the feasibility with which this information can be captured and maintained. Reiterating our response from the summer, ICE recommends that ESMA takes into account the limited ability of trading venues to compel its participants and/or members to provide certain information for the purposes of transaction reporting, particularly non-MiFID firms. Furthermore, even if a trading venue has the ability to require the provision of such information, many of the required fields noted in the proposed RTS 32 and Table of Fields (Annex I, Table I) are not readily accessible to traders and are not currently retained or populated on current order and transaction records. For example capturing the identity of the persons responsible for the investment decision and the execution, whilst ICE understands that it is required under the Level 1, will require significant technological and operational resources to achieve, not to mention enhancements to data controls to ensure the security of confidential information. Similarly, capturing the identity of branches, flagging risk reducing transactions and identifying the capacity in which a firm was trading will pose significant challenges for firms and venues alike.

ICE strongly recommends that ESMA provide adequate time for industry to properly implement any necessary changes, and these timelines should extend beyond any legislative deadlines by which ESMA is bound. ICE also strongly recommends that ESMA utilise the Markets Data Reporting working group to fully examine and analyse the proposed fields and respective formats to ensure that the market as a whole understands the meanings behind each field and the format for each field. This working group should be able to provide expertise by asset class on the meaning of the reportable fields and engage with the industry so that transaction reporting is made as seamless as possible.

<ESMA\_QUESTION\_CP\_MIFID\_218>

1. Do you agree with the proposed approach to flag trading capacities?

<ESMA\_QUESTION\_CP\_MIFID\_219>

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<ESMA\_QUESTION\_CP\_MIFID\_219>

1. Do you foresee any problem with identifying the specific waiver(s) under which the trade took place in a transaction report? If so, please provide details

<ESMA\_QUESTION\_CP\_MIFID\_220>

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<ESMA\_QUESTION\_CP\_MIFID\_220>

1. Do you agree with ESMA’s approach for deciding whether financial instruments based on baskets or indices are reportable?

<ESMA\_QUESTION\_CP\_MIFID\_221>

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<ESMA\_QUESTION\_CP\_MIFID\_221>

1. Do you agree with the proposed standards for identifying these instruments in the transaction reports?

<ESMA\_QUESTION\_CP\_MIFID\_222>

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<ESMA\_QUESTION\_CP\_MIFID\_222>

1. Do you foresee any difficulties applying the criteria to determine whether a branch is responsible for the specified activity? If so, do you have any alternative proposals?

<ESMA\_QUESTION\_CP\_MIFID\_223>

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<ESMA\_QUESTION\_CP\_MIFID\_223>

1. Do you anticipate any significant difficulties related to the implementation of LEI validation?

<ESMA\_QUESTION\_CP\_MIFID\_224>

ICE is aware of several scenarios in which counterparties to a reportable transaction may be restricted from obtaining a LEI or reporting a LEI for their opposing counterparty. Potential conflicts exist between the MiFIR proposals and the privacy/data protection laws of certain non-European jurisdictions. The laws of some non-European jurisdictions may, in certain circumstances, restrict or prohibit the disclosure of an opposing counterparty’s identity information by a counterparty with a reporting obligation under MiFIR. Additionally, depending on the non-European jurisdiction, disclosure of identity information may require opposing counterparty consent, regulatory authorisation or both. Due to the challenges associated with obtaining and reporting LEIs, ICE recommends that ESMA allow counterparties to report other identifiers should they be prohibited from obtaining or reporting an LEI.

<ESMA\_QUESTION\_CP\_MIFID\_224>

1. Do you foresee any difficulties with the proposed requirements? Please elaborate.

<ESMA\_QUESTION\_CP\_MIFID\_225>

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<ESMA\_QUESTION\_CP\_MIFID\_225>

1. Are there any cases other than the AGGREGATED scenario where the client ID information could not be submitted to the trading venue operator at the time of order submission? If yes, please elaborate.

<ESMA\_QUESTION\_CP\_MIFID\_226>

**General comments relating to RTS 34 requirements concerning relevant parties**

There are significant challenges in the implementation of these requirements and practical difficulties, which are significant from an investment firm’s point of view, and for the trading venues. To obtain the proposed data, whilst it is beneficial in being able to identify the end user, it will require that venues, in any case, follow up with the Member that granted them access. Besides the obvious sensitivities with maintaining confidential data, the other main difficulties in maintaining records will be to ensure they are kept up-to-date and that all orders include this information.

In terms of the value of this information, it is clear that surveillance of trading activity would benefit from having more granular information; however, achieving a complete audit trail in this respect is not possible. It is appropriate to assign an ‘Authorised Trader ID’. However, trading venues do not have the information or tools to obtain client level information, or indeed the details of all individuals that access trading venues. To address this issue, it is appropriate for trading venues to oblige firms to complete the Authorised Trader flags on each order. The specific client information can then be acquired on positions on a T+1 level. It’s worth also noting the recent Ownership and Control Reporting (OCR) requirement imposed by the CFTC which shall require owners of accounts which have traded over 50 lots in a single trading day, per product, to be identified. This overall approach assists with the surveillance undertaken by the individuals or algorithms. It would be in ESMA’s interest to observe their experience as they work towards implementing this level of identification on trading accounts, when considering the implementation of this at an order level. [*http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-26789a.pdf*](http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2013-26789a.pdf) *- Section B. Consideration of costs and benefits.*

ICE also notes that the cost-benefit analysis goes into no detail on the impact on venues of the implementation of this requirement. It also makes several assumptions that the venues already collect this level of information. Currently, venues do not collect all of these fields, and particularly not on orders. To collect it would require a system build such that the info can be provided on each order, or at least captured post-submission. There will be costs associated with the maintenance of any portal for capturing the required data and on-going compliance costs to ensure completion and accuracy of the data. Investment firms will also be required to develop systems such that they can provide this data to us, and similarly will have on-going compliance costs to ensure compliance. The accuracy of the data in any event cannot be guaranteed.

A solution may be that ESMA require data be provided on orders over a certain threshold per order and/or per trading day; or for liquid products only. This approach would be more realistic and would focus surveillance on areas that would give venues and regulators cause for concern, and it would be more appropriate for the detection of market abuse.

**Specific comments on RTS 34:**

The following remarks are observations made on the proposed RTS which we recommend that ESMA consider.

1. The definition under Article 1(a) of ‘Orders’ should be amended to be consistent with other proposed RTS.

2. Article 3(b) -Reiterating our position set out earlier, this information may be appropriate to capture on the transaction level but will be extremely difficult to capture and ensure accuracy on each order.

**Comments on the fields proposed under Annex I, Table I of RTS 34:**

We have undertaken an analysis of the fields proposed under Annex 1 Table I and noted those fields that would be difficult to obtain with any accuracy; where further interpretative guidance is required, and which are already captured. This is attached as an appendix to this response. We would encourage ESMA to engage directly with the venues and provide more detailed technical guides on how these fields should be completed and what is necessary for all asset classes. On the basis of the data provided, trading venues will not be able to ensure these fields are accurate and that the relevant data can be obtained should the regulator request it.

**Specific response on timing of submission of client ID information**

ICE disagrees with this proposal completely. At the time of order or trade entry, even when aggregating orders, the broker/trader does not have knowledge of the number of clients and their respective end client identifiers that are responsible for the order. Other circumstances where the client will not be identified include business conducted by fund managers and in-house execution desks, whereby they are given an order to execute but not given the details of who the beneficial owner or client is at that time.

Adding an identifier such as “AGGREGATED\_X” will not add any meaningful information and it is hard to ensure it is reliable. Allocation to end clients is primarily a post trade function, which is achievable therefore for transaction reporting requirements, but not for order reporting.

Our recommendation is for venues to provide the audit trail for all the post trade functions that are associated with a given transaction as part of the transaction reporting requirements without the need for a separate identifier at the order level.

<ESMA\_QUESTION\_CP\_MIFID\_226>

1. Do you agree with the proposed approach to flag liquidity provision activity?

<ESMA\_QUESTION\_CP\_MIFID\_227>

No. This information cannot always be provided on an order-by-order basis. On many venues, rebates that might be given as part of a market making scheme are calculated on a monthly basis, based on an assessment of whether the conditions of the scheme have been met. To be able to identify and flag market making activity, and to separate such activity from other order flows (as is required by the investment firms under RTS 15 Article 4(2)(b)) may require retooling of a number of systems and incur high cost for the industry without any material regulatory benefit.

<ESMA\_QUESTION\_CP\_MIFID\_227>

1. Do you foresee any difficulties with the proposed differentiation between electronic trading venues and voice trading venues for the purposes of time stamping? Do you believe that other criteria should be considered as a basis for differentiating between trading venues?

<ESMA\_QUESTION\_CP\_MIFID\_228>

Voice trading systems should be time stamped with granularity of a minute. Going below the minute is going to make it hard to reconcile the time when there are multiple parties involved in recording the trade.

<ESMA\_QUESTION\_CP\_MIFID\_228>

1. Is the approach taken, particularly in relation to maintaining prices of implied orders, in line with industry practice? Please describe any differences?

<ESMA\_QUESTION\_CP\_MIFID\_229>

This approach is not reflective of current practice. We have set out below the approach taken by ICE for implied products:

* We support multi-generation implieds so we can derive implied prices from both real and other implied prices. We can generate more than one implied order at a given price through multiple paths resulting in large implied chains.
* We publish only a subset of these implieds on our market data feed to avoid overwhelming the member systems and disrupting the market. We will tag all orders that are disseminated only on the market data feed with the tag “implicit”.
* Trades/transactions can occur as a result of the matching of implied or real orders. Each side of the transaction will be tagged with “implicit” or “real”. The trade can occur with implied orders that have not been disseminated on the feed. All the implied orders that are part of the trade are linked together with a LinkID.
* LinkID is not maintained or disseminated for orders that form implied chain that don’t trade as it will be onerous and expensive to maintain this for all implied orders.

To prevent any disruption to the market, we recommend that ESMA amend the relevant Articles to better reflect the current practice.

<ESMA\_QUESTION\_CP\_MIFID\_229>

1. Do you agree on the proposed content and format for records of orders to be maintained proposed in this Consultation Paper? Please elaborate.

<ESMA\_QUESTION\_CP\_MIFID\_230>

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<ESMA\_QUESTION\_CP\_MIFID\_230>

1. In your view, are there additional key pieces of information that an investment firm that engages in a high-frequency algorithmic trading technique has to maintain to comply with its record-keeping obligations under Article 17 of MiFID II? Please elaborate.

<ESMA\_QUESTION\_CP\_MIFID\_231>

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<ESMA\_QUESTION\_CP\_MIFID\_231>

1. Do you agree with the proposed record-keeping period of five years?

<ESMA\_QUESTION\_CP\_MIFID\_232>

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<ESMA\_QUESTION\_CP\_MIFID\_232>

1. Do you agree with the proposed criteria for calibrating the level of accuracy required for the purpose of clock synchronisation? Please elaborate.

<ESMA\_QUESTION\_CP\_MIFID\_233>

ICE disagrees with the proposed criteria and urges ESMA to reconsider its position on clock synchronisation.

Our observations are as follows:

* Most currently available network and server hardware does not support precision timing. This is beginning to appear, but given that equipment also has to support high levels of security, resilience and multicast functionality, products that support all relevant requirements are still in their infancy.
* Existing networks that most exchanges run today do not offer any meaningful hardware precision timing support. For example, some equipment may have the PTP boundary clock function but not the precision oscillator it needs. Only one major vendor that provides equipment to the financial trading vertical has a product that can do this today. Other major vendors have roadmaps to deliver precision oscillators into 2016 and once available these products would form a major programme of works to deploy.
* Vendors are still catering primarily for the Cellular radio market and although we have had some success in getting some features installed in Enterprise equipment, there is still some way to go.
* Equipment adequately to monitor precision at the network edge at scale is not commercially available.
* Customers or Exchanges running Solaris or Windows operating systems have major issues as neither of these operating systems supports precision timing properly and may never do so; migrating applications to another operating system may take time.

The following precision levels are possible:-

* A 10GB network installed within the last 4 years with application servers using standard NICs can be tuned to provide precision to circa 100µs at the 95th percentile.
* A cutting edge network with the latest top of rack switches, separate PTP timing distribution networks and hardware assisted PTP NICs can achieve precision approaching 5µs in some circumstances; however for compliance a figure of 10µs at the 95th percentile is more realistic.

We therefore propose the following:

* Most organisations should be able to achieve 100µs at the 95th percentile using software PTP and a standard January 2017 timeframe with relatively minor reworking. Some organisations may need to migrate to different operating systems so may need an extension.
* From 2017, the availability of vendor equipment would mean that any network and server hardware refresh would enable 10µs at the 95th percentile to be achievable. We would recommend that a future date be set for the higher precision level; a target date of 2019 for the higher precision level would be appropriate.

With respect to precision bandings based on round-trip time:

* For most electronic exchanges, the 2nd banding will be applicable; we would recommend the above figures for this banding.
* The 3rd 1ns banding is not achievable today as UTC itself is not distributed to this precision and is beyond the scope of commercial network distribution products and server client equipment. Even if the trading application round trip time crept into this banding, this level of precision to UTC is not tenable.

<ESMA\_QUESTION\_CP\_MIFID\_233>

1. Do you foresee any difficulties related to the requirement for members or participants of trading venues to ensure that they synchronise their clocks in a timely manner according to the same time accuracy applied by their trading venue? Please elaborate and suggest alternative criteria to ensure the timely synchronisation of members or participants clocks to the accuracy applied by their trading venue as well as a possible calibration of the requirement for investment firms operating at a high latency.

<ESMA\_QUESTION\_CP\_MIFID\_234>

ICE does foresee significant difficulties, specifically on the requirement for participants to apply the more precise level of accuracy and granularity. Please see response to Q233 above for reasons.

In addition to the responses provided above, ICE would like to make the following comments on the draft RTS.

ICE suggests that a definition of “business clock” be included in the RTS. This term is used extensively in the document and it is ambiguous. ICE interprets it to mean the clock on the device applying application timestamps however in the interests of clarity to ensure compliance, the ambiguity should be removed as it could also be interpreted as the device that takes time from the external source of UTC and distributes time to all a venue’s infrastructure.

Article 1 Definition (d) *“Reference time’ means the Coordinated Universal Time (UTC) issued and maintained by* ***one*** *of the timing centres listed in the latest Bureau International des Poids and Mesures (BIPM) Annual Report on Time Activities”* . The “one” implies that venues must get its time directly from one source, however, where a venue may get its time from multiple centres, as ICE does, this should be considered and clarified within the definition. This will also, for the record, have an effect on a venue’s ability to continually apply with the precision bands required, specifically when different time centres are used.

Under Article 3(4), ICE proposes that the language be amended to remove the ambiguity around whether a member or participant apply the same or higher granularity compared with the most accurate trading venue - which may not be applying the precision as set out in the table, but rather they should be applying the same precision as per the requirements in the table. This is important as Article 3 paragraph 5 states that participants must change their precision in line with ICE, if this relates to the banding in the table then that is straightforward, if however it is every time a venue changes infrastructure and precision changes venues would have to publish their timing precision constantly.

<ESMA\_QUESTION\_CP\_MIFID\_234>

1. Do you agree with the proposed list of instrument reference data fields and population of the fields? Please provide specific references to the fields which you are discussing in your response.

<ESMA\_QUESTION\_CP\_MIFID\_235>

It is not clear in the proposed RTS what information is required for what class of instrument, and we feel that there is significant ambiguity with respect to how derivatives should be treated that needs to be addressed. We encourage ESMA to engage with the industry directly on the reporting requirements to ensure compliance.

**Specific Comments on fields**

Date of admittance - it is not clear from the description outlined in this field what date should be used. To avoid any ambiguity, ESMA should provide additional detail.

The formats for the **‘Type of identifier of ultimate underlying instrument’** and ‘**Identifier of the ultimate underlying’** fields are not relevant for commodity derivative products which do not reference an underlying financial instrument. For example, the ultimate underlying for the ICE Brent Futures Contract may include the crude oil grades, Brent, Forties, Oseberg or Ekofisk, traded in the spot or forward markets. These crude oil grades, and other such commodity products will not have a specific instrument identifier, or can be identified by a country code, that can be included in the reference data file. Venues will therefore struggle, without clear guidance from the authorities as to the circumstances when this field can be left blank.

On further reflection of the taxonomy used to identify the underlying instrument, and when considered with the wider MiFID Level 2 proposals in mind, ICE has the following points to make:

Under **Further Subproduct Type**; the sub-product for Emissions should be redrafted to reference:

Certified Emission Reduction Units (CER)

European Union Allowance (EUA)

Emission Reduction Units (ERU)

European Aviation Allowance (EUAA)

**Subproduct for natural gas:**

Liquefied natural gas (LNG)

National Balancing Point (NBP)

NetConnect Germany (NCG)

Title transfer facility (TTF)

Under the subproduct ‘Oil’, we flag with ESMA that when a differential or crack contract is involved, there are essentially two underlying products, both are Oil but relate to two subproduct categories. In order to ensure that as a venue we can comply with the requirement to complete this field correctly, clear technical guidance from ESMA or the competent authorities will be required.

**Transaction Type**: This field should simply seek to highlight to competent authorities when a transaction has two underlying instruments, we therefore suggest that only crack or differential be included in this field.

**Final price type** - On reflection of these requirements, and as the objective is to establish an identifier for the underlying instrument, we consider it more accurate to leave this field blank where the underlying is a commodity derivative. The final price of the underlying will not be determined by Platts itself for example, but Platts will however be one source of benchmark price assessments of the physical commodity.

Provisions should also be made for how venues can update these categories as new products are launched for example. We suggest that ESMA be pragmatic in their requirements in this regard and seek to reach a solution that will not impact the commercial interests of venues. We therefore suggest working with the competent authorities to agree on a reasonable approach for these events.

<ESMA\_QUESTION\_CP\_MIFID\_235>

1. Do you agree with ESMA‘s proposal to submit a single instrument reference data full file once per day? Please explain.

<ESMA\_QUESTION\_CP\_MIFID\_236>

No. Our preference is to submit a delta file. A full file contains a significant volume of data; a delta file submitted daily would be a more straightforward to produce and manageable to consume. We note that the current requirement is to submit the files in local time; the draft RTS has suggested that this be adhered to under CET. We therefore seek clarification from ESMA as to which time zone should be adhered to.

<ESMA\_QUESTION\_CP\_MIFID\_236>

1. Do you agree that, where a specified list as defined in Article 2 [RTS on reference data] is not available for a given trading venue, instrument reference data is submitted when the first quote/order is placed or the first trade occurs on that venue? Please explain.

<ESMA\_QUESTION\_CP\_MIFID\_237>

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<ESMA\_QUESTION\_CP\_MIFID\_237>

1. Do you agree with ESMA proposed approach to the use of instrument code types? If not, please elaborate on the possible alternative solutions for identification of new financial instruments.

<ESMA\_QUESTION\_CP\_MIFID\_238>

We agree. ICE however would flag the insufficient field lengths that have been proposed for the AII instrument code field. For some products this would not be sufficient length which may cause adverse technical problems, and would not be appropriate future proofing.

<ESMA\_QUESTION\_CP\_MIFID\_238>

* Post-trading issues

1. What are your views on the pre-check to be performed by trading venues for orders related to derivative transactions subject to the clearing obligation and the proposed time frame?

<ESMA\_QUESTION\_CP\_MIFID\_239>

Given the difference in current market structures in the Exchange-traded Derivatives (ETD) and OTC markets, the approach to pre-checks should be tailored accordingly.

In relation to ETD traded on regulated markets, ICE urges ESMA to re-consider the proposals in relation to the pre-checks proposed by Trading Venues in the ETD markets as these are already met through the market's existing structure. ICE contends that:

1. Contractual arrangements are already in place upon trade execution under the Rules of ICE Futures Europe and ICE Clear Europe in order to ensure certainty of clearing. Under these Rules, all Exchange Members are required to either be a Clearing Member or put in place arrangements with a Clearing Members in order to ensure that all trades are cleared; and ICE Clear Europe provides an open offer to accept contracts for clearing for all markets to which it provides clearing services. As such, the requirement to provide certainty of clearing is already met without the need for additional prescriptive regulatory requirements; and
2. the implementation of any pre-execution risk checks would lead to market disruption as it would increase latency within already efficient markets. ICE has, and continues, to invest heavily to increase its processing capabilities and reduce trade execution times and any delay or interruption of order execution flow could result in orders not being executed at all or at an inferior price than that which would have been available if they had been submitted with no delay.

Based on these comments ICE suggests that ESMA reduce the scope of the provisions in Article 3 of draft RTS 37 to disapply pre-trade checks for ETD products by a Clearing Member or Trading Venue in respect of any order submitted to Trading Venues where appropriate contractual arrangements are in place between the Clearing Member, Trading Venue and CCP to ensure contractual certainty.

In relation to OTC products, ICE Clear Europe has put in place arrangements to ensure that trades are accepted for clearing on a timely basis following execution. We therefore broadly welcome the proposals, in particular consistency with arrangements already put in place in other jurisdictions - most notably the US.

<ESMA\_QUESTION\_CP\_MIFID\_239>

1. What are your views on the categories of transactions and the proposed timeframe for submitting executed transactions to the CCP?

<ESMA\_QUESTION\_CP\_MIFID\_240>

ICE broadly supports the categorisation of transactions proposed by ESMA and the applicable timeframes set out by ESMA. However, ICE notes that in practice its systems will not differentiate between transactions registered for clearing under Sections 2 (Derivative transactions executed on a bilateral basis and subject to the clearing obligation) and 3 (Derivative transactions voluntary cleared) and therefore believes that the same rules should apply to voluntarily cleared trades and mandatorily cleared trades.

<ESMA\_QUESTION\_CP\_MIFID\_240>

1. What are your views on the proposal that the clearing member should receive the information related to the bilateral derivative contracts submitted for clearing and the timeframe?

<ESMA\_QUESTION\_CP\_MIFID\_241>

No comment.

<ESMA\_QUESTION\_CP\_MIFID\_241>

1. What are your views on having a common timeframe for all categories of derivative transactions? Do you agree with the proposed timeframe?

<ESMA\_QUESTION\_CP\_MIFID\_242>

ICE broadly welcomes the approach taken by ESMA to ensure equivalence with the US requirements and notes that it already complies with the CFTC's determination that "as soon as technologically practicable" means 10 seconds for OTC swaps. However, ICE notes that this requirement was mandated through Staff Guidance (link below) rather than being codified through Regulation (or similar) and suggests that ESMA re-consider the appropriate mechanism for implementation given process for amending such a requirement (e.g. use of the EMIR Q&A).

<http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/stpguidance.pdf>

<ESMA\_QUESTION\_CP\_MIFID\_242>

1. What are your views on the proposed treatment of rejected transactions?

<ESMA\_QUESTION\_CP\_MIFID\_243>

In relation to ETD traded on regulated markets, ICE does not believe that additional rules are required in relation to rejection of transactions as these are already provided for in the rules of the Regulated Market or CCP. It is also worth noting that given the certainty of clearing provided by existing market structure, trade rejections are extremely rare.

In relation to OTC derivatives, we agree with ESMA’s proposals and that the handling of rejected trades should be subject to agreement between the trading venue and CCP. From a practical perspective, re-submission of a rejected trade within 10 seconds from the previous submission is too short and this period should be extended. We would also note that the definition of “technical problem” should also be subject to agreement by the trading venue and CCP.

<ESMA\_QUESTION\_CP\_MIFID\_243>

1. Do you agree with the proposed draft RTS? Do you believe it addresses the stakeholders concerns on the lack of indirect clearing services offering? If not, please provide detailed explanations on the reasons why a particular provision would limit such a development as well as possible alternatives.

<ESMA\_QUESTION\_CP\_MIFID\_244>

ICE broadly welcomes the proposals in relation to indirect clearing for ETD under MiFIR and encourages ESMA to consider aiming for further consistency with the relevant requirements under EMIR. However, we would note that the proposals:

* do not adequately address conflict of law issues in order to ensure a harmonised approach to indirect clearing following the default of the indirect client or Clearing Member. The extension of the indirect clearing requirements to non-EU clients will only serve to exacerbate this problem and will prevent a large number of existing clients providing indirect clearing services (e.g. US clients). ICE therefore proposes that ESMA limit the RTS to indirect clients established in the EU (covering entities incorporated in the EU and not, for instance, EU branches of non-EU firms).
* prescribe yet another form of customer omnibus account structure - namely an individually segregated gross omnibus customer account. ICE notes that:
  + The introduction of another account will lead to significant operational, legal and implementation challenges. ICE asks ESMA to recognise the work needed by CCPs, Clearing Members and indirect clients to put such systems in place and provide sufficient implementation time beyond 03 January 2017. Further, the revised approach will require additional legal analysis and re-papering of the relevant legal and contractual agreements in order to ensure that certain provisions within the Clearing Rules extend to the Agreement between the Clearing Member, the direct client and the indirect client.
  + While we note that such structures are common in the US where FCMs must collect gross margin from their clients and provide sufficient reporting on a daily basis to ensure that CCPs can calculate and collect such margins (both from the direct Clearing Member and any FCM clients for whom they are acting as “carry broker”) the reporting that underpins this approach is not yet widely implemented in Europe. Further in the US, such accounts are omnibus accounts and therefore we question why ESMA have proposed that this should be a separate individually-segregated account.

<ESMA\_QUESTION\_CP\_MIFID\_244>

1. Do you believe that a gross omnibus account segregation, according to which the clearing member is required to record the collateral value of the assets, rather than the assets held for the benefit of indirect clients, achieves together with other requirements included in the draft RTS a protection of equivalent effect to the indirect clients as the one envisaged for clients under EMIR?

<ESMA\_QUESTION\_CP\_MIFID\_245>

As noted in our response to Question 244, ICE broadly welcomes the proposals. However, ICE also questions the consistency of these proposals with the relevant requirements under EMIR; Article 30(1) of MiFIR states that indirect clearing arrangements are permissible provided that the assets and positions of the counterparty benefit from protection with “equivalent effect” to that referred to in EMIR Articles 39 and 48. Given that the proposals provide for neither individual customer segregation nor porting, we question how they have “equivalent effect”. The requirement on Clearing Members to provide information as set out under Article 39(7) of EMIR in relation to the segregation requirements as set out under Article 4(4) of RTS 38 is important to ensure that the indirect client understands fully the protections offered.

<ESMA\_QUESTION\_CP\_MIFID\_245>

1. The field will used for consistency checks. If its value is different from the value indicated during submission on the website form, the latest one will be taken into account. [↑](#footnote-ref-1)