European Securities and Markets Authority

Reply form for the Consultation Paper on MiFID II / MiFIR

19 December 2014

General information about respondent

Name of the company / organisation	Deutsche Bank AG
Confidential[1]	☐
Activity:	Investment Services
Are you representing an association?	☐
Country/Region	Europe

2. Investor protection

Q1. 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?

Item 5(iii) should specify "shareholders with qualifying holdings" to align with article 7.4(c) of MiFID 2.

Q3. 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?

The criteria should take into account if the proposed acquirer is an entity that is subject to supervision within the EEA.

Q4. 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?

The obstacles mentioned to appraise the suitability of a shareholder should only be one element in the decision making process and should not preclude the acquisition taking place if other elements (sound organisation, reliable mangers, etc) point towards suitability.

Q12. Do you find it useful that a separate passport notification to be submitted for each tied agent the branch intends to use?

It is not clear why an investment firm that plans to use several tied agents with similar tasks and scope of activities should not be allowed to make one notification comprising the individual details of each agent.

In a scenario where an investment firm changes its details (e.g. address) it would be required to make a notification of this change, but also to each and every tied agent notification. This creates a significant administrative burden for firms and regulators so we propose instead

[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.

that the changes in the details of the firm using tied agents should only lead to one notification.

Q15. Do you agree that credit institutions needs to notify any changes in the particulars of the passport notifications already communicated?

It would be desirable to introduce a materiality threshold so that only significant changes need to be notified.

Q23. 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

No. As for question 12, it is not clear why an investment firm that plans to use several tied agents with similar tasks and scope of activities should not be allowed to make one notification comprising the individual details of each agent.

In a scenario where an investment firm changes its details (e.g. address) it would be required to make a notification of this change, but also to each and every tied agent notification. This creates a significant administrative burden for firms and regulators and we think instead that the changes in the details of the firm using tied agents should only lead to one notification.

Q30. Do you agree with the approach taken by ESMA? Would a different period of measurement be more useful for the published reports?

The disclosure obligations could result in the exposure of risk positions taken by systematic internalisers (SI's) and other market makers within one month of quarter end. The consequences for the market and market making could be significant, with investment firms far less likely to commit capital and facilitate client business. Flagging of the individual SI to a transaction has not been included within the post trade transparency regime because of the risk of exposing an investment firm's position. For the same reason, SI's and market makers should either be excluded from this section or be allowed to report within 3 months of the end of the quarter, rather than one month.

It is also unclear what is meant by 'liquidity providers' as this is not a defined term within MiFID 2. Regarding market makers, it is not particularly clear which firms meet this designation, perhaps with the exception of those that have signed formal market making agreements with trading venues.

There is a potential risk of duplication where data published by market makers and liquidity providers is already published by trading venues, where those market makers are trading on trading venues.

It is not entirely clear that many of the data requirements could be fulfilled by market makers as they are generally aimed at execution venues.

Regarding the specific metrics in terms of reporting, we are of the view that it is important to consider how each metric contributes to market participants' understanding of best execution and therefore whether all of the specified data would be useful.

For these reasons we would therefore suggest either that the number of reporting fields be reduced for transactions in illiquid instruments or transactions that are large in size (i.e. above SSTI or LIS) where measuring best execution is much more difficult and consideration be given as to whether erroneous conclusions could be taken.

Q31. 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?

We partially agree with the proposal to split trades into ranges according to the nature of different classes of financial instruments. As stated above, for many instruments, recording prices above SMS / SSTI / LIS may not be appropriate since the nature of market liquidity may distort the data. Clarification on how trades will be split into ranges for equity derivatives is required.

Q32. Are there other metrics that would be useful for measuring likelihood of execution?

Metrics such as order data and message data are not relevant to understanding best execution and their inclusion will only risk making reports more complex and may lead to erroneous conclusions being taken.

ESMA has restricted publication of costs to only those which are incurred by the execution venues on behalf of the client. If SIs, market makers and liquidity providers are not excluded from the requirements of this section, clarity is required on whether costs incurred by these participants should be published, and if so how exactly they could be calculated.

As ESMA partially notes, we would highlight that trading venue fees are standard for all members, whereas SIs, market makers and liquidity provider contracts are negotiated on a commercial basis.

Q33. Are those metrics meaningful or are there any additional data or metrics that ESMA should consider?

ESMA proposes that for quote driven markets additional data needs to be published to support the creation of other metrics such as the mean and median time elapsed between the request for a quote and the provision of that quote, and between the client's acceptance of a quote and its execution. We question what additional value there is in including this metric and whether it will make reports more complex.

Q35. Do you agree with the proposed approach? If not, what other information should ESMA consider?

Whilst there may be benefits to standardisation, many clients already receive bespoke transaction cost analysis to measure their performance. This means that clients can receive information tailored to their needs, which is preferable in our view.

In addition, best execution is not altered by participant type so the reports should reflect that and be agnostic of participant type. Splitting reports per country would also introduce an extra layer of complexity – especially when many trading venues are pan-European. There is enough information in the reports that users can extract the data they require and build their own comparisons should they wish to.

Q36. Do you agree with the proposed approach? If not, what other information should ESMA consider?

As for execution venues, it is not clear whether data in illiquid instruments and in large sizes will be beneficial to end users.

We would like to stress that the proposed reporting/disclosure of trade information might be disadvantageous for retail clients as institutional clients could use the information to direct their trades in a beneficial manner if the information is made public on a website. This would not be in line with the objective of the directive to enhance consumer protection.

3. Transparency

Q37. 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.

We agree.

Q38. 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.

We agree in principle, however we would request explicit acknowledgement in the RTS that trades that do not form part of the relevant trading phase or are non price forming at point of reporting are excluded from the calculation. Auction volumes (which are outside of continuous trading) should be excluded from the calculation. A venue which only had end of day auctions should not become the most relevant market for intra-day trading – as it may not have any at all.

Q39. 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.

We welcome ESMA's desire to develop a list that is sufficiently flexible to ensure that the regulatory regime for negotiated transactions remains appropriate as markets evolve. However, we are concerned that the list no longer includes explicit reference to securities financing transactions and exchange for physical trades, even though ESMA were of the view they may be a subset of the other exemptions. We also request clarification from ESMA that the absence of give up/give in transactions from the list on page 58 of the consultation paper is an erroneous omission (as this is included in the list included in RTS 8, Art 6).

To ensure a consistent approach, this list should be similar to the exhaustive list of transactions not contributing to the price discovery process (RTS 8, Art 2).

Q40. 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.

We agree.

Q41. 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.

We agree with ESMA that average daily turnover (ADT) is a far from an ideal measure for calibration of the LIS threshold and we would welcome investigation of alternate approaches.

We welcome the introduction of additional classes of less liquid shares. However, it is important to ensure that the waiver is relevant by ensuring that the thresholds are set appropriately. If only 0.17% of trades are currently executed above the current LIS thresholds, then, given that the proposed changes focus on making the application more granular, it can be assumed that this will remain unchanged under MiFID II. In general, we consider that the LIS thresholds remain too high to be useful given the current market structure.

Q42. 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.

We support the alternate proposal of a single LIS threshold of €1m applying to all ETFs regardless of their liquidity. In the ETF market, the primary concern should be to make the regime as simple as possible.

Q44. Do you agree with the proposed approach on stubs? Please provide reasons for your answers.

We agree with the proposed approach.

Q45. 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.

We agree. Quotes should be published with the time entered or updated.

Q46. Do you agree with the proposed definition of when a price reflects prevailing conditions? Please provide reasons for your answers.

We agree.

Q47. Do you agree with the proposed classes by average value of transactions and applicable standard market size? Please provide reasons for your answers.

We do not agree. It is important that standard market size reflects the average value of orders executed in the market for the financial instruments in each class (MiFIR Art 14.4). We note the intention to use a banding approach but feel the outcome is suboptimal: 95% of securities exist in a single band and the standard market size does not represent the reality of trading activity in a majority of securities because it is too high.

Q48. 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.

We welcome ESMA's objective to ensure that the regulation should be sufficiently flexible to remain relevant as markets evolve. We suggest that exchange for physical trades and exchange of ordinary shares for depository receipts be explicitly included. These are clearly non price forming and while they may be subsets of other trade classifications their explicit removal without recognition of them being covered elsewhere risks causing confusion.

Q50. 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.

We agree.

Q51. Do you agree with the proposed list of flags that trading venues and investment firms shall made public? Please provide reasons for your answers.

We are unclear what the benefit is of an algorithmic flag – especially as smart order routers (SORs) are classified as algorithms.

Q52. 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.

We agree.

Q53. 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.

We agree. This list of transactions should be similar to transactions not contributing to the price discovery process listed in RTS 8 Art 2. Intra-group trades should also be included in the list of exemptions.

Q54. 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.

We do not agree. In particular we see two problems:

1) Delays appropriate for trades much larger than the thresholds are not catered for. Trades above €100m for liquid shares would need a longer delay period in order to enable investment firms to either hedge or unwind the risk they have taken on.

2) The calibration of trades in SME's (the last few groups) does not reflect the sensitivity they are trying to account for. Trades of several million Euros can occur in these stocks, so delays calibrated around trade sizes of €15 – €50,000 do not reflect the reality of trade sizes in this market. Longer delays for these large trades in SMEs will open them up as investable to a larger universe of investors and thus aid the imperative of structuring the market to support SMEs. At present, the difficulty of the delay regime accounts in large part for the regrettable infrequence of such trades.

Q55. 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.

We do not agree with the usage of ADT as a classification of the deferral range for ETFs because it does not recognise the liquidity of the underlying securities.

We would propose the following approach to post trade calibration for ETFs:

< €10 million	Real time reporting
€10million < €50 million	60 minute delay
€50million	End of Day

Q57. 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.

We do not agree with ESMA's proposal for a definition of a liquid market. The proposal results in bonds being inaccurately classified as liquid, including a number of corporate bonds, which needs to be addressed because of the potentially damaging impact on capital markets. Given the inherent shortcomings that exist in any approach based on classes of bonds (including issuance size) our preference would have been for ESMA to pursue an instrument by instrument approach in order to ensure a higher level of accuracy in classifying bonds. If ESMA does continue with a classes approach based on issuance size, then the thresholds need to be significantly revised upwards to reduce the incidence of 'false positives' and capture only those bonds which can be genuinely considered liquid.

1. We broadly agree with the subclasses identified, but consideration could be given to time from issuance and currency as additional factors. We assume that the 'financial convertibles' class does not include issuances from the financial arm of a non financial company.

2. We support the parameters used but the thresholds are too low. A bond should not be considered liquid if it only trades on average twice on the days in which it trades, and does not trade on every day of the year. Two trades could simply comprise a market maker purchasing a bond in the morning and then selling it in the afternoon. The definition of a 'liquid market' under MiFIR references there being 'ready and willing buyers and sellers on a continuous basis' which cannot be the case for a bond which trades only twice per day. In our view, a bond should be considered liquid if it trades at least 4-5 times per day, on the days that it trades. The inclusion of very infrequently traded bonds in the liquid market category means imposing real time post trade transparency and pre trade transparency requirements on bonds which cannot support this and which could therefore result in reducing liquidity even further.

3. Yes, some classes / bonds that have been classified as liquid, are in fact illiquid. The focus should be on eliminating these 'false positives' – such as the 321 non financial corporate bonds and the 367 EU sovereign bonds which have been classified as liquid according to issuance size, but do not meet the quantitative thresholds that have been set by ESMA. These should be addressed by increasing the issuance size thresholds (see below). We agree with the proposal to classify all structured finance products as 'illiquid'.

Q58. 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.

We do not agree. If the instrument by instrument approach cannot be followed and ESMA takes issuance size as a proxy for determining liquidity, in our view the following issuance sizes would be more appropriate as a display of the level at which bonds start to display characteristics of being 'liquid'.

Given that the liquidity of a bond is generally concentrated in the first few weeks of its issuance, lower thresholds could apply to newly issued bonds in order to ensure a higher level of transparency for them.

- Sovereign: €10bn (For the first 4 weeks the threshold could be €1bn)
- Corporate Financial Senior: €1bn
- Corporate Non-Fin Senior: €1.5bn
- Corporate Financial Sub: €1.5bn
- Corporate Non-Fin Sub: €1bn

Q59. 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.

We do not agree with ESMA's proposal. The presence of a market maker is not a proxy for the determination of liquidity. Securitised products can be highly bespoke and tailored for an individual clients needs. A market maker may list a securitised product for pricing purposes and the instrument could trade only once to redemption, i.e. the client buys the product and holds.

We agree with using the parameters of average daily volume and number of trades in a particular ISIN as an acceptable method of determining liquidity. However, the ESMA analysis itself concludes that the vast majority of the products traded very infrequently, if at all and so should therefore be deemed illiquid.

Exchange-traded-commodities and exchange-traded notes should fall under the transparency regime for ETFs as we see them as sufficiently similar in structure.

Q60. 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.

The definition is not granular enough. ESMA's analysis has itself identified various sub-classes.

Q61. 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.

We do not agree with the proposal for a definition of a liquid market. The following points need to be addressed:

1. We broadly agree with the criteria used to define the subclasses, but more granularity is needed in two areas: swaptions need to be broken down by both tenor as well as currency and inflation swaps which are currently only split by currency also need to be defined according to the index in question.

2. For OTC traded contracts, we support the parameters used but the thresholds should be higher, as a number of contracts have been caught which we would not consider to be liquid. Each sub class should reach a threshold of at least 15 – 20 trades per day to be considered liquid. Instruments should not be considered liquid on the basis of trading only once or twice per day.

   In relation to broken dates, we support option 1 which includes all dates within the range as liquid. However, we would caution that as a result the SSTI needs to be set at an appropriate level in order to accommodate variances in liquidity around different tenor dates, given that liquidity is usually concentrated around a number of fixed dates (5, 10, 30 years maturity). In relation to ESMA's comment about broken dates, the trading obligation should not be defined by simply excluding broken dates (i.e. option 2); a set of higher quantitative thresholds should be set to bring the regime more in line with the products under the trading mandate in the US.

   For exchange traded derivatives, the liquid market should be determined by considering the number of contracts (number of lots and lot sizes) rather than the notional value. Depending on the value of the underlying asset, some instruments with higher notional values require lower volumes to be considered liquid. Conversely, exchange traded derivatives instruments with lower notional values would require disproportionally higher volumes to be considered liquid. Furthermore, considering the number of contracts traded rather than notional value (in Euro) when defining liquidity ensures there is no FX risk in calculations for non-Euro denominated contracts.

3. Yes, we would define some classes that have been declared as liquid as illiquid. ESMA's focus should be on those currencies which are liquid in Europe - we do not consider the currencies of MYR, MXN or KRW as liquid, as in any tenor they generally trade infrequently within the EU.

We also consider that consideration needs to be given to package transactions where multiple different swaps may be traded simultaneously. We consider that where one component of the package is not liquid then the entire package should be treated as illiquid.

Q62. 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.

We do not agree for the reasons provided above.

Q63. 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.

We prefer option 1 where only contract types with a time to maturity up to six months would qualify as liquid. As ESMA's analysis demonstrates, nearly all of the volume is usually concentrated in sub classes in short maturities up to three months. However, there needs to be much more granularity in respect of the subclasses that have been identified (see below), as well as quantitative threshold tests applied to each of those classes. At present, the classes as proposed would capture a significant amount of illiquid activity. Some contracts in certain names would not trade in any volume, if at all each day.

We acknowledge ESMA's concern that there is already a high degree of pre and post trade transparency available in equity derivatives markets. However, it is not necessarily the case that because some products are categorised as illiquid, transparency will necessarily be diminished. Multilateral venues are not obliged to apply for a pre trade transparency waiver for illiquid instruments and are unlikely to do so where this would diminish the transparency that is already enjoyed by market participants.

The impact could be substantial however, if a systematic internaliser is required to show pre trade transparency in bespoke instruments which are deemed liquid by ESMA, but in reality never trade in any meaningful volume. For this reason, products which are in reality illiquid, should be categorised as such.

Q64. 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.

The subclasses need to be much more granular to reflect the differences in liquidity that would currently exist within each of the classes.

- Some underlying contracts/names are much more liquid than others. We would suggest adding classes which take into account the specific underlying in question, or whether the underlying is a constituent of a major index;
- As specified above, standard near maturities vs far maturities should be considered (i.e. those with a maturity up to six months);
- Options that are in the money / out of the money could also be considered.

A contract should trade multiple times per day to be considered liquid.

For exchange traded derivatives, a liquid market should be determined by considering the number of contracts (number of lots and lot sizes) rather than the notional value. Depending on the value of the underlying asset, some exchange traded derivatives instruments with higher notional values require lower volumes to be considered liquid. Conversely, exchange traded derivatives instruments with lower notional values would require disproportionally higher volumes to be considered liquid. Furthermore, considering the number of contracts traded rather than notional value (in Euro) when defining liquidity ensures there is no FX risk in calculations for non-Euro denominated contracts.

We would suggest that where an underlying instrument has been deemed to be illiquid, the derivative of that instrument should also be considered illiquid.

Q65. 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.

We do not agree. The taxonomy used needs to be much more granular. As it stands, it is far too broad and means that calculations for liquidity are calculated at too high a level. As specified above, classes could be built on the basis of maturity, in/out of the money, listed / OTC, and specific underlying.

Specifically, some sub-classes of instruments proposed in the RTS are traded infrequently and in low volumes, and should be classed as illiquid, including Dividend Index Futures and Options, Stock Dividend Futures and Options, Basket/Portfolio Futures and Options. ESMA should focus on Stock Futures and Options and Index Futures and Options.

Q66. 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.

1. We do not consider notional currency to be relevant in defining sub classes of metals commodity derivatives.

2. We agree with the parameters used, but disagree with the quantitative thresholds. An instrument or product should trade multiple times per day to be considered liquid (once per day is not enough). A notional of €100,000 is acceptable.

   For exchange traded derivatives, liquid markets should be determined by considering the number of contracts (number of lots and lot sizes) rather than the notional value. Depending on the value of the underlying asset, some instruments with higher notional values require lower volumes to be considered liquid. Conversely, exchange traded derivatives instruments with lower notional values would require disproportionally higher volumes to be considered liquid. Furthermore, considering the number of contracts traded rather than notional value (in Euro) when defining liquidity ensures there is no FX risk in calculations for non-Euro denominated contracts.

3. On the above basis, for futures (Table 21 p.134) only Aluminium, Copper, Lead, Nickel, Tin, and Zinc would be considered liquid; and for options (Table 22 p.135) only Copper and possibly Aluminium should be considered as liquid.

Q67. 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.

We agree with the parameters used, but disagree with the quantitative thresholds. An instrument or product should trade multiple times per day to be considered liquid (once per day is not enough).

For exchange traded derivatives, liquid markets should be determined by considering the number of contracts (number of lots and lot sizes) rather than the notional value. Depending on the value of the underlying asset, some instruments with higher notional values require lower volumes to be considered liquid.

We would not view Oil denominated in RON trading less than multiple times on a daily basis with an aggregate notional of €525,000 to be liquid. We would also suggest that the ICE Brent Futures contract should be classified as liquid. This is a systemically important contract and classifying this contract as illiquid is not representative of the characteristics of this contract.

We suggest that ESMA produce more granular detail on the classes of instruments defined as liquid.

Q68. 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.

We agree with the parameters used to assess liquidity, but disagree with the quantitative thresholds. An instrument or product should trade multiple times per day to be considered liquid (once per day is not enough).

For exchange traded derivatives, liquid markets should be determined by considering the number of contracts (number of lots and lot sizes) rather than the notional value. Depending on the value of the underlying asset, some instruments with higher notional values require lower volumes to be considered liquid. Conversely, exchange traded derivatives instruments with lower notional values would require disproportionally higher volumes to be considered liquid. Furthermore, considering the number of contracts traded rather than notional value (in Euro) when defining liquidity ensures there is no FX risk in calculations for non-Euro denominated contracts.

We suggest that ESMA produce more granular detail on the classes of instruments defined as liquid.

Q69. 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.

For exchange traded derivatives, liquid markets should be determined by considering the number of contracts (number of lots and lot sizes) rather than the notional value. Depending on the value of the underlying asset, some instruments with higher notional values require lower volumes to be considered liquid. Conversely, exchange traded derivatives instruments with lower notional values would require disproportionally higher volumes to be considered liquid. Furthermore, considering the number of contracts traded rather than notional value (in

Euro) when defining liquidity ensures there is no FX risk in calculations for non-Euro denominated contracts.

Q70. Do you agree with ESMA's proposal with regard to the content of pre-trade transparency? Please provide reasons for your answer.

We support ESMA's clarification that a quote is only executable by the requesting party, however further amendments are necessary to ensure that the request for quote (RFQ) protocol is workable in practice. Under the current proposal, RFQ responses would be made immediately public and visible to all participants on the platform – this creates a disincentive for dealers to quote and exacerbates the "winner's curse" (whereby the market moves against the dealer which wins the business).

This would result in end users (asset managers, pension funds etc.) receiving worse prices from dealers on their requests.

To solve this problem, we would suggest a solution whereby quotes would be made public simultaneously only after a 'collection period'. During the collection period, quotes are hidden but can be adjusted by responding entities. After this period, quotes are frozen and made public for a period of time during which they are executable by the requestor.

This amendment is vital to ensuring the proper functioning of the RFQ protocol in sizes up to the SSTI.

Q72. 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?

The proposal could require a composite average of quotes from a minimum number of participants to be published. Any method used to determine indicative bid/offer prices should be as formulaic as possible and be readily available.

Q73. 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.

Inclusion of this may be duplicative or unnecessary given the other information that will included in reports such as flags for trades which benefitted from a deferral etc. The implementation challenge of this for non equity products will be significant.

Q74. Do you agree with ESMA's proposal on the applicable flags in the context of post-trade transparency? Please provide reasons for your answer.

Flagging trades accurately will be a major implementation challenge in non equities given the broad range of systems and products involved. Our concern would be that their use may hinder accurate timely reporting through trades being erroneously flagged.

Q75. 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.

We do not agree. The maximum delay of 15 minutes should be maintained on an ongoing basis and not reduced to 5 minutes after 3 years.

Given existing price discovery and trading mechanisms we see little benefit in subsequently reducing the post trade delay to 5 minutes. This makes allowance for the time necessary to capture and report bespoke OTC or physical trades not conducted over electronic platforms.

If necessary, a review could be conducted after 3 years exploring the necessity of reducing the delay to 5 minutes.

Q76. 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.

We agree that securities financing transactions should be exempt from the post trade reporting requirement. Intragroup transactions should also be excluded given that they are non price forming.

Q77. 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.

1. We agree with a 48 hours deferral period – although note that for many products, this would only be workable in practice if the supplementary deferral regime is made use of

by the relevant national competent authority. In particular, the exemption of volume either indefinitely, or for a number of weeks.

2. We do not agree. 50% of LIS is acceptable for post trade transparency but not for pre trade transparency. As long as the threshold is the same for both pre and post trade transparency, then it needs to be substantially lower. If the legislative objective of the text is to be followed, the threshold should be the size at which “liquidity providers are exposed to undue risk” then for pre trade transparency the size specific threshold should be nearer to 10% of LIS. The proposal for SSTI to be 50% of LIS captures at least 80 - 85% of tickets, which is an extremely high portion of the total and results in sizes which are far above where we would be comfortable as a liquidity provider. SSTI at 10% of LIS would still capture 50% of trades; which we see as positive policy outcome.

   Furthermore, it does not seem appropriate that two trades in SSTI size should equal one trade of block or LIS size.

3. For structured finance products, SSTI/LIS thresholds need to be calculated based on the current notional. ABS trades will amortise over time so it is important that the SSTI does not reference the original notional but rather current notional.

4. We do not agree. The thresholds are too high for pre trade transparency purposes. Either the size of the threshold should be reduced, or the pre trade threshold should be decoupled from the post trade threshold, with the pre trade threshold being substantially lower than it is now (we would propose 10% of LIS).

5. We would prefer a system based on annual recalculation but without arbitrary minimum thresholds so thresholds can adjust as markets evolve. We also do not agree that the methodology should be based on an exclusion of trades beneath a certain size, because this distorts the results. The proposed LIS thresholds are therefore too high, particularly for corporate non financial subordinated bonds.

For convertible bonds, the SSTI and LIS thresholds should be the same for both financial and non financial issuances – €500,000 and €1 million. This reflects the risk most market makers are prepared to quote up to in both classes.

Q78. 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)?

1. We agree with a 48 hours deferral period – although note that for many products and instruments, this would only be workable in practice if the supplementary deferral regime is made use of by the relevant national competent authority. In particular, the exemption of volume either indefinitely, or for a period of 4 weeks.

2. We do not agree with the size specific to the instrument threshold being set at 50% of the large in scale threshold. This is too high, particularly for the pre trade quoting obligation. Based on an analysis of our trading data and the size up to which we are not exposed to undue risk, the right number should be nearer to 15%. This would still capture 50% of the trades in each sub class.

3. For exchange traded derivatives, liquid markets should be determined by considering the number of contracts (number of lots and lot sizes) rather than the notional value.

4. For OTC products, the thresholds are too high for pre trade transparency purposes. Either the size of the threshold should be reduced, or the pre trade threshold should be decoupled from the post trade threshold, with the pre trade threshold being substantially lower than it is now.

5. We would prefer a system based on annual recalculation, but without an exclusion of trades beneath a certain size, or an arbitrary minimum below which thresholds cannot drop. Compared to an analysis of our own data as a market participant, the current thresholds proposed seem too high by up to 20% up to 10 years maturity and too high by more than 20% above 10 years. There also appears to be some inconsistency across tenor buckets – as we would generally expect the size to decrease as the tenor increases; which is not always the case in ESMA's numbers.

   ESMA's date calculator also needs to be adjusted as we don't observe the same levels of liquidity in the 6, 11, and 13 year points as ESMA does. It looks like transactions which are 5 years in duration have been pushed into the 6 year bucket.

   In relation to exchange traded derivatives, we note that there is already a transparency regime in place which has been set by exchanges in conjunction with their members. ESMA should take account of this when setting thresholds for these markets and not seek to change a market structure which functions adequately at present. This may involve adopting a different methodology for the setting of thresholds, such as taking into account the liquidity which exist pre trade in resting bids and offers on central limit order books and the way in which futures and options are often traded together.

We also consider that consideration needs to be given to package transactions where multiple different swaps may be traded simultaneously. We consider that where one component of the package is above SSTI or LIS, then this treatment should apply to the whole package.

Q79. 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.

1. We agree with a deferral period of 48 hours

2. 50% of LIS is too high for the SSTI threshold and we would suggest this is reduced to at least 25% of LIS.

3. For exchange traded derivatives, the volume measure should be determined by considering the number of contracts (number of lots and lot sizes) rather than the notional value.

4. Pre trade and post trade thresholds should not be set at the same size, to reflect the additional risk which exists pre trade.

5. We support annual recalculation of thresholds with no mandatory minimum to account for the fact that markets and trading patterns evolve over time.

   In relation to exchange traded derivatives, we note that there is already a transparency regime in place which has been set by exchanges in conjunction with their members. ESMA should take account of this when setting thresholds for these markets and not seek to change a market structure which functions adequately at present.

Q80. 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.

1. We agree with a 48 hours deferral period – although note that for many products and instruments, this would only be workable in practice if the supplementary deferral regime is made use of by the relevant national competent authority. In particular, the exemption of volume for a suitable length of time (3 months may be necessary).

2. 50% seems an arbitrary figure and an expectation would be that this figure should be lower. Liquidity in instruments can drop off in percentages lower than at 50% of a LIS.

3. The volume measure should be determined by number of contracts multiplied by the underlying price of instrument – consistent with EMIR reporting.

   For exchange traded derivatives, the volume measure should be determined by considering the number of contracts (number of lots and lot sizes) rather than the notional value.

4. The risk on pre trade transparency is higher so the threshold should be lower.

5. We support annual recalculation of thresholds with no mandatory minimum to account for the fact that markets and trading patterns evolve over time. However, the policy targets which have been proposed (90% trades, 70% volume) should be kept under review in order to ensure that the resulting thresholds are realistic.

   Equity derivatives require more granularity in terms of the identified classes. For example, the LIS threshold for Index Futures is €2,000,000 notional. This is a very broad threshold and does not account for differences in liquidity between different types of indices, such as a FTSE future and an Oslo 20 Index future.

   In relation to exchange traded derivatives, we note that there is already a transparency regime in place which has been set by exchanges in conjunction with their members.

ESMA should take account of this when setting thresholds for these markets and not seek to change a market structure which functions adequately at present.

Q81. 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.

1. We agree with a 48 hours deferral period – although note that for many products and instruments, this would only be workable in practice if the supplementary deferral regime is made use of by the relevant national competent authority - in particular, the exemption of volume for a suitable length of time.

2. 50% seems an arbitrary figure and an expectation would be that this figure should be lower. Liquidity in instruments can drop off in percentages lower than at 50% of a LIS.

3. We agree.

4. The risk on pre trade transparency is higher so the threshold should be lower.

5. We support annual recalculation of thresholds with no mandatory minimum to account for the fact that markets and trading patterns evolve over time. However, the policy targets which have been proposed (90% trades, 70% volume) should be kept under review in order to ensure that the resulting thresholds are realistic.

Q83. Do you agree with ESMA's proposal in relation to the supplementary deferral regime at the discretion of the NCA? Please provide reasons for your answer.

We agree, although would note the complexity and high number of possible different outcomes. In respect of volume omission, 4 weeks will be acceptable for the majority of transactions, but for occasional very large transactions or in bespoke instruments, four weeks will not be enough and longer would be required.

Pan EU consistency will be very important to ensure a level playing field and business shifting between jurisdictions. We would urge the relevant regulators to come to an agreement around the supplementary deferral regime.

Q84. 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.

Temporary suspension of transparency requirements should also apply when a bond is nearing default and is in 'distressed' status. This could be measured when the bond experiences a drop in price of at least 30% from par. When a bond issuer defaults altogether, the bond should be excluded from the scope of the requirements entirely – we assume it would be delisted from a trading venue.

For equity derivatives the volume measure should be number of contracts multiplied by underlying price of instrument; additional granularity would also be a necessity.

Q87. Do you agree with the proposed draft RTS in respect of implementing Article 22 MiFIR? Please provide reasons to support your answer.

As ESMA acknowledges this area requires more detailed proposals. In particular we would draw attention to the need to clearly define the trades that should be excluded because they do not contribute to the relevant volumes for the required calibration exercises. At present this seems open to interpretation and therefore requires more prescription to ensure a consistent application.

Q88. 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?

The assessment would need to be conducted at a sufficiently granular level. In some products, the test for sufficiently liquid would need to be more granular than is currently proposed for the liquid market test for transparency purposes.

Consideration also needs to be given to the treatment of package transactions. We consider that where one part of the package is either not sufficiently liquid, or exceeds the relevant block threshold, then the trading obligation should not apply to the whole package.

Q89. Do you have any other comments on ESMA's proposed overall approach?

We support ESMA's approach to determining a trading obligation on a case by case basis and the use of public consultation.

We would note that the trading obligation needs to be sufficiently differentiated from the determination of the liquid market for the purposes of transparency. This should include testing against a significantly higher set of thresholds – rather than just excluding broken dates of instruments which have deemed to have a liquid market under the transparency regime. The latter approach would result in a far broader set of products being mandated to trade on venues when compared to the US.

Q90. 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?

We support ESMA's proposal and the approach of aligning the MiFIR RTS with Regulation 285/2014 under EMIR to the extent possible.

Q91. Should the scope of the draft RTS be expanded to contracts involving European branches of non-EU non-financial counterparties?

We welcome ESMA's proposal to restrict the RTS's scope to European branches of non-EU financials. Expanding the scope to European branches of non-EU non financial counterparties would create an inconsistency with Regulation 285/2014 without clear policy benefits.

Q92. Please indicate what are the main costs and benefits that you envisage in implementing of the proposal.

The costs are not expected to be significant where there is legal certainty on the scope and obligations of counterparties.

4. Microstructural issues

Q93. Should the list of disruptive scenarios to be considered for the business continuity arrangements expanded or reduced? Please elaborate.

We have the following comments regarding the list of disruptive scenarios:

- Point (d) – the requirement for hardware to permit 'continuous operation' in case of a failover presents an extremely high compliance burden. In reality, backup services may take effect after a period of time delay of 15 minutes, for example. Continuous operation cannot be guaranteed beyond a small subset of critical services only**.**

  Point (d) should therefore be redrafted as follows:

  "duplication of hardware components to permit ~~continuous operation~~ ***rapid recovery*** of operations in case of a failover;"

- Point (i) – it is not possible or even desirable for a firm to be able to trade all orders manually. Given the proportion of business which is now automated via algorithms, this provision will be extremely difficult to comply with.

- Point (c) is a valid point but is not related to business continuity – it seems more relevant to requirements related to record keeping.

Q94. 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?

There should be more proportionality around stress testing. For example, some systems can reasonably be expected to never incur volume of "twice the highest over the previous six months". The qualification that "tests should be appropriate to the nature of the trading activity" should extend to the nature of the trading system that is being used as well.

It is doubtful whether the controlled roll out of algorithms can be applied to market making algorithms – including those needed to meet the market making obligation. We note the obligation for controlled roll out only applies to new algorithms or those subject to material changes – which we support. As controlled deployment should be bespoke and appropriate to the algorithm, we would suggest the following drafting amendment to RTS 13 Art 12(2):

"Limits shall be placed ***as appropriate*** on the number of financial instruments being traded, the price, value and number of orders, the strategy positions and the number of markets to which orders are sent"

Non-live testing environments allow firms to test their infrastructure set up (i.e. confirming that an execution moves into the relevant post-trade systems as required). However, it is extremely difficult for a non-live test environment to be set up that accurately mimics a production environment.

Non-live environment testing could be enhanced by requiring trading venues to also offer trading environments with test symbols – a dummy stock / future for the explicit purpose of testing and not resulting in actual trades / executions (this is in addition to a well functioning simulated environment). This would have the benefit of allowing firms to test both their infrastructure set up and also the market impact of their algorithms.

Q95. Do you have any further suggestions or comments on the pre-trade and post-trade controls as proposed above?

We have interpreted these requirements as only applying to algorithmic trading.

The capability to cancel outstanding orders from a particular subset of an investment firm's trading activity – e.g. at desk level or for a particular client, should precede the ability to cancel all orders from an investment firm regardless of the venue on which it is trading. The latter may have a more significant impact on markets more broadly, and whilst the ability to do this should exist, it should be preceded by an attempt at a more minimal shutdown at the particular algorithm / client level. In terms of sequencing to deal with an erroneous algorithm, under article 17 of the RTS, paragraph 2 should precede paragraph 1.

It would be better if the RTS did not prescribe the mechanism for implementing pre-trade controls. We would suggest that RTS 13, Art 21 (4c) be amended to:

"c) Maximum order volume which prevent orders with an uncommonly large order size from entering the order books. ~~Limits shall be set in shares or lots."~~

We support the exclusion of listed derivatives from the pre trade control on maximum order value. The market operates on the concept of a 'lot' (=1 contract) and we need to adhere to this generic concept as all listed derivatives have a different nominal & tick size. The maths behind calculating a check pre-trade will be very complex and of low-value when compared to the current state today.

The real time monitoring requirements detailed in RTS 13 Art 16(3) should not prescribe the mechanism for implementing the reconciliation requirement (i.e. by drop copy). We would suggest the following amendment:

"3. Investment firms shall maintain real-time and accurate trade and account information which is complete, accurate and consistent, and they shall reconcile as soon as practicable, and in real time where it is possible, their own electronic trading logs with records regarding their current outstanding orders and risk exposures ***<u>(for example,</u>*** drop copies)…"

Q96. In particular, do you agree with including "market impact assessment" as a pre-trade control that investment firms should have in place?

A market impact assessment test is difficult to implement and we would caution against making the requirement too prescriptive.

We have done a lot of work on our platforms to cater for the implementation of such a check and it is difficult to cater for all types of prices (including multi-leg strategies and low premium options). It would be preferable if firms were given the choice to impose checks based on the percentage deviation or number of ticks as appropriate.

Q97. Do you agree with the proposal regarding monitoring for the prevention and identification of potential market abuse?

Cross asset class and cross market surveillance presents a number of challenges from a technological perspective and most firms will not have the capability to do this. There should be sufficient flexibility for competent authorities to apply this based on the technical and operational ability of the firm to do so.

Q98. Do you have any comments on Organisational Requirements for Investment Firms as set out above?

We agree with the proposed list of minimum criteria that clearing firms should assess their clients against on an initial and ongoing basis. The requirement should not require the clearing firm to disclose the levels required of these criteria in a binding written agreement. Further, any additional criteria the clearing firm may itself require to assess and monitor a client's risk and performance should not be disclosed, made public or detailed in a binding written agreement. With regards to Annex B, Chapter V, Article 28.2 we support a formal annual review of a client's performance but view this as supplementary to ongoing client risk and performance management which must be flexible to market conditions, current internal risk appetite and subject to commercial consideration.

With regards to Annex B, Chapter V, Article 29 Position Limits and Margining; trading / position limits with clients should remain unadvised and uncommitted and whilst maintaining a real-time view of client positions is desirable it should not be mandatory. It would be more appropriate to have a minimum requirement for intra-day risk management which may increase in accordance with market, volume and risk demands where required. It would be beneficial if CCPs applied limits to clients of clearing firms in order to automatically limit the exposure of clearing firms to their clients. Procedures and oversight should be in accordance with Article 37 of EMIR.

Annex B, Chapter V, Article 30 should be wholly in accordance with EMIR Articles 38 & 39.

Q99. Do you have any additional comments or questions that need to be raised with regards to the Consultation Paper?

We would request clarification from ESMA as to whether clearing firms credit limits are required to be reflected on the firm's balance sheet, whether utilized or not. In our view only utilized credit should be reflected on balance sheet.

We request that ESMA consider the following requirements: i) for CCPs to apply limits to clients and clearing firms in order to automatically limit exposures of the clients to the clearing firms, ii) the practicality of CCPs applying limits to parties that they do not have relationships with such as trading member firms. ESMA should also consider and guard against the unintended consequences of limit application in order to prevent any competitive advantage of one CCP over another.

The requirement to notify the competent authority of a breach to electronic security seems sensible, but this should apply more broadly to any major incident affecting critical trading systems.

The requirement with regard to penetration testing does not allow enough flexibility with regards to frequency. Firms should be able to conduct with a frequency of less than one year.

Under the direct electronic access requirements, storage of alerts generated by monitoring systems for sponsored access clients is not possible. This information is not held by sponsored access (SA) providers. For other clients, clarity is needed on how long alerts need to be stored for; we would suggest 3 months.

Q100. 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.

We support the clarification that the testing obligation for investment firms should only apply to new algorithms, algorithms used in other trading venues and material changes to previous architecture.

Q103. In particular, do you agree with the proposals regarding the conditions to provide DEA?

We agree with the proposal to adopt option A: requiring venues to set out a general framework for members and participants that want to offer direct electronic access (DEA).

However, more guidance would be helpful regarding the requirement to "ensure sufficient knowledge of market rules and trading systems". At present, it is unclear what level of knowledge should be sought – which would result in an unlevel playing field as DEA providers implement the requirements in a different manner. Further clarity around the baseline level of knowledge would be useful.

We are also concerned about part 23.1 (e) in the draft RTS which states that DEA providers remain liable for potential fines and sanctions imposed on the member as a consequence of the DEA user's behaviour. We assume this would not apply outright and only in cases where the DEA provider is proved not to have applied the relevant pre trade and market abuse monitoring controls.

Q104. Do you agree with the proposed draft RTS? Please provide reasons for your answer.

The text does not specify any detail around the process / timeline to be followed for signing a market making agreement, nor how an agreement can be exited should a firm decide it wishes to cease pursuing this type of strategy. Under the process for becoming an SI, investment firms have one month to do so after they have identified that they exceed the quantitative thresholds. A similar approach could be followed here.

There should be exemptions for quotes which are the result of client activity or quotes provided at the request of a client. Client facilitation /client hedging transactions should be included in this. In these cases, the investment firm is either not acting in a genuine proprietary capacity (but is trading as a result of a client action) or is only streaming prices at the request of a client and should be excluded.

We also note that there will need to be a mechanism for either the investment firm or the trading venue to be able to differentiate between quotes or orders resulting from their own versus client activity. Should a DEA client be engaging in market making, then the agreement will need to be signed by that party and not by the investment firm providing the access.

Q105. 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.

The qualifying figure of 30% is too low. 50% would be more appropriate, otherwise there is a risk of capturing activity which is not market making. The objective should be to capture passive market making strategies, 30% would risk capturing strategies which are not passive market making.

30% could be appropriate for some fixed income markets where the trading hours are significantly longer, thus justifying a lower percentage.

Q106. 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.

50% should be the minimum and it could be higher. The goal should be to ensure continuous quoting during times of market stress. It is not appropriate to require a strategy which quotes for 30% of the day to then quote for 50% of the day as the strategy will have been designed with the intention of being present in the market for 30%, not 50%. As long as the counting methodology for the 50% includes stressed market conditions, then this will result in a stricter set of obligations compared to what exists today.

Q109. Do you agree with the proposed regulatory technical standards? Please provide reasons for your answer.

Art 48 (6) MiFID states that trading venues should ensure that algorithmic trading systems cannot result in disorderly markets, including "***limit the ratio of unexecuted orders to transactions that may be entered into the system by a member or participant"***. The order to trade ratio (OTR) proposed in RTS 16 should be defined for this purpose. We would welcome clarity regarding the interaction between the OTR and the requirement in Art 48(9) of MiFID 2, which permits trading venues to impose higher fees on participants placing a high ratio of cancellations to executions.

We would also suggest that ESMA specify the time period for calculating the OTR.

OTRs should be adjusted for market making activities so that these activities are not penalised.

Our assumption is that the order to trade ratio would be applied at the member level, although we would note that a member's flow would encompass trading activity from a number of different internal desks, including a number of different clients – some of whom may have a high order to trade ratio whereas others may have a much lower ratio.

Q110. Do you agree with the counting methodology proposed in the Annex in relation to the various order types? Please provide reasons for your answer.

The following messages should not be included:

- Cancellations following uncrossing of auction (*as these are the result of market structure)*
- Cancellations following loss of venue connectivity (cancel-on-disconnect) *(these cancellations are designed to ensure orderly markets)*
- Cancellations following use of kill switch *(these cancellations are designed to ensure orderly markets)*

If the objective of OTRs is to reduce disorderly trading, preventing the cancellation of open orders will actually increase this risk.

We would assume that immediate or cancel (IOC) orders do not count as two messages as the investment firm only sends one message to the trading venue and the trading venue then manages the subsequent message.

Q112. Is more clarification needed with respect to the calculation method in terms of volume?

OTRs should be adjusted for market making activities so that these activities are not penalised.

Q113. 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.

We agree.

Q114. 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.

We agree that monitoring needs to take place on at least a monthly basis. Venues should have the obligation to monitor their participants' activity, and highlight to them if they are at risk of or are in breach of the order to trade ratio.

Q128. 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.

With regard to ETFs, the proposal results in tick sizes which are too wide. For example, the tick size for ETFs in the 100-200 price range results in a tick size of 0,02 whereas in our view it should be 0,01. The current proposal would result in wider spreads to those which are currently found on a number of EU trading venues.

We see two potential options for addressing this:

- Creating an exceptions process where tick sizes could be made narrower, subject to the agreement of the ETF issuer, trading venue and market maker, once an ETF had demonstrated a spread to tick ratio of 3 on a consistent basis. We acknowledge that creating an exceptions process may not be preferable from ESMA's perspective;

- Creating an additional super liquid category with tick sizes half of what they are for the current 15000+ range.

5. Data publication and access

Q134. 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.

We agree.

Q138. Do you agree with ESMA's proposal?

We agree.

Q140. Do you agree with the draft RTS's treatment of this issue?

We agree.

Q145. 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.

We are uncomfortable with venues being left with the ability to decide not to disaggregate by the criteria set out in Article 2(1) of the draft RTS 22. If they are allowed to do so then there needs to be an explicit and effective mechanism for challenging their assessment of "sufficient demand". Specifically, there is evidence of demand for separation of auction data from continuous trading data (Article 2.1e) for equities and this demand not being met. This disaggregation should be mandatory and not subject to the exchange's assessment of demand in Art 3.1.

Q146. 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.

This proposal appears to remove the scope to continue current market convention that a broker will report on behalf of its clients, regardless of who is the seller. We are not aware of any criticism or concern around this practice. To force all small asset managers to establish the mechanisms to initiate the report would result in material costs for no identified benefit.

Q147. 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?

We do not agree. This proposal appears to remove the scope to continue current market convention that a broker will report on behalf of its clients, regardless of who is the seller. We are not aware of any criticism or concern around this practice. To force all small asset managers to establish the mechanisms to initiate the report would result in material costs for no identified benefit.

Q148. 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.

We are in favour of trading venues gaining access to CCPs and vice versa, as long as this promotes healthy competition and does not introduce additional unnecessary operational/legal complexity or risk. Consumers should be able to choose where to execute and clear their transactions.

A prudently managed CCP should have capacity to accommodate fluctuations in its existing business model and therefore have capacity to accommodate incremental trade volumes generated within a new or existing trading venue. Conservative capacity planning should not be used as a tool to avoid competition.

From a risk and complexity perspective, and specifically considering operational risk we do not regard point 27.i) 'incompatibility of trading venue and IT systems…' to be an insurmountable issue in practice, and therefore a valid basis to deny access. IT solutions are largely vendor based, scalable and flexible in their compatibility. Most importantly, there needs to be clear metrics and thresholds in place to define 'IT incompatibility'. In reference to point 27.ii) and the systemic importance of a CCP, we agree that it should as a matter of course, be adequately resourced by staff with the appropriate level of competence.

With regard to the 'Conflicts of law' points set out in paragraphs 34-36 we agree that the conflicts of law constitute a reason to deny access if the relevant laws are fundamentally incompatible and compromise investor protection in the event of default / insolvency. Clarity is required as to which entities insolvency law / default procedures should take precedence – the CCP or the Trading Venue considering that the contract was entered in to at the trading venue and effectively given up to a different jurisdiction / law for clearing.

Also, a CCP should be in a position to deny access to clear anything that falls outside of EMIR.

Q149. 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.

We agree in principal but for the same reasons mentioned in Q148, would request a more precise definition of what constitutes IT incompatibility and whether such incompatibility can be overcome without significant costs being incurred.

In the event that access is denied due to cost, a breakdown should be provided with absolute transparency of what the costs constitute and how they have been quantified. We reiterate the point made above in Q148 with regards to 'conflicts of law' and seek inclusion of such a condition for refusing access.

Q150. 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?

We agree in principle subject to further definitions being provided on what exactly constitutes 'inability to acquire the necessary human resources…' and how any such inability is to be qualified.

Q151. Do you agree with the elements of the draft RTS that cover a CA's ability to deny access? If not, please explain why and, where possible, propose an alternative approach.

We agree but seek clarification from ESMA on points 49.i) and 49.ii) in how 'legal obligations' and 'wider negative impact on the market would be defined, implemented and measured.

Per MiFID Article 35(4)(b), ESMA should provide that any <u>one</u> of the grounds listed for denial of access by a CA (threaten smooth orderly functioning of markets – in particular due to liquidity fragmentation or adversely affect systemic risk) on its own, should be sufficient grounds for denial vs. conditions in the RTS, which are worded cumulatively.

Q152. 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.

We agree in principle and in particular endorse the need for a new clause catering for cyber-security breaches (proposed under Art 8(1)(f)(v). Further clarifications requested include on "transfer orders" in Art 8(1)(c), Art 8(1)(f)(ii) should be extended such that the access agreement is clear on the impact of termination on trades already cleared by the CCP to ensure systematic integrity and market stability in the event of a termination of a key access arrangement. Art 8(2)(c) should be amended such that prior consent of the relevant party is required if the impact of a change is significant. Given the symbiotic nature of the relationship between a trading venue and a CCP, it should not be permissible for one venue to force significant changes on another without their prior consent.

Q153. 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.

We agree but request clarity on whether it is the schedule of fees or the fees themselves that must be the same. Our expectation that it must be 'schedule' as fees should be on an individually agreed basis per clearing member. CCP fees should be trading-venue neutral. We support the required granularity of the CP and support the proposed additions of point 61 i-vi).

Q154. 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.

Where it is contemplated that CCPs shall determine whether a contract trade on a venue to which it has granted access is "economically equivalent" to those it clears - needs clarification. Economic equivalence would benefit from a more detailed definition. ESMA/the European Commission's definition under EMIR through Article 27(1) of Commission Delegated Regulation No. 153/2013 (which relates to cross-product margining at CCPs and is referred to in Article 13 of RTS 24), is that economic equivalence means that the two instruments being compared are "significantly and reliably correlated, or based on equivalent statistical parameters of dependence, with the price risk of one another".

The RTS proposes that a CCP should apply to economically equivalent contracts the same margin and collateral methodologies – regardless of where the contracts are executed. Article 35(6)(e) of the level 1 texts suggests that there should "non-discriminatory" treatment between contracts traded on different venues but does not suggest identical treatment – which needs clarification. This same argument applies to the netting of economically equivalent contracts – where the RTS suggests the same netting process should be applied unless legally unenforceable vs. non-discriminatory treatment and also with cross-margining of correlated contracts where the same portfolio margining approach is required regardless of where contracts are executed.

Q155. 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.

We agree with the provisions in Article 15 of the RTS but request that specific details of the time the CA has to approve a transitional arrangement are stipulated.

Q156. 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.

We would propose a long-stop date by which an assessment period must end. ESMA has the ability in Article 19(3) to interrupt the assessment period and this can be used to defer the end of the assessment period indefinitely and could cause market uncertainty due to the open-ended nature.

7. Commodity derivatives

Q184. 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?

25% of deliverable supply is a sensible baseline. We note there is still a major open question as to who will determine ‘deliverable supply’ and how.

Q185. 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?

40% would be suitable. As for the previous question, we note there is a major open question as to who will determine ‘deliverable supply’ and how.

Q186. 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?

We agree.

Q187. Are +/- 15% parameters suitable for all the factors being considered? For which factors should such parameters be changed, what to, and why?

We agree.

Q188. 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?

The spot month limit should be smaller than the limits for all other months by approximately 25%.

Q190. What wider factors should competent authorities consider for specific commodity markets for adjusting the level of deliverable supply calculated by trading venues?

Historic mean open position levels (spot and all-months) and delivery volume should be taken into account in determining ‘deliverable supply’.

Q191. What are the specific features of certain commodity derivatives which might impact on deliverable supply?

Deliverable supply of agricultural commodities is likely to fluctuate more frequently and sizeably than that of metals or energy products, according to crop production. This is the case not just in the EU but globally; for example a crop deficit in Asia may lead to exports from the EU and therefore reduced deliverable supply in the EU.

Deliverable supply in metals and energy products will be driven by levels of global economic activity and underlying costs of production, which are likely to move over longer timelines than agricultural crop cycles.

Q193. What participation features in specific commodity markets around the organisation, structure, or behaviour should competent authorities take into account?

We agree with ESMA's proposal that the competent authority should make any adjustments in line with the principle that the greater the number of position holders, the lower the overall position limit, on the basis that a person's position can become individually dominant at a lower lever.

Q194. 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?

We agree with ESMA's proposal that competent authorities should make any adjustments in line with the principle that the greater the flexibility of the commodity market, the higher the position limit.

Q195. For what time period can a contract be considered as "new" and therefore benefit from higher position limits?

For this purpose a period of two years would seem reasonable. If a new contract is to become established it would do so within this period. After that, illiquidity would be as a result of lack of demand for the contract, rather than it being new.

Q196. Should the application of less-liquid parameters be based on the age of the commodity derivative or the ongoing liquidity of that contract.

After a two year introductory period, ongoing liquidity should be the driver.

Q197. 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?

Our strongly held view is that once set, position limits should be adjusted as infrequently as possible. There may be a requirement for an initial recalibration one-to-two years after the introduction of limits, taking into account any lessons learned from their practical application. Thereafter limits should be adjusted only because of a fundamental and long-term change in the structural supply of the product. Limits should not be adjusted with every annual or seasonal change in deliverable supply. This is the practice of the successful and established position limit regime in the US.

Q198. Do you agree with ESMA's proposal to not include asset-class specific elements in the methodology?

We agree.

Q206. Do you agree with the proposed draft RTS regarding the definition of significant volume for the purpose of article 57(6)?

We agree with the comments raised in paragraph 41 p.549, regarding the existence of third country venues on which derivatives on commodities are listed and the impracticality of trying to impose position limits over contracts that are traded on venues outside the EU.

Q207. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

We agree that the aggregation and netting of positions on third country venues should not be included within the draft technical standard.

8. Market data reporting

Q213. 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.

The industry should utilise the messaging standards already in use wherever possible, i.e. allowing for different formats to be used to submit reports. ISO 20022, FIX & FpML are the most appropriate for use in specific scenarios. ISO 20022 is most appropriate for payments, FpML is preferred for derivatives and FixML for securities. Translating into different formats would prove challenging as there is no single standard that meets all needs, at least without loss of information. Therefore, converting one format to another raises the risk that information is not accurately reported, potentially leading to a lack of understanding of the reported information as well as additionally introducing a time lag due to the additional translation step.

An agreement of common meanings across all core message formats needs to be undertaken by select standards teams to reduce the implementation challenge and impact to ESMA and the industry. The alignment of equivalent meaning then helps remove the format discussion, and leads to higher quality and standardised reporting.

Q214. Do you anticipate any difficulties with the proposed definition for a transaction and execution?

The definition creates significant differences in reportable transaction types between EMIR and MIFIR and these should be aligned where possible. A comprehensive list of transaction types to be included would be beneficial in order to control reporting quality.

When looking at the aim to monitor firm's positions, it does not appear to be useful to exclude close-out transactions or transactions going into clearing. By excluding transactions for settlement purposes, data may be omitted which means that monitoring firm's positions is no longer possible i.e. the position the regulator knows about might differ from the position the bank shows because certain transaction types are not reportable. The clearing broker might not have all the relevant data for reporting the execution such as trader ID, decision maker ID, trade time etc. It is unclear how this information should be fed to the clearing broker in order to report the execution. We would suggest having the executing broker report the execution and the clearing broker the relevant details once the trade has been accepted.

For FX options, we would assume that the spot trade that results from the exercise is not reportable. This would ensure consistency with EMIR.

Further clarity would also be appreciated on novations which are deemed out of scope and what happens if the new counterparty post-novation is eligible for MiFIR reporting whereas before it was not (for example because it moved from a non-EU counterparty to an EU one).

Q215. In your view, is there any other outcome or activity that should be excluded from the definition of transaction or execution? Please justify.

We support the exclusion of transactions falling under the Securities Financing Transactions Regulation (SFTR). However, given the SFTR is likely to go live in 2017 after MiFIR, we would request clarification that no reporting is required under MiFIR in the interim.

Dividend re-investment plans/employee share incentive plans should be excluded in general.

In our view primary market transactions including issuance, allotment or subscription, and placements should be excluded because they meet the criteria for exemption: transaction dates published in advance; investment decision is an election to enter the transaction with no ability to vary the terms of the transaction; material time delay between the election and the time of execution. The criteria for exemption appears to be inconsistent with the transactions ESMA specify as in scope of reporting.

Q216. Do you foresee any difficulties with the suggested approach? Please justify.

We support the approach taken that the transmitting firm and the receiving firm have to agree on the order transmission process rather than making it mandatory for the receiving firm.

Nevertheless, we consider that the complexity for firms to set up legal agreements and implement this approach, plus the reluctance of firms to send client identification details, will mean in practice that investment firms will transaction report themselves rather than elect for the transmission receiver to report.

We would also request clarification as to how tripartite agreements should be treated.

Q217. Do you agree with ESMA's proposed approach to simplify transaction reporting? Please provide details of your reasons.

We agree. The proposed approach is simpler and more intuitive, identifying clearly the buyer and seller of the transaction. However, we would like to request clarification on how to report transactions which do not have a buyer or a seller, such as transactions in derivatives.

We would also appreciate clarification on whether the amendments to EMIR reporting that are currently being consulted on will also be applicable to MIFIR.

Q218. 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.

As a general comment it would be helpful to clarify which fields are mandatory vs. which are optional. We are also seeking clarification on what should be populated in fields not applicable to the respective transaction.

We consider that the amount of personal data that is required where the buyer/seller/decision maker is a natural person (fields 8-12, 15-19, 23-27, 30-34) i.e. full name, date of birth, country and postcode information is highly burdensome for firms to maintain and report, particularly given firms are already providing a unique identification number. Removing these fields from the transaction report should not hinder regulators from monitoring for market abuse which is the primary objective.

We have the following comments regarding the specific fields:

Field 5/6: For the identification of natural persons, we understand that the personal identity card should be used in cases where the client has one. Furthermore, we understand that the data of the actual ID card must be reported. While the expiry date of an ID card can be recorded there is no way of identifying that a client has received a new ID card within the period of validity of the old/current card in case a client has lost his/her ID card. We assume that asking for identification via a new ID card is expected to happen only when the old ID card has expired.

Field 41: Guidance would be beneficial on how to treat average price transactions; including whether the booking time of the average price transaction be quoted, whether firms should report executions only, report average price transactions only or alternatively both with a third transaction reflecting the firms internal transaction.

Field 63: This field adds no value to the report in terms of being able to monitor for market abuse and should be deleted.

Field 68/69: The expected seniority of the decision maker for the firm is unclear; it could be the respective desk head or a more senior decision maker. Further guidance on this point would be beneficial.

Field 74/75: We would have preferred the use of the existing algorithm identifier in the same format as already provided for by trading venues. We would request clarification as to whether there are any interdependencies between the algorithm field and trader ID, i.e. is it necessary to report a trader ID when two algorithm ID's are reported? In addition, can both the algorithm and trader ID fields can be filled with the same value?

Field 76: It is our understanding that waiver information received from the trading venue may be used for reporting purposes without further verification.

Field 77: It is extremely challenging to be able to flag short sales at the legal entity level at the time of execution, especially if all global branches of a firm are in scope under MiFIR.

Field 81: The parameters detailed only cater for new reports and cancellations of reports. Guidance on how amendments/corrections be treated would be welcomed.

Q219. Do you agree with the proposed approach to flag trading capacities?

We would appreciate a detailed description of transactions falling under the "matched principal capacity". Particularly what is meant by 'executing simultaneously' as client side and market side trades are not executed at the same time.

Q220. 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

It is our understanding that waiver information received from the trading venue may be used for reporting purposes without further verification.

Q221. Do you agree with ESMA's approach for deciding whether financial instruments based on baskets or indices are reportable?

We would appreciate clarification of the fact that RTS 17 seems to call for more than one, i.e. 2 or more, components of a basket to be a reportable financial instruments for the transaction with an underlying basket to be reported, whilst the CP states as soon as one reportable financial instrument is included in the basket, the transaction will be reportable.

Also, we would request more clarity on the position to be adopted in the case of a basket of baskets.

We see complex implementation challenges in identifying reportable instruments where the basket may only contain one reportable instrument, specifically in markets where ISIN's are not widely used and reportable instruments might be identified using other identifiers.

Q222. Do you agree with the proposed standards for identifying these instruments in the transaction reports?

For baskets, if firms need to report the ISIN of all the eligible constituents this will mean in some instances a very large number of ISINs will need to be reported which will lead to practical problems in terms of the number of characters allowed for the field.

Q223. 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?

We note the extension of reporting to include all non EEA branches of EU investment firms is a major increase in scope compared to how MiFID 1 has been implemented in many member states. In our view it should be left to the national competent authority to decide whether this is necessary for the firms they regulate.

In our view, determining the primary relationship of a client does not add value to the transaction report and should therefore be regarded as not mandatory.

Determining which branch or head office has the primary relationship with a client could be very complex to establish, given that international clients deal with various locations frequently. It might also be considered that different parts of the client's business might deal with different business divisions and locations of a firm, e.g. a client might have a close business relationship with branch X for trading activities whilst contacting the firm's headquarters for loans and with branch Y for payment services. We would propose to make reference to the entity in the booking systems to determine the branch/head office who has executed/managed the order.

Q224. Do you anticipate any significant difficulties related to the implementation of LEI validation?

The LEI is currently only implemented for counterparties to derivatives contracts. Such counterparties have a reporting obligation under EMIR whilst for the majority of market participants in securities markets, this is not the case under MIFIR. Consequently, we foresee implementation challenges for banks to get such clients to apply for and renew LEI's. Also, non-EU counterparties may not be willing to apply for an LEI as they might not require a LEI for transaction reporting or other regulatory purposes in their home country.

We note that the LEI approach is based on an assumption that the global LEI database will be available and fully operative before the obligation to report under MiFIR commences.

Clarification should be provided as to what approach will be taken if this is not the case or there is regulatory divergence between jurisdictions.

Q225. Do you foresee any difficulties with the proposed requirements? Please elaborate.

We would still support a golden source list of reportable instruments. The benefit would be that reporting entities and regulators would have the same data source and could therefore act in a transparent environment and aim to provide complete and accurate transaction data.

We also see a difficulty regarding the stated objective in the draft RTS 14(5) which requires investment firms to have adequate arrangements in place to ensure that the transaction reports "when viewed cumulatively accurately reflect the changes in position of the firm and/or its clients". Given that not all events/transactions are reportable it will not be possible for transaction reports to be used to see a firm's exact position in a given instrument.

Q227. Do you agree with the proposed approach to flag liquidity provision activity?

No. It is not necessary for trading venues to record liquidity provision activity. Trading venues are able to monitor market making activity without this information – as they do today.

Q230. Do you agree on the proposed content and format for records of orders to be maintained proposed in this Consultation Paper? Please elaborate.

The scope of the obligation should extend only to those systems or desks which engage in high frequency algorithmic trading. Under the current proposal, firms would be required to apply these requirements to their whole business, on the basis of being defined as a HFT firm because one algorithm trading on a single instrument qualifies as HFT.

In the context of an investment firm which might receive a variety of orders, including those from retail clients on a variety of platforms, it does not seem proportionate to apply all the obligations this requirement implies, including the higher timestamping accuracy.

We consider that the objective of these requirements should be logging the correct ordering of events, and so events should be recorded by a system to a level of time accuracy that ensure the ordering of events is maintained. The specific level of accuracy is less important.

Q232. Do you agree with the proposed record-keeping period of five years?

We agree.

Q234. 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.

There could be problems created by the requirement to synchronise to the level of one microsecond as this is not possible for many systems. Some network components and systems take longer than one microsecond to process a message. If this is the case, it not clear which time should be allocated to that message – it could either be the time it was first received or the time when it was fully processed. The synchronisation accuracy should be permitted up to the level of one millisecond.

Q236. Do you agree with ESMA's proposal to submit a single instrument reference data full file once per day? Please explain.

Our assumption is that this reference data will form the basis of instruments which are deemed to be 'traded on a trading venue' for the purposes of determining the scope of the transparency requirements, both for SIs but also from a post trade transparency perspective. Given this, we would support the list being made available as early as possible before MiFID II is implemented to give clarity to firms on their transparency obligations. In addition, where a new instrument is added to the list, the associated transparency obligations should apply only after a notice period, during which time firms can prepare systems and make adjustments for technological readiness. A period of one month would seem appropriate.

We also assume that for bonds which enter default, they would then be delisted and no longer included within the scope of the transparency regime.

Q237. 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.

The approach seems reasonable.

9. Post-trading issues

Q239: 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?

Fundamental differences between exchange traded derivatives (ETD) and OTC infrastructure impact the ability and speed for electronic processing. While ETD operates in a mature electronic infrastructure, OTC still needs to significantly enhance and upgrade electronic trade execution, processing and clearing infrastructure to achieve a full near real time straight-through-processing (STP) flow.

Given the developed, mature and efficient systems and procedures in place for timely clearing of ETD contracts, we support a "rules based certainty" approach to exempt ETD transactions from the pre-trade check requirement for those derivative orders submitted by clearing members (CM) who are members of trading venues and their associated CCPs where binding contractual obligations arise between the trading venue members and their CMs, and consequently between the CMs and the CCP immediately or automatically upon execution of the trading venue transaction.

From an OTC derivatives point of view, we agree that certainty around clearing is key ahead of the start of trading. For client trade risk management, pre-trade credit checks should be mandatory. For non-client trades where CM's face the CCP not on behalf of a client, it would be preferable to have a trade registration fund arrangement in place to minimize the risk of trades being rejected for clearing.

<u>ETD markets:</u>

According to the requirements of Article 29 (2) of MiFIR "CCPs, Trading Venues and investment firms which act as clearing members….shall have in place effective systems, procedures and arrangement in relation to cleared derivatives to ensure that transactions in cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable using automated systems" and these are already met through the binding contractual arrangements that arise upon trade execution under the rulebooks of trading venues and CCPs.

ETD markets require certainty of clearing to maintain market integrity and user confidence. In a multilateral (anonymous) counterparty market such as the ETD market, credit risk of counterparties is mitigated by trading venue and associated CCP rulebooks, which set out membership standards, contractual arrangements, operational processes and technology infrastructure requirements. Contractual arrangements in trading venue rules require that for every exchange member executing on the market, there is a CM that is contractually obliged to stand behind the trade either as buyer or as seller of the contract (CM counterparties are not disclosed to each other). Under the contractual obligations of the CCP, these trading venue contracts are then discharged and immediately or automatically replaced with a legally binding contract between the buying CM and the CCP on the one hand, and the selling CM and the CCP on the other.

Data requirements by the trading venue and the CCP (based on contract specifications of the trading venue) mean that all orders submitted meet precise requirements and any incorrect orders, ie: invalid exercise prices, expiry dates or tick values, are rejected by trading venue at the point of order submission itself. Robust integrated messaging interfaces between CMs, trading venue and CCPs provide near real-time transfer of transactions from the trading venue to the CCP and for immediate or automatic re-transmission of such transactions to the relevant CMs.

Credit checks at client order level would require a fundamental re-structuring of ETD market infrastructure i.e. how orders are submitted to trading venues and how positions are held by CCPs. There would be a requirement for a real-time interactive link between the CCP, the trading venue, the CM, the client, plus each Executing Broker and its CM (should that execution route still be viable) for the calculation of the impact of the trade on the client's positions, margin requirement and transmission of this information to relevant parties. To work in practice, the trading venue and the CCP would need to know the identity of each client for the CCP to be able to identify the positions held by each client.

The order's impact on the margin requirement and the client's credit limit then need to be translated into a number of lots of that order to be submitted for execution. trading venues have already invested significant sums of money to reduce trade execution times down to milliseconds and to avoid latency in the execution of such orders, trading venues, CCPs and CMs would now need to undertake extensive reengineering of market infrastructure to try and implement pre-trade order limit checks even faster than the trading venue's matching algorithm. Any delay or interruption in transmitting this information could cause result in orders not being executed at all, orders being submitted for execution behind other members' orders and orders potentially being executed at an inferior price than that which would have been available if they had been submitted with no delay.

Where certainty or speed of trading is negatively impacted, an unintended consequence could be that CMs and clients opt out of the market.

<u>OTC markets:</u>

For OTC transactions, a key element for all parties is to achieve 'certainty of clearing' as early as possible in the process. This check will significantly reduce the possibility of trade rejections and only leave the CCP acting as the final participant in the process to reject a transaction before it gets cleared. For actual implementation and format of the checks to be performed, we would recommend flexibility for different implementation options in the marketplace, for example- trading venues may wish to leverage central credit limit hubs to facilitate pre-trade credit check services, which is one of the options used in the US to fulfil the CFTC's pre trade credit checks.

Q240. What are your views on the categories of transactions and the proposed timeframe for submitting executed transactions to the CCP?

Most ETD trading venues already facilitate trade execution in milliseconds and can transfer these transactions to the CCP in almost real-time. Occasional peaks in trading volume can cause limited delays in submitting executed transactions to a CCP. Therefore, the timeframe for submitting executed transactions to a CCP should be on average not more than 10 seconds (measured over the trading venue's hours of trading). The timeframe should not be so long such that certainty of trading is prejudiced.

From an OTC point of view, the same rules should apply to trades executed on a trading venue. We do not agree that timeframes for submission of derivative trades to a CCP should only be for trades subject to a clearing obligation. STP obligations should apply as broadly as possible to reduce clearing risks in line with Art 29 (2) of MiFIR which extends STP obligation to voluntarily cleared derivatives. The only distinction should be between trades executed on and off a trading venue.

For trades executed on a venue, timeframes should be based on whether it is executed electronically or not. If electronic, processes should be sufficiently automatic to proceed to a cleared/rejected state in seconds – so 10 seconds is appropriate in this instance. Where not executed electronically, there is a longer process to verify details of the trade. This should be split into two timeframes: (1) submission by trading venue to post trade affirmation process, which should occur in 10 seconds; and (2) where the executing parties should have a period of time – ie: within 10 minutes of receipt– to complete affirmation. During this affirmation process, counterparties will hedge their risk assuming the trade will clear, which is why any provisions in respect of voiding trades will cause market disruption without remediation. Following receipt of affirmation, the trading venue will send the information to the CCP in 10 seconds.

For transactions executed bilaterally, the Europe, Middle East and Africa (EMEA) and US versions of the ISDA/FIA cleared derivatives execution agreement (CDEA) allow for trades to be submitted to a CCP within 150 minutes. Potential benefits of reducing this down to 30 minutes as proposed in the RTS will not offset significant costs around operational restructuring and repapering that would be required. It would also create a divergence with US rules, which allow market participants to agree bilateral terms, with the CDEA being widely adopted by the industry. Therefore we would recommend alignment towards 150 minutes.

Q241. 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?

Given Art 5(1) relates to trades subject to the clearing obligation, it should not only be the CM that should be responsible for this, rather each party should be responsible for ensuring that the relevant details are submitted to the CCP. Responsibility for the trade submission lies with the two bilateral trading partners who may or may not be clearing members. Each of the bilateral trading partners is responsible for meeting its own clearing obligation, which may require that it provides the relevant information to its clearing member.

Bilaterally executed trades can encounter delays in reaching a cleared or rejected state and we support Art 7.3 which clarifies that the treatment of bilaterally agreed trades which are rejected by a CCP shall be determined by the contract between the parties.

Further, in RTS Art 4(1), the words “from the execution of the transaction” need to be added at the end of this paragraph so that it is clear that the 10 seconds timeframe for the transfer of information starts running after the pre-trade check (because the pre-trade check will need to be completed before the trade is executed).

In RTS Art 5(2), it would be helpful if this contained an obligation on the CCP to ensure that all information required under its rulebook has been received. Also, the second sentence should clarify that 60 seconds runs from the time the CCP confirms that information has been received (i.e., acceptance of the transaction referred to in the first sentence), otherwise it could be construed that the 60 seconds for the CCP and CM run concurrently.

Q242. What are your views on having a common timeframe for all categories of derivative transactions? Do you agree with the proposed timeframe?

As explained in response to Q240, most ETD trading venues already facilitate trade execution in milliseconds and can transfer these transactions to the CCP in almost real-time. Occasional peaks in trading volume can cause limited delays in submitting executed transactions to a CCP. Therefore, the timeframe for submitting executed transactions to a CCP should be an average not more than 10 seconds (measured over the trading venue's hours of trading). The timeframe should not be so long such that certainty of trading is undermined

From an OTC perspective, a common timeframe for all categories is the preferred approach to minimise complexity. The proposal of 10 seconds is appropriate.

Q243. What are your views on the proposed treatment of rejected transactions?

For ETD trades, given the certainty of clearing obtained through the contractual obligations that arise upon execution of a transaction, rejection for such trades by the CCP *does not arise in the normal course of activity.*

Given the (anonymous) multilateral counterparty model of ETD markets, the impact of rejection of matched trades by the CCP relating to the creditworthiness of the selling CM would result in the trades of the buyer(s) of the trade also being rejected, despite there being no issue with their leg of the transaction. This is why anonymous, multilateral counterparty trading venues and their CCPs have rulebooks to provide certainty of clearing as invalidation of seemingly acceptable trades for one counterparty would severely undermine the integrity of the market and cause a significant lack of confidence in its users.

To prevent the adverse impacts associated with trade rejection, the CCP relies on immediate or automatic post-trade risk management of the trade and will undertake regular, frequent intra-day assessments of the impact of transactions on the portfolio of positions held at the CCP by each CM / account of the CM to confirm the appropriate margin cover is held. If necessary, it will make an intra-day call for additional margin or, in extremis require the CM to reduce their risk exposure by trading to close out part of their position. In turn, CMs undertake the same regular margin cover / risk exposure calculations in respect of its exchange members and other clients across multiple markets and, if necessary, call for additional intra-day margin or otherwise manage down the position through further trading in the market.

RTS Art 7(1) states that where a derivative contract is concluded on a trading venue and rejected by the CCP, the trading venue should void such contract. Despite the rationale put forward that it should only happen in rare instances, parties may still suffer a loss if they are not able to execute a trade which they had expected to do so (particularly where the trade passed the pre-check limits). trading venues and CCPs have provisions in their rule books on invalidation of trades - generally relating to trades arising from disorderly market activity or from a problem with trading venue technology ie: messaging infrastructure failure or matching algorithm problem. Here, trading venues and CCPs may agree to adjust the execution price of transactions, rather than invalidate the trades. There is also no provision in the RTS for *how quickly* this needs to be communicated to the trading venue and subsequently from the trading venue to the parties to the trade so even though the STP process may be a short timeframe, if it took longer for a party to find out about the contract being void, there is a higher potential for loss. As a result, the relevant contract should not be void and the approach taken in RTS Art 7(2)(a) should be followed so that the contract is treated in accordance with the rules of the trading venue following rejection by the CCP.

From an OTC perspective, and for similar reasons stated above, transactions that are subject to mandatory clearing and executed on a trading venue should not be made void. Rather, the approach taken in RTS Art 7(2)(a) should be followed so that the contract is treated in accordance with the rules of the trading venue following rejection by the CCP.

Where a CCP would move to reject a trade due to a technical issue under Article 7 (4), with existing infrastructure, it is highly unlikely the parties would know the trade has failed, identify the reason why, notify the other counterparties of the rejection or to rectify the problem within the 10 second timeframe proposed for re-submission.

Per chapter II, Art 3(3) and Art 4(3), where information is submitted to a CCP, both of the original trading partners of the transaction should be informed in real time.

Q244. 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.

The draft MiFIR RTS apply to ETDs only. There is sufficient access to global markets for ETDs and this access is often provided through indirect clearing services. A key aim of any regulation in this regard should be to ensure that access to global markets is not restricted unnecessarily as the impact could be significant on market liquidity. While ESMA has sought to address some of the concerns raised in the context of the EMIR RTS, certain features of the MiFIR RTS will be difficult for market participants to comply with and/or cause excessive market disruption. We would like to highlight the following concerns and possible alternatives.

It should be clarified in the RTS that only indirect clearing arrangements falling within the scope of the RTS must comply with the RTS requirements and that there may be indirect clearing arrangements which are not captured by the RTS and are still permitted. We would support, for example, clarity in the RTS that where a non-EU client clears for an EU indirect client and the law applicable to the client is not compatible with the RTS, these indirect clearing arrangements are still permitted but that any risks with respect to the insolvency law applicable to the client are disclosed to such indirect clients. The current drafting of the RTS only allows indirect clearing arrangements where the insolvency law applicable to the client is compatible with the RTS. Such a limitation will prevent a large number of existing clients providing indirect clearing services.

The scope of the RTS should be limited to indirect clearing arrangements involving CCPs authorised under EMIR (i.e. CCPs established in the EU) and to EU indirect clients so that there is an appropriate EU nexus and ensure they are workable in practice. This is consistent with the mandate under MiFIR Article 30 and EMIR Articles 39 and 48. Limiting the RTS requirements to EU indirect clients would extend the protection being pursued without preventing an EU indirect client from accessing global markets where applicable law may not be compatible with the RTS. If ESMA wishes to ensure certain minimum requirements for all indirect clients, we would suggest that the client is required to make appropriate risk disclosures where applicable law means that there are greater risks in the arrangement.

We note that the RTS scope limitations described above may be appropriate for ETD under MiFIR but not for OTC indirect clearing arrangements under EMIR, because of the different regulatory objectives the two Regulations pursue and because market participants are subject to different obligations under each. In this regard, we are supportive of ISDA's request for ESMA to consider the EMIR RTS for indirect clearing of OTC derivatives separately and welcome ESMA's acknowledgement that the EMIR RTS for OTC derivatives need to be revisited. We support ISDA's comments on indirect clearing where areas a different approach may be appropriate for the EMIR RTS for indirect clearing in the context of OTC derivatives has been highlighted to take into account these differences.

We welcome ESMA's view that the mandate under MiFIR does not require ESMA to address the additional layers of clients beyond indirect clients in the RTS is appropriate. It should be clarified in the RTS that the requirements are limited to four-party chains to avoid uncertainty as to whether the requirements extend also to 'longer chains'. The fact that a longer chain involves additional parties should not affect the characterisation of the arrangements as ETDs.

One of the main challenges previously noted in drafting RTS for indirect clearing arrangements is the possibility of conflicting provisions of law in each relevant jurisdiction applicable to a party involved in the arrangement. This is acknowledged by ESMA in the consultation paper. Whilst the removal of the requirement to port transactions has addressed certain concerns, this does not go far enough. For example, there are third-country jurisdictions under the laws and regulations of which a client (in this case registered as a Futures Commission Merchant) will not be permitted to comply with some of the RTS requirements due to conflicting mandatory provisions of its insolvency law.

The RTS do therefore need to take into account that a clearing member (CM) is not under the same protections as a CCP when it is managing the default of a client and that the CM may not always be able to make a leap frog payment (where the CM makes a payment directly) to the indirect client because of restrictions of applicable law, mandatory insolvency law or insufficient information about the indirect client. The obligation in the draft RTS is for CMs to have robust procedures in place which will allow, to the extent possible and permissible, the CM to make a direct payment. Additional wording should be added to the RTS to reinforce the fact that this is not an obligation to make a direct payment to indirect clients in all circumstances and introduce the possibility for a CM to make a payment to the defaulted client along the lines of EMIR Art 48(7) (under which the CCP may, in the event that it does not know the identity of the indirect clients, return assets to the defaulted CM for the account of the clients).

In practice, there are various circumstances which may prevent a CM from paying liquidation proceeds directly to indirect clients, despite the best efforts of the CM, and these should be contemplated in the RTS, for example:

- Insufficient information has been provided by the client to the CM (as contemplated in the RTS) which may include not knowing the identity of indirect clients. This will always be the case when indirect clients have selected a net omnibus account or even when the CM knows the identity of gross omnibus indirect clients, but some other information is missing which is required to make a direct payment (e.g. incorrect payment instructions).

- A direct payment to the indirect clients "leapfrogging" the insolvent client would be contrary to or inconsistent with applicable law or regulation (even if/when the CM knows the identity of indirect clients).

Any such risks could be explained to indirect clients in a risk disclosure document which means that the indirect clearing arrangement is permitted with appropriate disclosures.

To prevent disruption to the orderly functioning of existing indirect clearing arrangements used for ETDs, we suggest that in the absence of an indirect client's response as to the choice of segregation provided under Art 4(2), the client can decide to provide indirect clearing services to such indirect clients by putting them in a net omnibus account. This ensures that the uncertainty which arose out of EMIR Art 39(5) and practical issues that CMs have faced with implementing Art 39, which often included passive and unresponsive clients, are mitigated.

In line with the requirement in Art 30 MiFIR that indirect clearing arrangements should not increase counterparty risk, Art 4(8) of the RTS should be amended so that a CM is only subject to the obligation to identify, monitor and manage risks which affect the resilience of the CM and the obligations relate only to information received under Art 5(7).

We have had the opportunity to review the proposed revised draft of the RTS on indirect clearing submitted by the FIA which endeavours to address a number of the concerns raised above and we support the FIA's proposal.

Q245. 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?

The challenges and concerns noted in our response to Q244 need to be taken into account in relation to the proposed gross omnibus account segregation to ensure that the requirements for indirect clearing arrangements under the RTS are workable. The RTS introduce a new type of gross omnibus account and impose requirements as to the functionality associated with such account which will require CCPs, CMs and clients to develop systems and procedures to support this new account structure. The requirement for contractual arrangements to cover the terms of the indirect clearing arrangement will require extensive and costly repapering and due diligence by all parties involved. Further, the requirement in Art 5(6) to include terms to facilitate the prompt return of liquidation proceeds to the indirect client will involve the CM having to obtain legal advice in respect of the insolvency regime applicable to each client, the development of bespoke contractual terms per entity type and jurisdiction and the re-documentation of existing relationships. A client should only be required to put a contractual security interest arrangement in place as contemplated in the RTS where (i) there is no statutory regime available that would support a direct return of liquidation proceeds to indirect clients, (ii) such arrangement would not be contrary or inconsistent with applicable third country insolvency law or regulation and (iii) the indirect client has selected a gross omnibus segregation.

In the absence of an exemption under (i) above, there would be a duplication of protections that would achieve the same result. The exemption under (ii) addresses a scenario in which laws or regulations of a third country would prevent or prohibit the client from agreeing a contractual arrangement that would facilitate a 'leapfrog' payment or would render such contractual arrangement unenforceable. The exemption under (iii) reflects technical differences between net and gross omnibus segregation models, namely, the identity of indirect clients in the net omnibus account will ordinarily not be known to the CM, therefore the CM would not be able to make the payment.

In addition to the explanation in our response to Q244 that the RTS should allow a CM the ability to pay the defaulting client, where contractual terms that facilitate 'leapfrog' payment are contrary to or inconsistent with applicable laws or regulations, the client should be able to provide indirect clients with relevant risk disclosure to allow the indirect clearing arrangement as permitted under the RTS.