

FESE Response to ESMA Consultation Paper on Draft Technical Standards for the Regulation on OTC Derivatives, CCPs and Trade Repositories – ESMA/2012/379

1. Introduction

The Federation of European Securities Exchanges (FESE) represents 46 exchanges active in equities, bonds, derivatives and commodities through 21 full members from 30 countries, as well as 7 observer members from European emerging markets. FESE is a keen defender of cross-border competition and many of its members have become multi-jurisdictional exchanges, providing market access across multiple investor communities. FESE members operate Regulated Markets (RMs), which provide both institutional and retail investors with transparent and neutral price-formation.

FESE members are glad to have the opportunity to contribute to ESMA's consultation. FESE supports efficient, fair, orderly and transparent financial markets that meet the needs of well protected and informed investors and provide a source for companies where to raise capital and for investors to hedge their portfolios.

Below you will find our response to some of the questions included in the discussion paper. Our response focuses on those provisions in the technical standards that have an impact on regulated markets. We have suggested alternative wording to the technical standards when needed and supported our proposals with evidence and examples where relevant.

2. Response to the Consultation Paper

2.1. Liquidity fragmentation¹

ANNEX II - Draft regulatory technical standards on OTC derivatives, Chapter VI, Article 1 LF, pages 71 and 72 of consultation paper

We believe that the ESMA mandate under article 8.5 of Regulation (EU) No X/2012 [EMIR] has been exceeded. Level 1 legislation states that '(...) ESMA shall develop draft regulatory technical standards specifying the notion of liquidity fragmentation'. However, the technical standards propose not only a notion of liquidity fragmentation but also remedies to the potential issues posed by liquidity fragmentation. Therefore we believe that ESMA is interpreting its mandate too widely. In addition, we think that the proposed remedies pre-empts the results of the study about the extension of the scope of interoperability that ESMA has to prepare by 30 September 2014 in line with article 85.3.d of Regulation (EU) No X/2012 [EMIR]

FESE members also believe that the definition of liquidity fragmentation proposed is too narrow. There are liquidity pools on both the trading and clearing layer which necessitate a differentiation between trading liquidity fragmentation and clearing liquidity fragmentation. Our assumption is that clearing liquidity fragmentation is being dealt with in EMIR and that trading liquidity fragmentation will be dealt with in the review of the Markets in Financial Instruments Directive (MiFID). In line with this assumption we suggest that clearing liquidity fragmentation refers to a situation where the business conducted through separate CCPs would create additional systemic risk (resulting from the split of liquidity and unmitigated risk between the CCPs). We consider that the definition of liquidity fragmentation proposed

¹ Please note that the views expressed on this section 2.1 are not the ones of Nasdaq OMX.

limits the notion of liquidity fragmentation only to a single scenario in which a transaction is prevented from happening.

2.2. Resources of group companies

ANNEX III - Draft regulatory technical standards on CCP requirements; Chapter IV, Article 1 ORG, 5, page 93 of consultation paper

Wording proposed by ESMA	Suggestion proposed by FESE
A CCP that is part of a group shall take into account any implications of the group for its own governance arrangements including whether it has the necessary level of independence to meet its regulatory obligations as a distinct legal entity and whether its independence could be compromised by the group structure or by board members also being members of the board of other parts of the same group. In particular, such a CCP shall consider specific procedures for preventing and managing conflicts of interest including with respect to outsourcing arrangements. Without prejudice to outsourcing arrangements, a CCP shall have its own dedicated human resources which are not shared with other group entities.	A CCP that is part of a group shall take into account any implications of the group for its own governance arrangements including whether it has the necessary level of independence to meet its regulatory obligations as a distinct legal entity and whether its independence could be compromised by the group structure or by board members also being members of the board of other parts of the same group. In particular, such a CCP shall consider specific procedures for preventing and managing conflicts of interest including with respect to outsourcing arrangements. Without prejudice to outsourcing arrangements, a CCP shall have its own dedicated human resources which are not shared with other group entities.

Justification

In defining how the CCPs should manage their resources, ESMA should have a more realistic recognition of the fact some CCPs belong to a wider group and may share resources within the group.

2.3. Liquidation period

ANNEX III - Draft regulatory technical standards on CCP requirements; Chapter VII, Article 3 MAR, 1.b, page 106 of consultation paper

Wording proposed by ESMA	Suggested wording proposed by FESE
b. for financial instruments other than OTC derivatives, 2 business days.	b. for financial instruments other than OTC derivatives, 12 business days.

Justification

FESE members believe that the technical standards should include a minimum liquidation period of 1 day for listed derivatives, rather than 2 days as currently proposed in the draft technical standards. Our members are comfortable that for listed derivatives 1 day liquidation is well within safety margins and other major jurisdictions have made rules providing that 1 day is enough to perform a safe liquidation.

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