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| 9 July 2021 |

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| Reply form for the Consultation Paper on the RTS 1 and RTS 2 Review  DK-Stellungnahmeentwurf  (Version 01, 10.09.2021) |
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| Date: 9 July 2021 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on the RTS 1 and RTS 2 review published on the ESMA website.

*Instructions*

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

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

Responses are most helpful:

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

**Naming protocol**

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

ESMA\_CP\_RVEW\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_CP\_RVEW\_ESMA\_REPLYFORM or

ESMA\_CP\_RVEW\_ANNEX1

***Deadline***

Responses must reach us by 1 October 2021.

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

***Publication of responses***

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

***Data protection***

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

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | Deutsche Kreditwirtschaft (DK) / German Banking Industry Committee (GBIC) |
| Activity | Banking sector |
| Are you representing an association? |  |
| Country/Region | Germany |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_CP\_RVEW\_1>

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**Introductory comments**

The EU Commission is currently preparing the regular review of MiFID II and MiFIR. We expect that subsequent changes to the legal texts at Level 1 will also result in changes at Level 2. From the perspective of users of RTS 1 and 2, the question therefore arises as to whether the timing of ESMA's consultation on RTS 1 and 2 was well chosen. Specifically, we are concerned that there will be a need for several rounds of implementation. While investment firms and other norm addressees always have an interest in simplifications and improvements, the implementation effort must always be taken into account. We would therefore strongly suggest that the current considerations be incorporated into the Level 2 amendments in the course of the review. This would ensure that the objectives are achieved without duplicating implementation efforts.

<ESMA\_COMMENT\_CP\_RVEW \_1>

RTS 1 – Transparency shares

Q1 : Do you agree with the proposed amendment to Article 7(2) of RTS 1? If not, please explain your concerns about the proposed increase of the threshold.

<ESMA\_QUESTION\_RVEW\_1>

<ESMA\_QUESTION\_RVEW\_1>

Q2 : Do you agree with the proposed amendment to Table 5 of Annex II of RTS 1? If not, please explain why you are concerned about the proposed increase of the thresholds.

<ESMA\_QUESTION\_RVEW\_2>

<ESMA\_QUESTION\_RVEW\_2>

Q3 [CP: Seite 37] : Do you agree with ESMA’s amendments to Articles 2, 6 and 13 of RTS 1 described above? If not, please explain why.

<ESMA\_QUESTION\_RVEW\_3>

<ESMA\_QUESTION\_RVEW\_3>

Q4 [CP: Seite 41] : Do you agree with the proposed description of FBA trading systems and the updated description of periodic auction trading systems? If not, please explain why and which elements should be added to the description and/or removed.

<ESMA\_QUESTION\_RVEW\_4>

<ESMA\_QUESTION\_RVEW\_4>

Q5 [CP: Seite 41]: Which of the two options for the pre-trade transparency requirements for FBA trading systems do you prefer? Please explain in case you are supportive of a different approach than the two options presented.

<ESMA\_QUESTION\_RVEW\_5>

<ESMA\_QUESTION\_RVEW\_5>

Q6 [CP: Seite 43]: Do you agree with ESMA’s proposals for ‘hybrid systems’? If not, please explain why and which elements should be added and/or removed.

<ESMA\_QUESTION\_RVEW\_6>

<ESMA\_QUESTION\_RVEW\_6>

Q7 [CP: Seite 43] : Do you agree with aligning both Table 1, Annex I of RTS 1 and Table describing the type of system and the related information to be made public in accordance with Article 2, of Annex I of RTS 2, to describe the same systems (with the exception of voice trading systems) and pre-trade transparency requirements? If not, please explain why.

<ESMA\_QUESTION\_RVEW\_7>

<ESMA\_QUESTION\_RVEW\_7>

Q8 [CP: Seite 48]: Do you agree with ESMA’s proposals to require a specific format and standardise further the pre-trade information to be disclosed? If not, please explain why. If yes, please clarify which elements should be amended, added and/or removed, if any.

<ESMA\_QUESTION\_RVEW\_8>

<ESMA\_QUESTION\_RVEW\_8>

Q9 [CP: Seite 49]: Do you agree with the changes proposed by ESMA to amend Article 15 (3) of RTS 1? If not, please explain your rationale.

<ESMA\_QUESTION\_RVEW\_9>

<ESMA\_QUESTION\_RVEW\_9>

Q10 : Do you agree with the proposed amendments to Article 17? If not, please explain.

<ESMA\_QUESTION\_RVEW\_10>

<ESMA\_QUESTION\_RVEW\_10>

Q11 : Do you agree with the proposed amendment of Article 11(3)(c) of RTS 1? Please explain.

<ESMA\_QUESTION\_RVEW\_11>

<ESMA\_QUESTION\_RVEW\_11>

Q12 [CP: Seite 49]: Do you agree with the changes proposed to Table 3 of Annex I of RTS 1 (List of details for the purpose of post-trade transparency) presented above? If not, please explain and provide any alternative proposal you might have. Are there other issues to be addressed and how?

<ESMA\_QUESTION\_RVEW\_12>

<ESMA\_QUESTION\_RVEW\_12>

Q13: Do you agree with ESMA’s proposal not to change Tables 1 and 2 of Annex III of RTS 1? If not, and you consider that certain modifications shall be made, please explain.

<ESMA\_QUESTION\_RVEW\_13>

<ESMA\_QUESTION\_RVEW\_13>

Q14 : Do you agree with ESMA’s proposal on the new Tables 1 and 2 of Annex IV of RTS 1? If not, please explain and provide any alternative proposal you might have.

<ESMA\_QUESTION\_RVEW\_14>

<ESMA\_QUESTION\_RVEW\_14>

Q15 : Please provide concrete examples or scenarios when the price cannot be determined as described or cases of the need to set a zero price for the different types of instruments: shares, ETFs, depositary receipts, certificates, other equity-like financial instruments.

<ESMA\_QUESTION\_RVEW\_15>

<ESMA\_QUESTION\_RVEW\_15>

Q16 [CP: Seite 72] : Do you agree with the deletion of the SI flags ‘SIZE’, ‘ILQD’ and ‘RPRI’? If not, please explain what you consider to be their added value.

<ESMA\_QUESTION\_RVEW\_16>

<ESMA\_QUESTION\_RVEW\_16>

Q17 [CP: Seite 72]: Do you agree with the deletion of the ACTX flag? If not, please explain what you consider to be its added value.

<ESMA\_QUESTION\_RVEW\_17>

<ESMA\_QUESTION\_RVEW\_17>

Q18 [CP: Seite 75]: Do you agree with the approach suggested for non-price forming transactions? If not, please explain.

<ESMA\_QUESTION\_RVEW\_18>

<ESMA\_QUESTION\_RVEW\_18>

Q19 [CP: Seite 76]: Do you agree with ESMA’s proposal to introduce a pre-trade LIS waiver flag for on-book transactions? If not, please explain. Should it be limited to completely filled LIS orders?

<ESMA\_QUESTION\_RVEW\_19>

<ESMA\_QUESTION\_RVEW\_19>

Q20 [CP: Seite 76]: Do you agree with ESMA’s proposal to introduce a pre-trade LIS waiver for off-book transactions? If not, please explain.

<ESMA\_QUESTION\_RVEW\_20>

<ESMA\_QUESTION\_RVEW\_20>

Q21 [CP: Seite 82]: Do you agree with the proposal not to add such additional flags? If not, please explain why those flags are needed in your view.

<ESMA\_QUESTION\_RVEW\_21>

<ESMA\_QUESTION\_RVEW\_21>

Q22 [CP: Seite 82]: Do you recommend adding/deleting/amending any other flags? If yes, please explain.

<ESMA\_QUESTION\_RVEW\_22>

<ESMA\_QUESTION\_RVEW\_22>

Q23 [CP: Seite 82]: Do you agree with the proposal to prescribe the order of the population of flags? If not, please explain and provide an alternative proposal.

<ESMA\_QUESTION\_RVEW\_23>

<ESMA\_QUESTION\_RVEW\_23>

**RTS 2 – Transparency non-equity**

Q24[CP: Seite 85] : Do you agree with the proposed amendments above? If not, please do not reiterate the arguments made under the previous question asked for equity instruments and please rather explain why those amendments are not suitable for non-equity financial instruments.

<ESMA\_QUESTION\_RVEW\_24>

Yes, we agree.

<ESMA\_QUESTION\_RVEW\_24>

Q25[CP: Seite 92] : Do you agree with the proposal to specify the fields to be populated for pre-trade transparency purposes? If not, please explain. In case you support the proposal, please comment on the fields proposed, in particular whether you would consider them necessary and/or whether additional information is required.

<ESMA\_QUESTION\_RVEW\_25>

ESMA correctly states in para 242 that they do not have a mandate to specificy the arrangements for the publication of quotes by SIs with respect to non-equity financial instruments. We therefore strongly reject the proposal for „Description and details to be published“ in fields #19 and #20, according to which the details specified would also apply to SIs.

<ESMA\_QUESTION\_RVEW\_25>

Q26[CP: Seite 93] : Please indicate, if applicable, which medium-term targeted improvements you would like to see to the threshold calibrations in RTS 2.

<ESMA\_QUESTION\_RVEW\_26>

We would like to reiterate that it is essential for SIs in non-equity that quotes above SSTI are exempt from pre-trade transparency or rather quoting obligations, otherwise Article 18 (10) MiFIR would become meaningless. If the SSTI were to be substituted by too high an LIS-threshold market participants would suffer collateral damage by way of unwanted market impact. In order to avoid this, it will be necessary that ESMA carries out comparative model calculations in order to determine sensible new tresholds which achieve the same effect as the current waiver. This will be a complex task in itself. Any temporary measures do not make sense for this reason alone. While it does not become entirely clear what ESMA means by „medium-term“ changes, we do not see any need for such changes.

<ESMA\_QUESTION\_RVEW\_26>

Q27 [CP: Seite 95]: Do you agree with the proposed changes to Article 13? If not, please explain.

<ESMA\_QUESTION\_RVEW\_27>

Yes, we agree with the proposed changes.

<ESMA\_QUESTION\_RVEW\_27>

Q28 : Do you agree with the proposed changes to Article 4? If not, please explain.

<ESMA\_QUESTION\_RVEW\_28>

<ESMA\_QUESTION\_RVEW\_28>

Q29[CP: Seite 97] : Do you agree with the proposed changes to Article 12? If not, please explain. Please do not reiterate the general comments made in the equity section and try to focus on arguments that are specific to non-equity financial instruments.

<ESMA\_QUESTION\_RVEW\_29>

We understand that it is ESMA’s intention to streamline Articles 2, 6 and 13 of RTS 1 by substituting various existing references with a single reference to Article 2(5) of RTS 22. While we generally support the intention to reduce overlaps and to streamline above mentioned Articles we are not entirely convinced that the reference to Article 2(5) of RTS 22 and in particular, to „clearing or settlement purpose“ transactions is sufficiently unambiguous. Discussions around Article 2(5) of RTS 22 in the past have shown that the definitions made there are not always clear. We therefore already see a need to clarify certain interpretations by means of Q+A at Level 3. For example, it should explicitely be stated that give-ups fall under the exception. Whether this approach would be preferable remains to be decided.

ESMA\_QUESTION\_RVEW\_29>

Q30[: Please provide your comments on the analysis and proposals related to the liquidity framework applicable to commodity derivatives, EA and DEA detailed in Section 4.2 and summarised in Section 4.2.5. Please list the proposals with their ID (#1 to #9) for ease of reference.

<ESMA\_QUESTION\_RVEW\_30>

<ESMA\_QUESTION\_RVEW\_30>

Q31 [CP: Seite 125] : Do you agree with the changes proposed to Table 2 of Annex II of RTS 2 (List of details for the purpose of post-trade transparency) presented above? If not, please explain and provide any alternative proposal you might have. Are there other issues to be addressed and how?

<ESMA\_QUESTION\_RVEW\_31>

Yes, we agree with the changes proposed to Table 2 of Annex II of RTS 2.

<ESMA\_QUESTION\_RVEW\_31>

Q32 [CP: Seite 126]: Do you agree with the changes proposed to Table 4 of Annex II of RTS 2 (Measure of volume) presented above? Do you think that it now provides more clarity? If not, please explain and provide any alternative proposal you might have.

<ESMA\_QUESTION\_RVEW\_32>

Yes, we agree with the changes proposed to Table 4 of Annex II of RTS 2.

<ESMA\_QUESTION\_RVEW\_32>

Q33 : Do you agree with ESMA’s proposals on Table 1 (Symbol) and Table 2 of Annex IV of RTS 2? If not, please explain and provide any alternative proposal you might have.

<ESMA\_QUESTION\_RVEW\_33>

<ESMA\_QUESTION\_RVEW\_33>

Q34 [CP: Seite 130]: Do you agree with ESMA’s proposals on the segmentation criteria for bonds (Table 2.2), securitised derivatives (Table 4.1), interest rate derivatives (Table 5.1), equity derivatives (Table 6.1), credit derivatives (Table 9.2 and 9.3) and emission allowances (Table 12.1) of Annex III of RTS 2? If not, please explain and provide any alternative proposal you might have.

<ESMA\_QUESTION\_RVEW\_34>

<ESMA\_QUESTION\_RVEW\_34>

Q35 : Please provide your comments in relation to the proposals related to the segmentation criteria applicable to commodity derivatives summarised in Table 11. Please list the proposals with their ID for ease of reference. Do you have other proposals related to the segmentation criteria applicable to commodity derivatives and C10 derivatives?

<ESMA\_QUESTION\_RVEW\_35>

<ESMA\_QUESTION\_RVEW\_35>

Q36 [CP: Seite 138] : Do you agree with ESMA’s proposal on the new Table of Annex V of RTS 2 (Details of the data to be provided for the purpose of determining a liquid market, the LIS and SSTI thresholds for non-equity financial instruments)? If not, please explain and provide any alternative proposal you might have.

<ESMA\_QUESTION\_RVEW\_36>

<ESMA\_QUESTION\_RVEW\_36>

Q37 [CP: Seite 140] : Do you agree with ESMA’s proposal to delete the ACTX flag? Please explain.

<ESMA\_QUESTION\_RVEW\_37>

No. From experience, the practical use case of the ACTX flag is indeed limited but not irrelevant. Therefore, we would prefer to keep the ACTX flag and not deleting it.

<ESMA\_QUESTION\_RVEW\_37>

Q38 [CP: Seite 141]: Do you agree with ESMA’s proposal to merge the current non-equity deferral flags into one general flag?

<ESMA\_QUESTION\_RVEW\_38>

Yes, we agree with ESMA’s proposal to merge the current non-equity deferral flags into one general flag.

<ESMA\_QUESTION\_RVEW\_38>

Q39 [CP: Seite 142]: Do you agree with ESMA’s proposal not to change the existing flags regarding non-price forming transactions in non-equity financial instruments? If not, please explain.

<ESMA\_QUESTION\_RVEW\_39>

Yes, we agree with ESMA’s proposal not to change the existing flags regarding non-price forming transactions in non-equity financial instruments.

<ESMA\_QUESTION\_RVEW\_39>

Q40 [CP: Seite 142] : Do stakeholders agree with ESMA’s proposal to introduce a general waiver flag for non-equity transactions benefitting from a waiver? For LIS, should it be limited to completely filled LIS orders?

<ESMA\_QUESTION\_RVEW\_40>

No, we do not agree with ESMA’s proposal to introduce a general waiver flag for non-equity transactions that benefitted from such pre-trade waiver. As ESMA rightly points out in para 461 the combination of certain information may lead to information leakages. This would run counter to the aim of deferred publication which is to protect participants in a transaction from negative market impact. Instead, the current state without such waivers should be maintained and market participants who incorrectly use the flags „LGRS“ or „ILQD“ should be informed accordingly. Moreover, we would like to remind ESMA that according to their Final Report ESMA70-256-2756 on Systematic internalisers in non-equity instruments, Article 18(2) of MiFIR should be deleted in order to simplify the requirements applicable to quotes in illiquid non-equity instruments. As a consequence, only the use of other waivers would be flagged which does not seem useful.

<ESMA\_QUESTION\_RVEW\_40>

Q41 : Do you agree with ESMA’s proposal to introduce a flag for pre-arranged non-equity transactions?

<ESMA\_QUESTION\_RVEW\_41>

No, we do not think that a flag for pre-arranged transactions that are formalised on trading venues (‘NTTR’) which would allow to identify the use of these types of transactions, for both NCAs and market participants would add value. The effort to implement such a flag is out of proportion to the benefit.

<ESMA\_QUESTION\_RVEW\_41>

Q42 [CP: Seite 146] : Do you agree with the proposal on the delayed implementation of certain provisions of the amended RTS 1 & 2 ? Do you have proposals to minimize the delay?

<ESMA\_QUESTION\_RVEW\_42>

While we generally share ESMA's view that delayed implementation makes sense, we would like to emphasise that this does not only apply to certain provisions, but to all amendments. Unnecessarily complex implementation rules place a heavy burden on any change process. Moreover, we would like to add that for a smooth and efficient implementation it is necessary to know all the details in advance, including requirements that go beyond Level 2. Regarding the effective date, we would like to emphasise that January 1 of each year always poses massive problems. The reason for this lies in particular in the end-of-year work and the usual IT freeze period when all resources are already tied up elsewhere.

Concerning above mentioned certain provisions, the implementation period of 6 months is too short. Even if the possible changes are already being consulted on now and, thus, the market is aware of the direction of the amendments, a concrete implementation can only take place on the basis of the final legal texts. Admittedly, it might be APAs and trading venues which are primarily affected by the implementation in this case. However, it is to be expected that the new requirements will also have an impact on other market participants, such as investment firms. Thus, requirements for the those firms could also change fundamentally.

For example: due to changes in the segmentation criteria and the reference data reporting for systematic internalisers, a connection to ANNA DSB and FIRDS might be required in the future. As not all investment firms currently have such connection, a new set-up would have to be established by some of them.

<ESMA\_QUESTION\_RVEW\_42>

Q43 (CBA) : Can you identify any other costs and benefits not covered in the CBA below? Please elaborate.

<ESMA\_QUESTION\_RVEW\_43>

<ESMA\_QUESTION\_RVEW\_43>