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| 26 September 2022 |

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| Reply form for the Consultation Paper on market outages |
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| Date: 26 September 2022 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper on market outages 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\_OUTA\_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\_OUTA\_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

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

ESMA\_CP\_OUTA\_ESMA\_REPLYFORM or

ESMA\_CP\_OUTA\_ANNEX1

***Deadline***

Responses must reach us by 16 December 2022.

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

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| Name of the company / organisation | Nasdaq |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |  |
| Country/Region | Europe |

# Introduction

Please make your introductory comments below, if any:

<ESMA\_COMMENT\_CP\_OUTA\_1>

TYPE YOUR TEXT HERE

<ESMA\_COMMENT\_CP\_OUTA \_1>

1. : Do you agree with the main communication principles identified above?

<ESMA\_QUESTION\_OUTA\_1>

These principles, to our knowledge, are already adhered to by all larger trading venues in Europe, including Nasdaq. During 2021 and 2022, most of the trading venues have published incident/outage playbooks that documents the strategy and plan regarding communication, resumption schedules, order and trade status – all which are in line with the proposals in this consultation. As such, the proposed principles are not controversial but seem redundant to implement in regulation. **We would caution against potential burdensome and unnecessary requirements, which would restrict trading venues’ ability to take the necessary steps to resolve a technical incident and to communicate clearly to market participants. ESMA can best promote market integrity and more consistent resiliency across EU trading venues with high-level guidance, while allowing trading venues the flexibility necessary to resolve incidents and tailor communications in the most effective manner under the circumstances.**

**Also, The Federation of European Securities Exchanges (FESE) has adopted an industry-wide standard protocol, as well as collected in a database the individual protocols drawn up by separate exchanges, see link here:** [**https://www.fese.eu/blog/exchange-playbooks-on-outage-protocols/**](https://www.fese.eu/blog/exchange-playbooks-on-outage-protocols/)**.**

<ESMA\_QUESTION\_OUTA\_1>

1. : To promote harmonisation, should the guidance include a template on what trading venues’ communication notices should include?

<ESMA\_QUESTION\_OUTA\_2>

All incident communication notices for the larger trading venues in Europe are publicly available on the respective venue website and in our experience the format, content and frequency of updates are similar across the venues. Incident communication is also a central part of Nasdaq’s incident playbook, as it is in playbooks produced by other trading venues.Hence, a template would have limited benefit in our view.

<ESMA\_QUESTION\_OUTA\_2>

1. : Do you agree that trading venues should have a maximum of one-hour to provide clarity on the status of the orders during an outage? If not, what would be an appropriate timeframe in your view and why?

<ESMA\_QUESTION\_OUTA\_3>

We disagree. It is already in the interest of the trading venues to resume trading as quickly as possible after an outage, and hence to provide clarity on orders and trades as a prerequisite to resume trading. Imposing a maximum time could have negative effects on decision making and could force premature communication. If any time frame for order status is proposed, it should be aligned with the two-hour resumption of trading obligation under MiFID II.

<ESMA\_QUESTION\_OUTA\_3>

1. : Do you think the possibility to require trading venues to offer an order book purge should be considered in the guidance? If yes, should ESMA provide further guidance on when the integrity of the orders has been largely compromised?

<ESMA\_QUESTION\_OUTA\_4>

Again, in our experience, most trading venues will purge orders before resuming trading after an outage, or alternatively allow sufficient time for its participants to purge and manage orders themselves before a resumption. We think that the determination of order integrity by the trading venues and the need to purge orders before resumption works well today and is not in need of ESMA guidance. Status of orders and trades during an incident is another area covered in Nasdaq’s incident playbook.

<ESMA\_QUESTION\_OUTA\_4>

1. : What is your view with regards to the conditions under which a trading venue should reopen trading?

<ESMA\_QUESTION\_OUTA\_5>

Nasdaq’s principle is to resume trading after an outage through the same opening mechanism as applied during regular opening, i.e. order books that normally open with an auction will do so in a resumption of trading too whereas order books that open directly with trading (e.g. derivatives and ETPs) will move straight from preopen to trading in a resumption. We do not see a need and think there is a risk if ESMA would stipulate opening mechanisms.

<ESMA\_QUESTION\_OUTA\_5>

1. : What is your view in relation to the closing auction being affected and the procedures that trading venues should have in place to minimise disruption?

<ESMA\_QUESTION\_OUTA\_6>

Firstly, outages preventing trading venues to conduct closing auctions are rare. Nasdaq, as do most other European trading venues, maintain business continuity plans in the event that a closing auction cannot be conducted according to regular schedule. The plan includes the possibility to postpone the closing auction beyond the regular closing time and a backup mechanism to establish closing prices if a closing auction cannot be conducted. These procedures are described in Nasdaq’s incident playbook**, and have been successfully applied.**

<ESMA\_QUESTION\_OUTA\_6>

1. : Do you agree not to mandate trading venues to have an alternative trading venue capable of running the closing auction for them? If not, please explain.

<ESMA\_QUESTION\_OUTA\_7>

Yes, we agree with the conclusion and the arguments listed in the consultation. In addition to the complexity mentioned in the consultation, we do not believe that there would be a reasonable cost/benefit to the industry to have intermarket closing auction arrangements. **Switching to an alternative venue in the case of an outage is something that the most sophisticated market participants could potentially handle, but it is highly unlikely to be an adequate solution for smaller market participants, notably retail brokers and smaller local institutions, which are crucial in the capital markets ecosystems, not least in the Nordic and Baltic markets where Nasdaq operates venues.**

<ESMA\_QUESTION\_OUTA\_7>

1. : Do you agree that trading venues should have a cut off time (30 minutes before the normal schedule) to inform market participants on whether or not they intend to hold a closing auction?

<ESMA\_QUESTION\_OUTA\_8>

In principle, that makes sense and it is in the interest of the trading venues to timely communicate any changes to its closing auction schedule to its participants. However, it may be practically impossible to keep the cut off if the outage occurs in the last 30 minutes before the closing call. Again, this is an area where we believe that the interests of the trading venues and the participants are well aligned and further regulation will add little value.

<ESMA\_QUESTION\_OUTA\_8>

1. : Do you agree that the use of the last traded price is an appropriate solution in those cases that a trading venue cannot run the closing auction? If not, what alternative would you propose?

<ESMA\_QUESTION\_OUTA\_9>

Yes, we agree and this is also established practice on Nasdaq’s markets and described in Nasdaq’s incident playbook.

<ESMA\_QUESTION\_OUTA\_9>

1. : Is the lack of a reference price an issue in an outage context? If so, please provide details.

<ESMA\_QUESTION\_OUTA\_10>

No.

<ESMA\_QUESTION\_OUTA\_10>

1. : Do you agree with the proposed approach for non-equity instruments? Do you agree that provisions on par. 37-39 can be exempted for those trading venues that do not provide CLOB?

<ESMA\_QUESTION\_OUTA\_11>

Yes, Nasdaq applies its incident playbook across its equity and non-equity markets.

<ESMA\_QUESTION\_OUTA\_11>

1. : Is there any particular issue relating to trading of non-equity instruments that should be taken into account in the case of an outage? Where possible please differentiate between bonds and derivatives.

<ESMA\_QUESTION\_OUTA\_12>

Establishment of settlement prices for derivatives is linked to closing prices but has some nuances. Procedures to establish settlement prices under different scenarios are generally described in the contract specification of each product.

<ESMA\_QUESTION\_OUTA\_12>

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<ESMA\_QUESTION\_OUTA\_0>

1. : Is there a direct link/connection between an outage on an equity primary market and those derivatives that have these instruments as underlyings?

<ESMA\_QUESTION\_OUTA\_13>

Yes, trading of derivatives is commonly halted by the trading venues if the underlying assets are halted, e.g. due to an outage and consequently the resumption of trading needs to be coordinated with the resumption of the underlying contracts. This alignment and coordination are described in Nasdaq’s incident playbook.

<ESMA\_QUESTION\_OUTA\_13>

1. : In your view is there any further element ESMA should consider in the proposed guidance?

<ESMA\_QUESTION\_OUTA\_14>

We would advise ESMA to study the published incident/outage playbooks that have been produced by many trading venues and consider where further regulation in this area will add value to the industry.

<ESMA\_QUESTION\_OUTA\_14>