European Securities and Markets Authority

Reply form for the Consultation Paper on MiFID II / MiFIR

19 December 2014

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on MiFID II / MiFIR (reference ESMA/2014/1570), published on the ESMA website.

Instructions

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

- use this form and send your responses in Word format (do not send pdf files except for annexes);
- do not remove the tags of type <ESMA_QUESTION_CP_MIFID_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- 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;
- contain a clear rationale, and
- describe any alternatives that ESMA should consider.

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

Naming protocol:

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

E.g. if the respondent were ESMA, the name of the reply form would be ESMA_CP_MIFID _ESMA_REPLYFORM or ESMA_CP_MIFID_ESMA_ANNEX1

Deadline

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

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your in-put/Consultations'.

Publication of responses

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

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.

General information about respondent

Name of the company / organisation	FEDERATION OF EUROPEAN SECURITIES EXCHANGES (FESE)
Confidential[1]	☐
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_MIFID_1>

<u>(i) Transparency of equity and equity-like instrument</u>

Request for Quotes systems (RFQs)

It is important for ESMA to note that FESE agrees with the proposal to add a definition of RFQ <u>only</u> for equity-like products such as ETFs. ESMA must restrict the RFQ to equity-like instruments as we are concerned that for equity instruments, these systems could create a loophole in terms of pre-trade transparency and 'multilateral nature' of exchanges. In particular, this could be done by enabling semi-lit private pools of liquidity, where only certain participants could interact against one another, to be formally recognised as lit and multilateral venues. We consider that there is no need for these types of venues for equity instruments, which are order driven markets.

Systematic Internaliser regime

FESE is concerned with the potentially flexible transparency regimes for SIs than the one applicable to which market-makers active on multilateral platforms. We are also concerned that SIs do not truly contribute to price formation. This is truly problematic considering that they could become an increasingly attractive option for accommodating current BCN-type activity. We note that ESMA has acknowledged this is an issue but that it cannot provide further clarity in the RTS as it has no relevant empowerment to do so; we therefore strongly urge ESMA to raise this further with the European Commission so that it can be addressed appropriately. We are also concerned that SIs will be able to execute at any price that means that they are not in line with the harmonized tick size and they may price improve over bid and offer prices posted on regulated markets and MTFs at virtually no cost because also their quotes do not need to meet the minimum tick size. We therefore suggest that applying a harmonized tick size regime to SIs to ensure a level playing field between RMs, MTFs and SIs.

(ii) Transparency of non-equity instruments

<u>Transparency regime for Exchange Traded Derivatives (ETDs)</u>

FESE is concerned about the approach pursued by ESMA for ETDs. While in OTC derivatives every step towards transparency is welcomed, we views the attempts in specifying liquidity and resulting thresholds for ETDs more critically. ETDs already are characterized by high pre- and post-trade transparency, by providing price, size and depth towards the market. Also trade

[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.

reporting is close to real time. While the legislative goal is fully supported, the conversion steps proposed by ESMA are of concern, when focusing on ETDs specifically. It needs to be acknowledged that liquidity formation in ETDs is different and exchanges have put frameworks, rules and processes in place, in order to create and support a public order book. The very first step hereby is to introduce 'mature' products to a central clearing environment. The dynamic procedure established under the discretion of exchanges ensures that product specific steps are taken, when attracting formerly bilaterally traded products into a multilateral clearing and trading environment. In particular, FESE has serious concerns with the proposed LIS thresholds. We would like to inform ESMA that in many instances their proposals will actually result in a reduction in the current levels of transparency.
Our analysis, which both FESE and our members will include in their response to the consultation, indicates two very concerning outcomes of the ESMA proposal:

(i) Low thresholds proposed for very liquid contracts; and,
(ii) High thresholds proposed for very illiquid contracts.

The result of the ESMA proposal will be the move of liquid contracts from central order books and illiquid contracts from on-exchange trading altogether. The proposal is counterintuitive.
Ask ESMA if they have considered using a wider data set (i.e. pre trade data from trading venues) to calculate their thresholds, or to at least have a sanity check before setting final thresholds. This could be done in tandem with the exchange trading the instrument.

<u>(iii) Data publication issues</u>

Data disaggregation
While FESE strongly appreciates ESMA's approach as regards a mandatory disaggregation of four asset classes, we do not agree with further disaggregation, as we strongly believe it will add to unmanageable complexity and potentially higher costs to the end user instead of lower cost and thus be neither proportionate nor efficient. ESMA should also note that 90% of trading venue data is sent to data vendors and not directly to trading participants. In this respect the assumption made in the Cost Benefit Analysis that Market Data Vendors will offer at least the same level of disaggregation is not correct and needs to be corrected. ESMA must consider that there will be additional costs that infrastructures must face when striving to provide additional data packages. Therefore, the more granular the data disaggregation that is required, the more cost will be incurred. This will not help to reduce costs for investors. Moreover, increased number of data packages could add a lot of confusion in the market, i.e. more products and more data streams for investors to consider. Furthermore, the disaggregation by trading venues, as well as possible re-aggregation by vendors will add latency giving an edge to HFTs that take the full range of data directly from the primary sources. ESMA must consider that any unbundling exercise that must be undertaken increases costs. This must be taken into account when considering the Technical Advice on "reasonable commercial basis" for market data.

(iv) Microstructural issues
FESE would like to highlight to ESMA that we have made a number of proposals with regards to the microstructural portion of this consultation. We urge ESMA to take into account our proposals regarding RTS 15 due to the fact that as trading venues, FESE members have extensive experience in this area and are happy to provide ESMA with any feedback to assist their work.

< ESMA_COMMENT_CP_MIFID_1>

- # 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?

<ESMA_QUESTION_CP_MIFID_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_1>

Q2. Do you agree with the conditions, set out in this CP, under which a firm that is a natural person or a legal person managed by a single natural person can be authorised? If no, which criteria should be added or deleted?

<ESMA_QUESTION_CP_MIFID_2>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_2>

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?

<ESMA_QUESTION_CP_MIFID_3>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_3>

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?

<ESMA_QUESTION_CP_MIFID_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_4>

Q5. Do you consider that the format set out in the ITS allow for a correct transmission of the information requested from the applicant to the competent authority? If no, what modification do you propose?

<ESMA_QUESTION_CP_MIFID_5>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_5>

Q6. Do you agree consider that the sending of an acknowledgement of receipt is useful, and do you agree with the proposed content of this document? If no, what changes do you proposed to this process?

<ESMA_QUESTION_CP_MIFID_6>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_6>

Q7. Do you have any comment on the authorisation procedure proposed in the ITS included in Annex B?

<ESMA_QUESTION_CP_MIFID_7>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_7>

Q8. Do you agree with the information required when an investment firm intends to provide investment services or activities within the territory of another Member State under the right of freedom to provide investment services or activities? Do you consider that additional information is required?

<ESMA_QUESTION_CP_MIFID_8>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_8>

Q9. Do you agree with the content of information to be notified when an investment firm or credit institution intends to provide investment services or activities through the use of a tied agent located in the home Member State?

<ESMA_QUESTION_CP_MIFID_9>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_9>

Q10. Do you consider useful to request additional information when an investment firm or market operator operating an MTF or an OTF intends to provide arrangements to another Member State as to facilitate access to and trading on the markets that it operates by remote users, members or participants established in their territory? If not which type of information do you consider useful to be notified?

<ESMA_QUESTION_CP_MIFID_10>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_10>

Q11. Do you agree with the content of information to be provided on a branch passport notification?

<ESMA_QUESTION_CP_MIFID_11>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_11>

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

<ESMA_QUESTION_CP_MIFID_12>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_12>

Q13. Do you agree with the proposal to have same provisions on the information required for tied agents established in another Member State irrespective of the establishment or not of a branch?

<ESMA_QUESTION_CP_MIFID_13>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_13>

Q14. Do you agree that any changes in the contact details of the investment firm that provides investment services under the right of establishment shall be notified as a change in the particulars of the branch passport notification or as a change of the tied agent passport notification under the right of establishment?

<ESMA_QUESTION_CP_MIFID_14>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_14>

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

<ESMA_QUESTION_CP_MIFID_15>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_15>

Q16. Is there any other information which should be requested as part of the notification process either under the freedom to provide investment services or activities or the right of establishment, or any information that is unnecessary, overly burdensome or duplicative?

<ESMA_QUESTION_CP_MIFID_16>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_16>

Q17. Do you agree that common templates should be used in the passport notifications?

<ESMA_QUESTION_CP_MIFID_17>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_17>

Q18. Do you agree that common procedures and templates to be followed by both investment firms and credit institutions when changes in the particulars of passport notifications occur?

<ESMA_QUESTION_CP_MIFID_18>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_18>

Q19. Do you agree that the deadline to forward to the competent authority of the host Member State the passport notification can commence only when the competent authority of the home Member States receives all the necessary information?

<ESMA_QUESTION_CP_MIFID_19>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_19>

Q20. Do you agree with proposed means of transmission?

<ESMA_QUESTION_CP_MIFID_20>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_20>

Q21. Do you find it useful that the competent authority of the host Member State acknowledge receipt of the branch passport notification and the tied agent passport notification under the right of establishment both to the competent authority and the investment firm?

<ESMA_QUESTION_CP_MIFID_21>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_21>

Q22. Do you agree with the proposal that a separate passport notification shall be submitted for each tied agent established in another Member State?

<ESMA_QUESTION_CP_MIFID_22>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_22>

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

<ESMA_QUESTION_CP_MIFID_23>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_23>

Q24. Do you agree to notify changes in the particulars of the initial passport notification using the same form, as the one of the initial notification, completing the new information only in the relevant fields to be amended?

<ESMA_QUESTION_CP_MIFID_24>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_24>

Q25. Do you agree that all activities and financial instruments (current and intended) should be completed in the form, when changes in the investment services, activities, ancillary services or financial instruments are to be notified?

<ESMA_QUESTION_CP_MIFID_25>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_25>

Q26. Do you agree to notify changes in the particulars of the initial notification for the provision of arrangements to facilitate access to an MTF or OTF?

<ESMA_QUESTION_CP_MIFID_26>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_26>

Q27. Do you agree with the use of a separate form for the communication of the information on the termination of the operations of a branch or the cessation of the use of a tied agent established in another Member State?

<ESMA_QUESTION_CP_MIFID_27>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_27>

Q28. Do you agree with the list of information to be requested by ESMA to apply to third country firms? If no, which items should be added or deleted. Please provide details on your answer.

<ESMA_QUESTION_CP_MIFID_28>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_28>

Q29. Do you agree with ESMA's proposal on the form of the information to provide to clients? Please provide details on your answer.

<ESMA_QUESTION_CP_MIFID_29>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_29>

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

<ESMA_QUESTION_CP_MIFID_30>
Overall, FESE agrees with the approach taken by ESMA, and in particular welcome the recognition of different trading venues and mechanisms, and the introduction of standardisation. However we have a number of comments to make as we believe there are several areas that require further clarification to ensure a consistent approach to implementation.

We consider that Recital 8 and the provisions in RTS 6 provides for much more detailed and stringent publication requirements for pre-trade transparent order driven markets in comparison to other market models. This is a real issue as there is no reason for investors to be more informed in respect of the market quality of pre-trade transparent order driven market than of other market models, especially since the objectives of RTS 6 are to ensure that investors have the means to compare the quality of execution provided by the different venues on which the same instrument is traded. Without a harmonisation of the requirements, it will be impossible for investors to compare market quality across those venues.

In this respect, we are particularly concerned with the fact that hybrid models are covered by very few requirements, considering that most of the provisions in RTS 6 applies only to order driven markets and to quote driven markets. As such we would strongly urge hybrid models to be covered by similar requirements than those applicable to other models, i.e. subjecting them to the exact same requirements as order driven and quote driven markets.

Therefore, we would recommend either: (i) aligning the requirements for pre-trade transparent order driven markets with the requirements for other types of market models or, (ii) aligning the requirements for other types of market models with the requirements of pre-trade transparent order driven markets.

On Recital (6), we welcome the alignment of the transaction type definition with the taxonomy developed for post-trade transparency purposes but believe it requires further refining. In particular:

- Clarity as to whether trades under the Negotiated Trade Waiver should be grouped into a single category or remain under each sub-category.
- Consideration as to the most relevant trade flags for the purpose of assessing execution quality. We suggest not including all of the trade flags so as not to produce overly granular data which will then not be of benefit to investors or investment firms.

On Recital (8), this includes 'failed trades' but without any further definition in the proposed text. We interpret failed trades as "mistrades" or trades that have been annulled by the trading venue (exchange) (with the effect that the counterparties do not have to deliver / pay). We wish to state that 'cancelled orders' are not the same as 'failed trades'. Furthermore we question the inclusion of such data on cancelled orders as orders can be cancelled for a wide range of reasons and it is not necessarily an indication of poor execution quality.

On Article 3, consideration should be given as to whether or not transaction volume and value should be single or double counted. On Article 3(1)(d), we believe the details of volatility interruptions is not useful information for the purpose of best execution given that such mechanisms are in place in order to try and prevent disorderly trading and therefore should not be seen negatively or deter investment firms from venues that may have additional volatility interruptions by virtue of having more stringent controls than other markets.

ESMA suggests including market makers “that execute directly with clients rather than using a trading venue central order book” in the list of execution venues. We are of the view that this is not the intention of the Level 1 text as market makers are not included in the definition of ‘trading venue’ in Article 4 (1) (24). Furthermore, Article 27 (3) of the Directive refers to the obligation on “trading venues and systematic internalisers” in relation to financial instruments subject to the trading obligation, and on “execution venues” for all other financial instruments. We therefore believe that the intention was to capture both trading venues and systematic internalisers under the broader definition of execution venue.

Furthermore, we believe this could be misleading as some market makers execute directly with clients in addition to using a trading venue’s order book. Moreover, the off order book executions may be carried out under the rules of a trading venue and reported into that venue, and therefore will already be included in the data of that venue. Therefore we ask ESMA to clarify that only market makers who undertake all their market making activity outside of a trading venue, i.e. on a purely OTC basis are included in the scope of this proposal.

We are also concerned with the proposal by ESMA to include execution details at specific point-in-time levels. We believe that such information could be:

(i) Misleading as it will not include the specificities of each order;
(ii) Not comparable unless the same order types are executed at the exact same time on competing venues. As this is very unlikely, the information will in fact be redundant as it will not be indicative of general trends. Furthermore it is potentially only suitable for liquid markets with regular executions;
(iii) Not consistent as ESMA has proposed using UTC time which does not take into account daylight savings time.

We believe that aggregated data showing general trends is more beneficial, and therefore urge ESMA to re-consider their proposal and restrict the publication to aggregate data only. Furthermore we believe that daily is too frequent and we would suggest that capturing data over a longer period would be more appropriate for identifying general market trends.

Finally, we have a general comment to make on the extensiveness of the proposed publication requirements which we believe are far too detailed to be beneficial to investors. In particular we believe that the large number of data fields will be far in excess of what a retail investor would find beneficial in order to assess execution and in relation to institutional investors. Our experience to date is that these investors source and analyse data to suit their own business needs which clearly varies between firms and therefore are likely to continue to obtain and analyse data from other sources. For these reasons, we urge ESMA to take a more gradual approach, reducing the number of data fields to be introduced at the initial stage which can then be reviewed several months after implementation and supplemented if there is a need.

Amendment proposal (in relation to hybrid markets)

RTS 6

Recitals

~~**(7) Order driven execution venues permit the publication of additional measures of potential execution quality based on the availability of additional pre- and post-trade data. Therefore order driven markets shall report additional data on execution quality which will support the creation of supplementation execution quality metrics which rely on the existence of full pre and post-trade transparency data. For example, these execution venues shall report metrics on their average effective and realised spreads, best bids and offers, depth weighted spreads, book depths or order to trade ratios when applicable**~~.

(…)

(10) The speed of execution will be measured differently depending on the market mechanism and order type and these differences will be reflected in the reporting. The measurement of the speed of execution for order driven markets shall be the time elapsed between receipt of an order and its execution. Flags for different order and transaction types will provide sufficient context for the assessment of speed of execution. To provide a viable benchmark, execution venues operation order driven markets will also be required to publish the average speed of execution for unmodified passive orders at first limit. A different measure of the speed of execution is requirement in quote driven markets to reflect the time between a client submitting a request for quote and the execution venue providing it, as well as the time elapsed between the client's acceptance of that quote and the subsequent execution. The provision of mean and median time elapsed between a request for quote and execution may help, diminishing the impact of client behaviour on the speed of execution in quote driven markets as well as give some useful information on market stress periods. **Hybrid markets will have to report both metrics required from order driven markets and for quote driven markets.**

Article 4 - Additional data to be published by order driven execution venues **and hybrid markets**

1. Order driven execution venues

(…)

(p) average speed of execution for unmodified passive orders at first limit.

Article 5 - Additional data to be published by quote driven execution venues **and hybrid markets**

1. Quote driven execution venues

(…)

(b) the mean and median time elapsed between a request for a quote and provision of that quote, for all quotes in a given financial instrument when applicable.
<ESMA_QUESTION_CP_MIFID_30>

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?

<ESMA_QUESTION_CP_MIFID_31>
FESE believes that using the average trade size would be the best way to determine the ranges for equities, and furthermore that the venues should determine the ranges that are most appropriate to their venues. However, if ESMA decides to maintain the ranges based on other established ranges used in MiFID, we request that either the Standard Market Size table or the Large in Scale table is used rather than both, i.e. 8 ranges.

For example, if applying the LIS table, range 1 would be “greater than zero and less than 100000”, range 2 would be “greater than or equal to 100000 and less than 500000” etc. We believe that the same ranges should be used under RTS 6 and RTS 7 (in order to provide comparability).
<ESMA_QUESTION_CP_MIFID_31>

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

<ESMA_QUESTION_CP_MIFID_32>
FESE is concerned with the inclusion of ‘settlement’ in Article 2(1) given that this is not explicitly included in the Level 1 text and therefore we believe this should be removed.
<ESMA_QUESTION_CP_MIFID_32>

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

<ESMA_QUESTION_CP_MIFID_33>
FESE believes that clarity is needed when considering the speed of execution. It should explicitly exclude those trades that are executed outside of an electronic system such as manual trades.
<ESMA_QUESTION_CP_MIFID_33>

Q34. Do you agree with the proposed approach? If not, what other information should ESMA consider?

<ESMA_QUESTION_CP_MIFID_34>
In principle, FESE agrees that all execution venues for equities trading should have similar obligations. Also, regarding market making/liquidity provision outside of RMs/MTFs.

However, we believe that this data will be of relatively limited value for non-equity trading venues. It will only provide at best a top-level indication of execution quality, which is unlikely to enable clear and unambiguous interpretation.
<ESMA_QUESTION_CP_MIFID_34>

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

<ESMA_QUESTION_CP_MIFID_35>
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<ESMA_QUESTION_CP_MIFID_35>

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

<ESMA_QUESTION_CP_MIFID_36>
FESE’s principle concern is the inclusion of a ‘market maker’ as a type of execution venue. We believe that this should only be the case where the market maker executes the trades on an OTC basis. In addition, we believe that any separation of reporting by client type should only be provided to the NCA as it may be detrimental to investment firms’ business if this information

was made public. This could dissuade retail investors from dealing with certain firms, thereby offering them less choice.

We note that Article 5 (4) states that the total number of orders should be published, however, Recital 3 states that absolute numbers will not be required. This same comment also applies to the Table I of Annex 1.
<ESMA_QUESTION_CP_MIFID_36>

- **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.

<ESMA_QUESTION_CP_MIFID_37>

FESE agrees with the proposal to add a definition of RFQ only for equity-like products such as ETFs. We feel it is important that those are adequately captured by the Regulation. Precise pre-trade transparency requirements should be established for RFQs, Therefore we agree with the proposal in the Annex I, Table 3 of RTS 8 and Article 3 of RTS 8, but only for equity-like products.

FESE asks ESMA to consider restricting the RFQ to equity-like instruments as we are concerned that for equity instruments, these systems could create a loophole in terms of pre-trade transparency and 'multilateral nature' of exchanges. This could be done by enabling semi-lit private pools of liquidity, where only certain participants could interact against one another, to be formally recognised as lit and multilateral venues. We consider that there is no need for these types of venues for equity instruments, which are order driven markets.

In addition, we would strongly recommend some minor changes to the 'hybrid' category based on current experience with the MiFID I framework. This would ensure that, under the revised legislation, it is clear that in cases where prices are simply imported from lit venues, and in contrast to ESMA's proposal (Consultation Paper: p.49 para 9 & 10), the activity must fall under the Reference Price Waiver and be subject to the double volume cap mechanism.

The flexible definition of pre-trade transparency obligations for "hybrid" systems in the above-mentioned regulation has enabled some platforms to operate trading models that are functionally identical to dark platforms operating under the reference price waiver. However, these platforms are still being recognised from a regulatory perspective as pre-trade transparent platforms, despite their lack of participation in the price formation process.

Specifically, certain platforms currently considered to be pre-trade transparent import prices formed on competing lit platforms and display these prices as actionable even through those prices: (i) do not correspond, strictly speaking, to the interests present on the platform (they are calculated by the platform itself from prices other than those actually sent to the platform); and, (ii) can be made only if market makers operating on the platform are present and agree to trade at the price displayed.

These practices, which go against the spirit of MiFID, are problematic insofar as: (i) they do not allow clients directing their orders to these platforms to know whether the displayed prices are truly actionable; and, (ii) they impact the price formation process in an identical manner to dark platforms operating under the reference price waiver. In fact, by leaving the opportunity for some market participants to benefit from the prices formed by others on transparent platforms, they encourage a growing number of participants to veer towards what is perceived as a more convenient way to receive best execution (and which in the future if retained will be functionally identical to the reference price waiver, without falling under any volume cap). Thus, the share of volumes directed towards truly transparent pre-trade platforms decreases proportionally, resulting in a less efficient price formation process, detrimental to all stakeholders, including those activity on these deceptively transparent platforms importing prices that are less reflective of the real interests present in the market.

MiFID II/ MiFIR aims to better control the volumes executed under the reference price waiver using quantitative limits. However, in the absence of change in the rules concerning some so-called hybrid platforms, there is a risk that volumes executed today under the reference price waiver will shift to platforms considered to be pre-trade transparent but which actually operate under a model identical to the one used by dark platforms, thereby reinforcing the status quo. We strongly urge regulators to ensure that the rationale underpinning trading on hybrid platforms ensures that transactions are executed on the basis of pricing intentions generated by the interaction of buying and selling interest on the venue concerned. It should be made clear that in cases where prices are simply imported from lit venues the activity must fall under the reference price waiver and be subject to the double volume cap mechanism.

Therefore, we would strongly recommend deleting the wording '*if the characteristics of the price discovery mechanism so permit'* in the definition of the pre-trade transparency requirements applicable to hybrid models, in order to avoid creating loopholes in terms of pre-trade transparency.

In addition, we would suggest that in all of the systems and models there are categories identified for the purpose of pre-trade transparency requirement definition to replace "advertised" by "present". This is in order to ensure that the prices and quantity displayed by these platforms deemed to be pre-trade transparent are actual prices and quantity generated by participants active on these platforms and not simply imported from other markets.

Amendment proposal

RTS 8

Table 3 – Information to be made public in accordance with Article 3

Type of system	Description of system	Summary of information to be made public
Continuous auction order book trading system	A system that by means of an order book and a trading algorithm operated without human intervention matches sell orders with matching buy orders on the basis of the best available price on a continuous basis.	The aggregated number of orders and the shares, depositary receipts, ETFs, certificates they represent at each price level, for at least the five best bid and offer price levels continuously throughout normal trading hours**, corresponding to the trading interest that are present on the market**.

Quote-driven trading system	A system where transactions are concluded on the basis of firm quotes that are continuously made available to participants, which requires the market makers to maintain quotes in a size that balances the needs of members and participants to deal in a commercial size and the risk to which the market maker exposes itself.	The best bid and offer by price of each market maker in that share, together with the volumes attaching to those prices continuously throughout normal trading hours**, corresponding to the trading interest that are present on the market**. The quote made public shall be those that represent binding commitments to buy and sell the financial instruments and which indicate the price and volume of financial instruments in which registered market makers are prepared to buy or sell. In exceptional market conditions, however, indicative or one-way prices may be allowed for a limited time.
Periodic auction trading system	A system that matches orders on the basis of a period auction and a trading algorithm operated without human intervention.	The price at which the auction trading system would best satisfy its trading algorithm and the volume that would potentially be executable at the price by participant sin that system continuously throughout normal trading hours.
Request for quote trading system **for ETFs and certificates only**	A trading system where a quote or quotes are published in response to a request for quote submitted by one or more members or participants. The quote is executable exclusively by the requesting member or market participant may conclude a transaction by accepting the quote or quotes provided to it on request.	The bids and offers together with the volumes submitted by each responding entity during normal trading hours.

Trading system not covered by first 4 rows	A hybrid system falling into two or more of the first four rows or a system where the price determination process is of a different nature than that applicable to the types of system covered by the first three rows.	**Adequate information as to the level of orders or quotes and of trading interest; in particular, the five best vid and offer price levels and/or two-way quotes of each market maker in the share, if the characteristics of the price discovery process so permit.**

<ESMA_QUESTION_CP_MIFID_37>

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.

<ESMA_QUESTION_CP_MIFID_38>

FESE agrees with the proposal in paragraph 19 of the CP, except with regard to transactions executed under the order management facility waiver because the visible peak of reserve orders actually contributes to the information content to be used as a reference price. Therefore, such transactions should be included. We have already noted that ESMA follows this line of argumentation in Article 4(4) of Draft RTS 8 by limiting the exclusion to all transactions executed in accordance with one of the pre-trade transparency waivers specified in Article 4(1) paragraphs (a) to (c) of Regulation (EU) No 600/2014, but not extending the exclusion to orders held in an order management facility of the trading venue (Article 4(1)(d) of Regulation (EU) No 600/2014).

Finally, we would like to clarify that transactions on RFQ systems and transactions executed under RFQ protocols should be excluded when determining the most relevant market in terms of liquidity. The reason for excluding RFQ transactions is that only the requesting member or participant of such a quote request is in the position to conclude transactions by accepting the quote or quotes exclusively provided to it on request, but not all members or participants of such system as is the case in open order book and auction trading on regulated markets and MTFs.

Proposed amendment of Article 4(4) of Draft RTS 8:
The calculation of the turnover shall exclude all transactions executed in accordance with one of the pre-trade transparency waivers specified in Article 4(1) paragraphs (a) to (c) of Regulation (EU) No 600/2014 and all transactions executed on RFQ systems or under RFQ protocols.

Moreover, ESMA should consider linking these proposals to the quality of execution within the relevant sections of investor protection.
<ESMA_QUESTION_CP_MIFID_38>

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.

<ESMA_QUESTION_CP_MIFID_39>

Yes, FESE agrees with an exhaustive list. We believe the more transactions types that are transparent to the market, the better the market is. This is especially true whenever the information about a transaction is relevant for the public market in order to find the right price for the subject traded. However we have some concerns about the RTS as currently drafted and therefore have a number of proposals in order to ensure a consistent and transparent use of that part of the waiver, namely:

- Tightening of the definitions for benchmark, portfolio and delta neutral trades; and
- Specify the list of non-price forming technical trades under the NDW Alignment of the list of non-price forming trades under the NDW with those permitted to be executed on an OTC basis.

Firstly, we believe that a clearer and tighter definition of benchmark, portfolio and delta neutral trades for the purpose of this article should be adopted in order to avoid creating important loopholes, as these transactions are considered as non-price forming and therefore fall outside of "the volume cap". The risk is therefore that in the absence of a restrictive definition of these types of trades, the volume cap could be circumvented by using the 'uncapped' part of the NDW.

In order to ensure that the spirit of the text is respected, and therefore to close the above loophole, the definitions of these three types of trades should be further clarified. It should distinguish between

(i) Portfolio and delta neutral overall operations and the individual components thereof;

(ii) Benchmark transactions, either:

   a. A transaction whereby the price is derived over a period of time from post-trade prices of already executed trades or

   b. A transaction constituted by several dissociable and substitutable components which, when or if individually sent to regulated market(s), MTF(s) or systematic internaliser(s) for execution, do not or may not represent the initial interest in its entirety.

In relation to part (ii)(a), a benchmark trade executed at a price that is derived over already published post-trade prices should fall under the exemption for non-price forming trades executed under the NDW.

In relation to Part (i) and (ii)(b), only in its entirety should a benchmark, portfolio or delta neutral transaction be allowed to be effected under the NDW as non-price forming trades. The individual components (i.e. trades) of these operations (other than those derived from already published post-trade prices) are price-forming and therefore should not take place under the NDW as non-price forming trades.

With this distinction, the conduct of benchmark, portfolio and delta neutral operations will still be possible by enabling the operation to be considered, as a whole, as executable as non-price forming under the relevant part of the NDW whilst protecting the price formation process by ensuring that the individual components (trades) necessary to execute the overall operation are executed with pre-trade transparency where relevant (unless meeting criteria to avail of other waivers, for example large-in-scale).

Secondly there are a number of trade types that are included as being OTC which could take place on a trading venue under the negotiated trade waiver. We support the flexibility for trading venues to allow for these non-price forming trades to be also allowed to take place on venues as well as OTC. Regarding transactions contingent on technical characteristics we propose to specify that they need to be (1) related to non-addressable liquidity or (2) unrelated to the current market valuation of the financial instrument such as where the timing, price and volume of the transaction are fully based on a transaction executed on another transparent trading venue.

Lastly, we agree that only some very special non-standard or special settlement trades should be included on the list. In case that there is no other reason than a non-standard settlement period (e.g. any additional price determining aspect), then there is no reason for not being transparent and should therefore regularly be transparent cases in which an additional reason appears and an exemption is made should be defined clearly in advance.

Amendment proposal

RTS 8

Recital 2-bis
Whilst in its entirety, a benchmark, portfolio or delta neutral trade shall be allowed to be executed on an OTC basis or under the Negotiated Deal Waiver as non-price forming, the individual components (individual trades) necessary to the execution of those benchmark (other than those derived from already published post-trade prices), portfolio and delta neutral trades shall fall within the trading mandate and be executed on pre-trade transparent venues, as they are price-forming, unless meeting the eligibility criteria for other pre-trade transparency waivers due to their size or intrinsic characteristics.

Article 6 – Negotiated transactions subject to conditions other than the current market price

1. (…)
   (a) the transaction is executed in reference to a price that is calculated over multiple time instances according to a given benchmark. In other words the price is derived over a period of time from post-trade prices of already executed trades. Examples include volume-weighted average price or time-weighted average price**, where the transaction is either based on (i) a price derived over a period of time from post-trade prices of already executed trades or (ii) a transaction constituted by several non-dissociable and non-substitutable components which, when or if individually sent to regulated market(s), MTF(s) or systematic internaliser(s) for execution, do not or may not represent the initial interest in its entirety;**
   (b) the transaction is part of a portfolio trade that involves the execution of 10 or more shares from the same client and at the same time and the single components of the trade are ~~**meant to be**~~ executed only as single lot and **the trade is constituted by several non-dissociable and non-substitutable components which, when individually sent to a pre-trade transparent execution venue for execution, do not represent the initial interest in its entirety**;
   (c) the transaction is a give-up or give-in
   (d) the transaction is contingent to a derivative contract having the same underlying and where all the components of the trade are meant to be executed only as a single lot**, and is constituted by several non-dissociable and non-substitutable**

components which, when individually sent to a pre-trade transparent execution venue for execution, do not represent the initial interest in its entirety;

(e) the transaction is contingent on technical characteristics **representing non-addressable liquidity or** which are unrelated to the current market valuation of that financial instrument **such as where the timing, price and volume of the transaction are fully based on a transaction executed on another transparent trading venue.**

<ESMA_QUESTION_CP_MIFID_39>

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.

<ESMA_QUESTION_CP_MIFID_40>

FESE agrees with the main characteristics of orders held in an order management facility. Our understanding is that a stop order does not need to be displayed until triggered and that an iceberg order does not need to be displayed prior to execution, except for its peak size. FESE therefore agrees with the minimum size 1) being the minimum tradable quantity of the venue for stop orders and 2) being €10,000 for iceberg orders, i.e. reserve orders.

<ESMA_QUESTION_CP_MIFID_40>

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.

<ESMA_QUESTION_CP_MIFID_41>

FESE agrees with the ESMA proposal.

<ESMA_QUESTION_CP_MIFID_41>

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.

<ESMA_QUESTION_CP_MIFID_42>

FESE does not agree with the thresholds set for ETFs. We would also question the merit of having such a detailed table for ETFs with different ADT classes, especially because we are of the opinion that ADT is an inappropriate proxy for the liquidity of an ETF as it fails to capture the liquidity of the underlying market available to market makers in the ETF. Therefore we would consider it to be more straightforward and simplistic to implement a single table with a single threshold and therefore support ESMA's alternative proposal because we consider this to be more closely aligned with the actual liquidity of ETFs. FESE agrees with the threshold of € 1 million.

Proposed amendment to Article 8(1) of Draft RTS 8:

For the purpose of Article 4(1)(c) of Regulation (EU) No 600/2014 an order shall be considered to be large in scale compared with normal market size if, at the point of order entry or following any amendment, it is equal to or larger than the minimum size of orders specified in Annex II, Tables 2 to **3** as applicable. **For each ETF an order shall be considered to be large in scale when compared with normal market size if, at the point of order entry or following any amendment, it is equal to or larger than EUR 1 million.**

<ESMA_QUESTION_CP_MIFID_42>

Q43. Do you agree with the classes, thresholds and frequency of calculation proposed by ESMA for certificates? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_43>
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Q44. Do you agree with the proposed approach on stubs? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_44>
FESE agrees that all stubs should remain dark in order to allow ESMA to implement a simplistic regime that will be both harmonised and standardised as long as the metrics of the order are not changed. This will also be easier to monitor.
<ESMA_QUESTION_CP_MIFID_44>

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.

<ESMA_QUESTION_CP_MIFID_45>
FESE agrees that an SI should be required to publish with each quote a timestamp. We fear that without a timestamp issues might arise if the quote is changed close to the point in time when an order from a client is entered but may then not match the new quote of the SI because of the change. According to Art. 17.3 (a) MiFIR SIs are allowed to publish their quotes by using a website, however, this might cause problems as the website may slow down and the quotes are no longer accurate. Also we would like to emphasise that the timestamp is vital information for a client to analyse ex-post the quality of prices quoted by the SI.

In addition, standards for SIs should be the same as for venues - post-trade flags for instance should be harmonised and developed to identify 'lit' Sis transactions and other transactions (price improvement, above SMS) with harmonised time stamps. Otherwise, it will be impossible to: (i) account for the type of trades undertaken on Sis; and, (ii) to have full understanding of the exact volumes executed in a lit manner on SIs vs. those executed without pre-trade transparency. With the consequence that SIs could be a new home for dark trading in the context of the trading mandate and volume cap on RPW / NDW for transactions in liquid instruments. These trade flags could be incorporated within the current trade flags that are applicable for trading venues.

Amendment proposal

Table 2

List of flags for the purpose of post-trade transparency

Flag	Name	Type of execution venue	Definition
(…)	(…)	(…)	(…)
‘T’	Technical trades	RM, MTF OTC	Transaction not contributing to the price formation process as per Article 2, **or transaction not contributing to the price formation process as per Article 15(3) of Regulation (EU) 600/2014, and not covered by existing flags within this table**.
‘L’	Large in scale	RM, MTF, **OTC**	A transaction executed (i) **~~under a pre-trade transparency waiver in accordance with Article 4(1)(c) of Regulation (EU) 600/2014~~** ~~and~~ **which has benefited from deferred**

			publication under Article 7 of Regulation (EU) 600/2014, or (ii) on a systematic internaliser with no pre-trade transparency because the size of the incoming order was above the Standard Market Size, as defined in this Regulation, or (iii) on a systematic internaliser with no complete pre-trade transparency due to the fact that the incoming order considerably exceeded the norm, as defined Article 17(2) of Regulation (EU) 600/2014.
'N'	Negotiated transactions in liquid financial instruments	RM, MTF, **OTC**	Transaction executed in accordance with Article 4(1)(b)(i) of Regulation (EU) 600/2014 **or transaction in liquid instruments executed on a systematic internaliser with a price improvement in accordance with Article 15(2) of of Regulation (EU) 600/2014**

<ESMA_QUESTION_CP_MIFID_45>

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

<ESMA_QUESTION_CP_MIFID_46>

FESE agrees that a price reflects prevailing market conditions if it is close to comparable quotes for the same financial instrument on other trading venues. However we strongly urge ESMA to consider extending this definition. It should be clarified that only prices executed at price levels in line with the applicable tick size of that financial instrument should be deemed to reflect prevailing market conditions. The reason for that is that the introduction of a harmonized tick size regime in Europe will unfortunately not be applicable to SIs.

Consequently SIs will be able to execute at any price that means that they are not in line with the harmonized tick size of the respective financial instrument. Further they may also price improve over bid and offer prices posted on regulated markets and MTFs at virtually no cost because also their quotes do not need to meet the minimum tick size.

For instance consider a financial instrument (share or ETF) with a price of 145 EUR and a corresponding tick size of 0.02 EUR. Assume that the instrument is currently quoted with a bid offer spread of 145 to 147 EUR on a regulated market. To become top of book any participant of the regulated market would have to improve the current bid or offer price by at least 0.02 EUR. On the contrary an SI would be able to improve the price of the regulated market at a fraction of that cost, for instance by posting quotes at price increments of 0.01 EUR, 0.005 EUR or even smaller.

FESE fears that with such regulation trading volumes will move away from public markets to SIs due to regulatory tick size arbitrage. This would certainly not reflect the spirit of this regulation. We therefore suggest preventing it. Although we know that applying a harmonized tick size regime to SIs has been missed in the Level 1 text, FESE thinks that extending the definition as proposed above presents a valid alternative to ensure a level playing field between RMs, MTFs and SIs.

Further FESE suggests that the same logic should be applied when permitting SIs to execute orders at a better price than those quoted at the time of reception of the order. This means that they should only be allowed to price improve over the price quoted at the time of reception of the order at price levels in line with the instrument's minimum tick size.

See also our response to question 123.
<ESMA_QUESTION_CP_MIFID_46>

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

<ESMA_QUESTION_CP_MIFID_47>
FESE supports the rationale behind ESMA's goal of increasing transparency in equity markets. However, we would support a variant of Option 2 and advocate that SMS is set at € 15,000.

If not then the quantitative thresholds for the SMS, or at least the methodology, should be aligned with that used for the LIS. Otherwise, if current SMS methodology is retained, the more liquid you are, the less the average size of transaction is. Therefore, the lower the SMS threshold above which you can trade in the dark - completely counter-intuitive – gives no reasons for SIs to benefit from such a regime vs. multilateral platforms, especially in an environment where, due to the OTC regulation, SIs will become increasingly used.

Moreover, regarding the de minimum threshold for SIs, it must be made clear that the frequency component is 'on average' as stated in the technical advice, and not 'at least'. This will close any potential loopholes to circumvent the share trading mandate by misinterpreting on what is meant by 'ad hoc and irregular'.

In principle, we are concerned with the potentially flexible transparency regimes for SIs than the one applicable for market-makers active on multilateral platforms. Moreover, as stated in more detail on our response to the Discussion Paper, we are concerned that SIs do not truly contribute to price formation. This is truly problematic considering that they could become an increasingly attractive option for accommodating current BCN-type activity.

We urge ESMA and the Commission to resolve the ambiguities in the text pertaining to the potential use of matched or riskless principal trading by an SI. Without clarification, this point risks fundamentally undermining one of the core principles of the Level 1 framework, that is to say a strict separation of bilateral and multilateral trading functionality. In order to address such a development, which would go against the Level 1 framework agreement, a key point for regulators and policymakers should be to **ensure the bilateral nature of SI activity.** We are extremely concerned that some recitals in MiFID/R may be used by market participants to argue that riskless counterparty trading can be undertaken by SIs, thus providing an alternative home for current OTC broker crossing business. Such a development, combined with the relatively light transparency regime applied to SIs (especially when compared to functionally equivalent market makers on multilateral trading venues) together with their new ability to provide price improvement under MIFID II, would effectively see the **re-introduction of an OTF category within the equities space**. This is because riskless principal trading *de facto* enables the matching of two client orders by interposing the SI own account between them for a fraction of time, i.e. taking very limited market/ counterparty risk. Clearly, this would go against the political, technical and legal agreement underpinning the Level 1 text.

We note that ESMA has acknowledged this is an issue but that it cannot provide further clarity in the RTS as it has no relevant empowerment to do so; we therefore strongly urge ESMA to raise this further with the European Commission so that it can be addressed appropriately. . If not the quantitative thresholds for the SMS, at least methodology should be aligned with that for the LIS, otherwise, if current SMS methodology is retained, the most liquid you are, the less the average size of transaction is and therefore the lower the SMS threshold above which you can trade in the dark - completely counter-intuitive - no reasons for SIs to benefit from such a regime vs. multilateral platforms, especially in an environment where, due to the OTC regulation, SIs will become increasingly used.

Amendment proposal

RTS 8

Annex II: Standard market sizes, orders large in scale compared with normal market size and deferred publication thresholds and delays

Table 1
Standard market sizes (in EUR)

Class in terms of average ~~value of transactions (AVT)~~ daily turnover (ADT)	~~AVT < 20 000~~ ADT < 100 000	~~20 000 ≤ AVT ≤ 40 000~~ 100 000 ≤ ADT ≤ 500 000	~~40 000 ≤ AVT ≤ 60 000~~ 500 000 ≤ ADT ≤ 1 000 000	~~60 000 ≤ AVT ≤ 80 000~~ 1 000 000 ≤ ADT ≤ 5 000 000	~~80 000 ≤ AVT ≤ 100 000~~ 1 000 000 ≤ ADT ≤ 5 000 000	~~100 000 ≤ AVT ≤ 120 000~~ 5 000 000 ≤ ADT ≤ 25 000 000	~~120 000 ≤ AVT ≤ 140 000~~ 25 000 000 ≤ ADT ≤ 50 000 000	~~Etc.~~ 50 000 000 ≤ ADT ≤ 100 000 000
Standard market size	10 000	30 000	50 000	70 000	90 000	110 000	130 000	~~Etc.~~ 150 000

<ESMA_QUESTION_CP_MIFID_47>

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.

<ESMA_QUESTION_CP_MIFID_48>
FESE supports establishing an exhaustive list of the types of transactions which should be excluded from the trading mandate for equities. We consider this to be the most effective way to ensure that the equities trading mandate is not illegitimately circumvented. In order to respond to market needs, any such definition should rely on an analysis and pragmatic typology of the types of transactions currently executed on an OTC basis. We believe that a definition solely based on general principles would not be appropriate, as it would open opportunities to circumvent the trading mandate.

ESMA states that Level 1 allows it to exempt “non-price forming” trades from post trade transparency if they are transacted OTC (para 16). However, these “non-price forming” trades must be made public when executed on a trading venue due post trade obligations of the trading venues in relation to shares in MiFIR. This leads to a number of unintended consequences, namely:

1. Unequal treatment of OTC and on-exchange transactions which is not desirable from a transparency perspective
2. All OTC VWAP executions would be exempt from post-trade transparency obligation

3. Trade flags 'T' and 'G' have almost the same definition with the execution venue being the only distinction. However, in case non price forming OTC trades would be exempt from post trade transparency obligation, we don't see in which case the trade flag 'T' might be used.
4. The potential exemption of post trade transparency for non-price forming OTC transactions will make the sizing of the OTC trading activity impossible. This an acknowledged weakness of MiFID I and will affect the calculation of the volume cap mechanism under MiFID II.

Therefore, FESE recommends that the final RTS do not discriminate between on-exchange and OTC "non-price forming" trade. The same post-trade transparency requirements for non-price forming transactions should apply, irrespective whether they have been executed OTC or on-exchange.

Therefore, we consider that the definition of transaction types considered as "non-addressable" for the purpose of the equities trading mandate could rely on the work done by CESR (Committee of European Securities Regulators, now ESMA) in 2010[2] and the standards developed by the "Market Model Typology" (MMT) initiative. This initiative, now governed by FIX Protocol Limited[3], aims at supporting harmonised transaction reporting standards across the industry, including OTC transactions. Research undertaken by the Association for Financial Markets in Europe (AFME)[4] and Aite Group[5] also give a good overview of the type of transactions which are currently executed over-the-counter (OTC). These standards and research were used as a basis to establish a detailed typology of OTC transactions, on which FESE suggests regulators could rely to determine which OTC transactions can be considered as **"non-addressable" for the purpose of the equities trading mandate.**

We believe that **standard transactions**, which are currently in great proportion executed OTC, should be subject to the trading mandate to the extent that their characteristics do not justify execution outside regulated platforms. These include in particular**:**

(i) **Cross trades or agency trades**, which correspond to the matching of two client orders (otherwise BCNs will simply continue their activity OTC or under the SI category);

(ii) **Riskless principal or matched principal trades**, corresponding to the interposition of the intermediary's own account between two client orders or between a client order and the market; and,

(iii) **Principal trades** where the intermediary matches a client order against its proprietary capital.

These transactions should all be executed on regulated platforms. This is because they are not technical in nature and should take part in the price formation process and be accessible to the market as a whole. In other terms, they should not remain in the OTC space. Therefore we welcome the exclusion of these trade types from the non-exhaustive list.

The adoption of an exhaustive list to define the types of transactions considered as not contributing to the price discovery process is an important step to ensure that OTC trading is limited only to legitimate circumstances and does not provide for loopholes to the trading mandate provided under Article 23 of Regulation 600/2014.

[2] CESR, Technical Advice to the European Commission ahead of MiFID Review – Equity Markets, Post-trade Transparency Standards, Oct 2010
[3] Available here: http://www.fese.eu/en/?inc=page&id=79
[4] AFME, Market Analysis, The Nature and Scale of OTC Equity Trading in Europe, April 2011
[5] Aite, European Dark Trading: Who's Playing in Your Pool?, December 2010

However some of the definitions proposed should be further clarified in order to avoid creating significant loopholes, notably in respect to (i) benchmark trades – Article 2(a) RTS 8, (ii) portfolio trades – Article 2(b) RTS 8, and (iii) delta neutral trades – Article 2(c) RTS 8.

In order to ensure that the spirit of the text is respected, and therefore to close the above loophole, the definitions of these three types of trades should be further clarified. It should distinguish between:

(i) the portfolio and delta neutral overall operations and the individual components of these operations

(ii) benchmark transactions, either:

   a. A transaction whereby the price is derived over a period of time from post-trade prices of already executed trades or
   b. A transaction constituted by several dissociable and substitutable components which, when or if individually sent to regulated market(s), MTF(s) or systematic internaliser(s) for execution, do not or may not represent the initial interest in its entirety.

Firstly, a benchmark trade executed at a price that is derived over already published post-trade prices should fall under the exemption for non-price forming trades executed under the NDW.

Secondly, only in its entirety should a benchmark portfolio or delta neutral transaction be allowed to be effected under the NDW as non-price forming trades or OTC as an exemption to the share trading mandate. The individual components (i.e. trades) of these operations (other than those derived from already published post-trade prices) are price-forming and therefore should not take place under the NDW as non-price forming trades.

With this distinction, the conduct of benchmark, portfolio and delta neutral operations will still be possible (by enabling the operation to be considered, as a whole, as executable as non-price forming under the relevant part of the NDW) whilst protecting the price formation process by ensuring that the individual components (trades) necessary to execute the overall operation are executed with pre-trade transparency where relevant (unless meeting criteria to avail of other waivers, for example large-in-scale).

In addition, and in order to close any loopholes, we suggest totally aligning the definition of transactions not subject to current market prices under the systematic internaliser regime with those retained for the purpose of the trading mandate exemptions. Otherwise, the risk is to observe a growth of dark trading under the SI category, as the definition currently provided in 241 is much broader than that proposed for the purpose of the trading mandate.

Last, in order to avoid lack of clarity, we suggest encompassing all technical trades (which are non-price forming in their nature) within the non-price forming trade category in Table 2, which will facilitate flagging (as the distinction between technical vs. non-price forming trades may be difficult, precisely due to the non-price forming character of technical trades), we suggest retaining the 'T' technical trade flag and to delete the 'G' non-price forming trade flag, in order to fully align the definition and flagging of non-price forming trades whether executed under the NDW or an OTC basis.

Amendment proposal

RTS 8

Recital 2-bis

Whilst in its entirety, a benchmark, portfolio or delta neutral trade shall be allowed to be executed on an OTC basis or under the Negotiated Deal Waiver as non-price forming, the individual components (individual trades) necessary to the execution of those benchmark (other than those derived from already published post-trade prices), portfolio and delta neutral ~~this~~ trades shall fall within the trading mandate and be executed on pre-trade transparent venues, as they are price-forming, unless meeting the eligibility criteria for other pre-trade transparency waivers due to their size or intrinsic characteristics.

Article 2 – Transactions not contributing to the price discovery process

1. (…)
   (a) the transaction is executed in reference to a price that is calculated over multiple time instances according to a given benchmark, such as volume-weighted average price or time-weighted average price **where the transaction is either based on (i) a price derived over a period of time from post-trade prices of already executed trades or (ii) a transaction constituted by several non-dissociable and non-substitutable components which, when or if individually sent to regulated market(s), MTF(s) or systematic internaliser(s) for execution, do not or may not represent the initial interest in its entirety;**
   (b) the transaction is part of a portfolio trade that involves the execution of 10 or more shares from the same client and at the same time and the single components of the trade are ~~meant to be~~ executed only as single lot and **the trade is constituted by several non-dissociable and non-substitutable components which, when individually sent to a pre-trade transparent execution venue for execution, do not represent the initial interest in its entirety**;
   (c) the transaction is contingent to a derivative contract having the same underlying and where all the components of the trade are meant to be executed only as a single lot**, and is constituted by several non-dissociable and non-substitutable components which, when individually sent to a pre-trade transparent execution venue for execution, do not represent the initial interest in its entirety**;

Table 2

List of flags for the purpose of post-trade transparency

Flag	Name	Type of execution venue	Definition
'B'	Benchmark trade	RM, MTF, OTC	Transactions executed in reference to a price that is calculated over multiple time instances according to a given benchmark **and is either (i) a transaction whereby the price is derived over a period of time from post-trade prices of already executed**

			trades or (ii) a transaction constituted by several non-dissociable and non-substitutable components which, when or if individually sent to regulated market(s), MTF(s) or systematic internaliser(s) for execution, do not or may not represent the initial interest in its entirety
'X'	Agency cross trade	RM, MTF, ~~OTC~~	Transactions where an investment firm has brought together clients' orders with the purchase and sale conducted as one transaction and involving the same volume and price.
~~**'G'**~~	~~**Non-price forming trades**~~	~~**RM, MTF**~~	~~**All types of transactions listed under Article 2 of this Regulation and which do not contribute to the price formation.**~~

<ESMA_QUESTION_CP_MIFID_48>

Q49. Do you agree with the proposed list of information that trading venues and investment firms shall made public? Please provide reasons for your answers.

<ESMA_QUESTION_CP_MIFID_49>

FESE asks ESMA for its reasoning not to include the "Trade identification ID/Trade Identifiers" requirement in this section. We consider these identifiers as:

- A standard piece of information provided on each trade report made available to the public by most trading venues; and,
- Guarantee the uniqueness of trade report and avoids any duplicative processing of the same transaction.
- Enable the tracking of trade cancellation with the corresponding original trade.

Moreover, the requirement to include these identifiers were explicitly stated by the regulator in the CESR Technical Advice document CESR/10-882: *"Cancellations …should be published with a "C"… together with the unique transaction identifier of the original transaction…"*

We consider that the bundling of the proprietary trade ID generated by trading venues with a **MIC code** is a cost efficient way of consolidating the information, while also guaranteeing the uniqueness of trade reports and the consistent automation of trade cancellations. The assignment of the MIC code can under circumstances be processed at CTP/vendor level provided the data source is properly identified.

With regard to Q141 on content of information published by the equity CTP and the APA, ESMA requires the CTP to assign a trade ID that is unique at least for a given day. In cases where trading venues do not deliver their own unique trade ID to the CTP, it is technically impossible for the CTP to assign a consistent/reliable unique trade ID and furthermore technically impossible to chain trade cancellations with the original trade.

FESE recommends that ESMA adds the identifier “***viii. Trade ID”***. This would support the uniqueness of the trade identification at least within the same venue, The Trade ID supports the machine-readable cross reference of trade cancellation with the corresponding original trade. Bundling venues specific Trade ID and MIC codes would enable CTP and data vendors to guarantee uniqueness in an unambiguous manner. Current data vendors have strongly insisted on the value-added of getting Trade ID in each trade message they capture and process.

FESE supports that the identity of the SI platform is made public.
<ESMA_QUESTION_CP_MIFID_49>

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.

<ESMA_QUESTION_CP_MIFID_50>
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<ESMA_QUESTION_CP_MIFID_50>

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.

<ESMA_QUESTION_CP_MIFID_51>
FESE supports the fact that ESMA has taken into account the work of the Market Model Typology (MMT). However, we are concerned with the proposed “L” flag for LIS orders. LIS orders allow brokers to use lit order book liquidity for block trade execution but ~~as~~ we consider that flagging such trades will can potentially harm the price formation process by shifting LIS orders away from lit order books towards either dark pool or negotiated trade executions. Moreover, given ESMA’s decision to keep stubs hidden the ‘L’ flag would reveal the trading intentions behind these stubs to the market. We therefore recommend to remove the proposed “L” flag for trades originating from LIS orders.

In addition, we believe the post-trade transparency flags should only be used to indicate different types of transactions executed, and not different types of orders, as only one side of the trade may have been executed under the LIS waiver it may overstate the prevalence of large in scale trading and could be confusing for the market. We therefore recommend removing the proposed “L” flag for trades originating from LIS orders. Please note that we do however support the publication of a post-trade flag for large trades which have been deferred as permitted under Article 7 of the Directive.

We would like to pinpoint the fact that trade flags “T” and “G” have the same definition. In order to avoid overlapping usage of different codes in order to respect the data management rule of mutual exclusivity of trade categorization. We suggest to keep “T” as it was already available in previous CESR/10-882 document.

Regarding the ‘H’ flag we note that there was no such inclusion of this flag in the original discussion paper in May 2014 (see ESMA comment Nr 15 on p. 81).ESMA has not justified the use of this trade flag for post-trade market transparency, considering that a large variety of individual proprietary algorithmic order flags will be transformed into generic algorithmic flag on the public trade message. We consider that the algorithmic trade flag will lead to an ambiguous count of the algorithmic trades. As soon as one side of the executed trade originates from an algorithmic order, the entire trade will be flagged as algorithmic, even if the counterparty originates from a private retail investor. Therefore, we propose deletion of the ‘H’ trade flag.

In addition we would like to stress the overall principle that it should be the overall responsibility of members to inform venues of the relevant flag applicable to each trade.
<ESMA_QUESTION_CP_MIFID_51>

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.

<ESMA_QUESTION_CP_MIFID_52>
FESE agrees with the definition of ‘normal trading hours’ for market operators as set out in the RTS (i.e. ‘those hours which the trading venue or investment firm establishes in advance and makes public as trading hours’). However, we believe that for OTC, normal trading hours should be considered as the hours applicable to the market where the concerned instrument is primarily admitted to. We do not think it should be the most relevant market in terms of liquidity as the primary market is overall more consistent and causes less uncertainty while the latter venue may change over time. The primary market should be defined as the venue of first listing. Where a security is admitted to more than one market at its initial listing, the country of incorporation of the issuer should be used to determine the primary market.

FESE consider that for specific transactions, such as portfolio trades, no longer delays should be provided as that would be inconsistent with the goals of MiFID II. Moreover, this issue has already been appropriately addressed by the change in Art. 17 of the respective RTS to as “as soon as technically possible”.
<ESMA_QUESTION_CP_MIFID_52>

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.

<ESMA_QUESTION_CP_MIFID_53>
For equity, FESE considers that publication and reporting should be required for all transactions irrespective of their characteristics, in order to have the broadest visibility as possible over the types of transactions conducted in the EU, while still recognising the ESMA is willing to reduce ‘noise’. For shares the use of adapted flags will be sufficient to enable the market to distinguish between price-forming transactions and others. As such, these

transactions should be reported under the technical trade category as per Table 2, Annex 1 of RTS 8.
<ESMA_QUESTION_CP_MIFID_53>

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.

<ESMA_QUESTION_CP_MIFID_54>
We agree with the proposed classes and thresholds and welcome the decision to require the publication of transactions before the beginning of the next trading day, where appropriate.
<ESMA_QUESTION_CP_MIFID_54>

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.

<ESMA_QUESTION_CP_MIFID_55>
FESE does not agree with the proposed classes and thresholds for LIS transactions based on the same reasons as included in our answer to Q42. FESE prefers a less complex model similar to ESMA's proposed Option 2. Although Option 2 offers a simple and easy-to-implement solution to achieve post-trade transparency, we are convinced that the specific characteristics of the ETF market, such as the additional layer of liquidity available to market makers through the creation/redemption process, allow for higher thresholds than the single €5 million threshold proposed by ESMA in Option 2. Therefore, we propose to ESMA to consider a multiple threshold model based on the size of the transaction. The advantage of this proposal would be that ESMA could define separate thresholds for imminent, delayed and end-of-day reporting of ETF transactions and hence increase transparency over the single threshold model proposed in Option 2.

FESE suggests requiring imminent publication of all transactions with a size below €10 million, permit a 60 minutes delay for transactions with a size between €10 million and €50 million and permit an EOD publication for transactions with a size of €50 million and above.

We believe that with this proposal a well-balanced reporting regime could be reached that is in line with ESMA's objective to provide meaningful post-trade transparency for ETFs.

Proposed amendment to Article 15 (2) of Draft RTS 8:
In order to determine the relevant minimum qualifying size for the purposes of point (b) of paragraph 1, all shares, depositary receipts, certificates and other similar financial instruments shall be classified in accordance with their average daily turnover to be calculated in accordance with Article 8.

Proposed amendment to Table 6 in Annex II of Draft RTS 8:

Table 6
Deferred publication thresholds and delays
ETFs

The table below shows, for each permitted delay for publication, the minimum qualifying size of transaction that will qualify for that delay in respect of an ETF of that type.

Minimum qualifying size of transaction for permitted delay in EUR	**Timing of publication**
10 000 000 ~~≤Transaction Size ≤ 50 000 000~~	60 minutes
~~>~~50 000 000	End of the day

<ESMA_QUESTION_CP_MIFID_55>

Q56. Do you agree with the proposed classes and thresholds for large in scale transactions in certificates? Please provide reasons for your answers

<ESMA_QUESTION_CP_MIFID_56>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_56>

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.**

<ESMA_QUESTION_CP_MIFID_57>
In general, FESE strongly supports the use of the COFIA approach and the benefits that it would bring to market participants, including operators of trading venues, investment firms, national competent authorities.

The rules should regulate how bonds that have another denomination than Euro are to be converted into a euro-equivalent value in order to define whether a bond is liquid or not. One solution might be to use the same method as is used for calculating ADT for equity in order not to have too many different calculation methods. Please see below our response to the detailed sub questions:

(1) Qualitative criteria to define sub classes
We support the proposed parameters, especially the use of issue size (and only that criteria) as the variable determining liquidity in a particular bond. We have consistently argued against

the alternative IBIA model to use historical trade activity as a proxy for future liquidity. Under such an approach, historical information would still be an estimate of future liquidity and, especially in the case of new issued bonds, there would be a problem with the setting of liquidity standards. At the same time, given the likely fundamental changes the ESMA approach will lead to in the marketplace, and the possible misclassifications alluded to in the ESMA CP and highlighted below in our response, we would support an ongoing review of the outcomes in order to ensure that fixed income markets continue to function efficiently.

(2) Parameters and thresholds
We support the suggested parameters as an adequate proxy for assessing the liquidity in fixed income instruments.

(3) Classes declared as liquid
For senior corporate bonds non-financials we note that a significant part of bonds are classified as illiquid but trade above the liquidity thresholds (approx. 8%). FESE would therefore suggest lowering the threshold for corporate bonds to 300 EUR millions. This would allow capturing more of those liquid bonds which would wrongly fall into the illiquid category when using the current methodology and that would instead be included in the liquid one by lowering the thresholds.

In addition, current evolutions in the market structure for fixed income instruments justify lowering the thresholds. We understand that ESMA has sought to calibrate the thresholds in order to find an appropriate balance between transparency and liquidity, more liquid bonds being granted higher levels of transparency. Currently, the rise of electronic trading for bonds means that transactions will be smaller in size but also more numerous, thereby encouraging liquidity. Indeed, the market impact of a transaction in a given bond is measured against its issuance size, i.e. the smaller the transaction, the less of the available tradable quantity is exchanged, the smaller the market impact. Therefore, smaller transactions mean that bonds with lower issuance sizes can be made eligible to the transparency framework in MiFID II without any risk of harming liquidity.
<ESMA_QUESTION_CP_MIFID_57>

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.

<ESMA_QUESTION_CP_MIFID_58>
In principle, FESE agrees with the proposed definitions of bond classes which appear fairly accurate and easy to apply.

However, it is not clear who is responsible for determining which category an instrument belongs to and FESE would like to suggest that the responsibility to apply the different categories should lie with the issuer to achieve an equal treatment of an individual bond independent of the trading venue and the individual SI. This information should be made available in the initial prospectus or admission document, and it can then be made public to the market through the admissions notice issued once it is admitted to trading

We understood from ESMA at the Open Hearing on 19 Feb 2015, that this is addressed in section 8 of the consultation on Supplying Financial Instrument Reference Data (RTS 22) and that it will be the responsibility of the trading venue. However, we believe this is not the case. While trading venues and SIs will be responsible for submitting reference data to the NCA, this data is taken from the admission document/prospectus that has been submitted by the issuer. This is really an administrative data entry exercise; in our experience the trading venue is not responsible for determining or making a decision on the specific data. Therefore, we feel this provision does not clarify who is actually responsible for classifying what category each bond

falls under in the COFIA approach and as mentioned above, we believe it should be stated that the issuer should set it out in its prospectus/admission document in consultation with its own advisors.
<ESMA_QUESTION_CP_MIFID_58>

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.**

<ESMA_QUESTION_CP_MIFID_59>
FESE agrees with ESMA's assessment that that all securitised derivatives should be considered as liquid. FESE also agrees with ESMA's proposal for the definition of a liquid market for securitised derivatives with regards to ETCs and ETNs.
<ESMA_QUESTION_CP_MIFID_59>

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.

<ESMA_QUESTION_CP_MIFID_60>
FESE agrees with ESMA's proposal for the definition of a liquid market for securitised derivatives, but would like to point out that Exchange Traded Commodities (ETCs) and Exchange Traded Notes (ETNs) have similar characteristics to those of Exchange Traded Funds (ETFs). Therefore we suggest considering ETCs and ETNs as similar financial instruments to ETFs within this regulation and applying the same set of rules whenever possible.
<ESMA_QUESTION_CP_MIFID_60>

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.

<ESMA_QUESTION_CP_MIFID_61>
FESE is concerned about the approach pursued by ESMA. While in OTC derivatives every step towards transparency is welcomed, the attempts in specifying liquidity and resulting thresholds for exchange traded derivatives (ETDs) are viewed more critical.

ETDs already are characterized by high pre- and post-trade transparency, by providing price, size and depth towards the market. Also trade reporting is close to real time, or with sufficient delay to capture market needs, but never later than after the end-of-day batch run of 'T'.

While the legislative goal is fully supported, the conversion steps proposed by ESMA are of concern, when focusing on ETDs specifically. It needs to be acknowledged that liquidity formation in ETDs is different and exchanges have put frameworks, rules and processes in place, in order to create and support a public order book. The very first step hereby is to introduce 'mature' products to a central clearing environment. The dynamic procedure established under the discretion of exchanges ensures that product specific steps are taken, when attracting formerly bilaterally traded products into a multilateral clearing and trading environment.

Accordingly, exchanges (and clearing houses) adjust pre- and post-trade transparency parameters like block sizes and forms of deferred publication sizes along the product lifecycle with the ultimate goal to concentrate liquidity formation in the public central limit order book. Therefore, in the early stage of the product life-cycle block sizes are kept on low levels to compete with OTC traded markets. In more mature stages of the product life-cycle block sizes are increased, when the market has moved to central clearing and liquidity providers support the transparent public central limit order book.

Liquid market
FESE cannot agree with ESMA's proposal for the definition of a liquid market, specifically for interest rate derivatives. The initial approach to define liquid market with criteria like (i) average trades per day and (ii) average notional amount is applicable but the thresholds have to be changed for Bond Futures.

Regarding the sub-question 61 (1) the sub-class "time to maturity" in Bond Futures makes sense and can be supported.

Bond Futures are only liquid (please see in this context thresholds in answer 61 (2)) in one of the three listed contract months i.e. in the front-month of the futures product. The first back month is starting to trade approximately two weeks before expiration of the front-month. Six days before expiration of the front month the back month contract is traded actively and can be perceived as liquid. To summarize, in most bond futures the front-month futures contract is liquid but not the two back-month futures contracts. The sub-classes should consider this important aspect consistently throughout the analysis.

Regarding sub-question 61(2) as mentioned above the defined parameters/ criteria seem appropriate, but the thresholds are not applicable for listed exchange traded bond futures. As Bond futures are highly standardized products designed to concentrate volume into one product, thresholds of one trade per day and 5mn notional amount on average are too low. Exchange traded bond futures with 1 trade per day and 50 contracts traded on average (5mn= 50*100,000EUR contract value) can only be perceived as illiquid in the light of transparency.

Market perception is that a liquid ETD in the sense of transparency must have at least 2.000 trades per day and reach a daily notional amount of EUR 1bn. This benchmark shall be applied by ESMA, in order to determine a list of liquid instruments.

Regarding sub-question 61 (3) table 10 only marks those products as “illiquid” which have no trading volume at all (= 0 contracts per day). If only a small amount is traded the product is according to ESMA’s threshold definitions automatically liquid. This very generic and rough approach chosen by ESMA does not take into account the large differences in the level of liquidity within bond futures, and does not reflect market reality. Again, liquidity for the purpose of trading obligation obviously is satisfied, because the instruments are traded on exchange, but this does not qualify them to be liquid enough for any unrefined thresholds for transparency.

Although ideally an IBIA approach should have been chosen, overall the granularity of COFIA used for interest rate derivatives can be supported, with the correction on maturities and other aspects described before.

Large in Scale / SSTI waivers
FESE does not fully support ESMA’s preferred option 2 to determine the large in scale waiver.

Even if ESMA should follow the recommendations made to previous questions, to apply higher thresholds to define the liquid class, to include a more refined granularity to COFIA for the determination of LIS or SSTI, the differences in the ADT of the various bond futures summarized within the classes liquid/illiquid are still too big or in other words, the class is not homogenous enough in terms of ADT. As a consequence the thresholds of LIS and SSTI have to be different. For example, whereas 10-year Bund futures trade 700,000 contracts on a daily average and 10-year BTP futures are trading 80,000 contracts on a daily average. The different level of liquidity is reflected in a different level of existing exchange block trade levels (similar to the envisaged LIS). Depending on the liquidity of the order book, the market impact a large order could have is very different.

Taking as an example existing exchange block trade levels on Eurex, Bund Futures order book is 6 times more liquid than the OAT Futures. Thus, the orders having a significant market impact in the order book are also higher. Example existing levels Bund Futures: 2000 contracts (equals a notional of EUR 200mn) and OAT Futures: 250 contracts equal a notional of EUR 25mn.

In addition, by defining LIS and SSTI for Bond Futures the maturity of the derivatives and their underlying products is decisive. 2-year bond futures are trading in a higher clip size than 5-year or 10-year bond futures. Consequently, LIS and SSTI have to consider this aspect and set the levels accordingly.

So, either the liquidity approach used in options 2 must be revised to define liquidity on a more granular level and take the different maturity/ trade sizes into account or option 1 should be used (ADT) and IBIA should be applied for determining LIS and SSTI.

But clearly, it needs to be clarified that setting the SSTI at 50% of LIS is exaggerated. Ideally it is the same level, but if amendments have to be made, 95 % of the LIS shall be the level applicable to SSTI.

Liquidity is formed differently for futures and for options, and certainly for the OTC derivatives captured in this chapter. The goal should be to implement Level 1 in a prudent way that does not diminish the high transparency levels already achieved by exchanges in ETDs. The all-encompassing objective of exchanges is to develop instruments and create readiness for liquidity formation in a public order-book. Thresholds for transparency levels are dynamically addressed, taking into account the nature of the products. In order to ensure the overall goal, it is recommended to consider the approach of exchanges and to also look into the order-books of exchanges.

Regarding the liquidity in instrument types, futures are mostly front-month traded instruments, with the exception of money market, dividend and volatility derivatives. Futures predominantly trade in electronic order-books. Options trading interest is spread out in the dimensions call/put, strike and expiration. In addition, in index options, most options volume trades as multi-leg options strategy. Fragmented liquidity and trading bespoke option and option strategies leads to a higher level of voice negotiation. This can result in qualitative adjustments to block trade sizes to remain attractive against OTC alternatives of bilaterally trading exchange listed look-alikes.

Before the legislator determined that ESMA shall specify large-in-scale, exchanges have facilitated various markets in reaching the next step towards more transparency.
<ESMA_QUESTION_CP_MIFID_61>

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.

<ESMA_QUESTION_CP_MIFID_62>
FESE would like to propose amendments to the proposals in Annex III Draft RTS 9 Section 4 interest rate derivatives Table 5.

As already mentioned in answer Q61 above a differentiation into bond futures with "time to maturity" equal or up to 3months and bond futures with "time to maturity" greater than 3 months is required for each bond futures product listed in table 5.

A new differentiation and analysis shall be performed, based on the logic provided above and shall be compiled in Annex [NEW].

Also in connection with and the background provided in the answer to Q61 several bond futures listed in table 5 are categorized as 'liquid classes' and would have to be transferred into the class "Bond Futures – Classes not having a liquid market" based on evaluations based on the logic provided in the question above.

Moreover, due to the high standardization of these products, liquidity thresholds have to be set higher according to the methodology proposed on market practice above. As logical consequence, the higher thresholds will change the allocation of the existing bond futures into liquid and illiquid classes.

Other points of recommendation for ESMA would be to reconsider Swapnote Futures because strictly speaking these cannot be perceived as bond futures. As more futures based on swaps are about to be listed, it might make sense to generate an own class for it.

In addition, it is recommended to change the terminology from 'Interest Rate futures' listed in table 7 into 'short term interest rate futures' or so-called 'Money Market Futures'.
<ESMA_QUESTION_CP_MIFID_62>

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.

<ESMA_QUESTION_CP_MIFID_63>
FESE is concerned about the approach pursued by ESMA for equity derivatives. While in OTC derivatives every step towards transparency is welcomed, the attempts in specifying liquidity and resulting thresholds for exchange traded derivatives (ETDs) are viewed more critical.

As starting point, FESE supports Option 2 as presented by ESMA. We believe that MiFIR pre-trade and post-trade transparency obligations should be extended to all equity derivatives instruments available for trading on a trading venue irrespective of the time to maturity. Exchanges currently operate markets in the majority of sub-classes listed in durations longer than 6 months, therefore to ensure liquidity is not impaired as an unintended consequence of obligations we believe instruments on trading venues with duration of longer than 6 months should also be regarded as liquid classes.

ETDs already are characterized by high pre- and post-trade transparency, by providing price, size and depth towards the market, and trade reporting close to real time, or with sufficient delay to capture market needs, but never later than after the end-of-day batch run of 'T'. Therefore, we urge ESMA to adapt an approach in line with the assessments made by exchanges for ETDs.

Given that the liquidity formation in ETDs is different, ESMA must put frameworks, rules and processes in place, in order to create and support a public order book. In order to achieve this we recommend that ESMA considers further granularity for both stock and index derivatives. We also recommend ESMA to introduce as a liquidity criteria, a floor level for the ADT each product class.
<ESMA_QUESTION_CP_MIFID_63>

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.

<ESMA_QUESTION_CP_MIFID_64>
Please find below the specific answer to ESMA's questions:

(1) Alternative proposal
FESE is concerned about the approach pursued by ESMA for equity derivatives. While in OTC derivatives every step towards transparency is welcomed, the attempts in specifying liquidity and resulting thresholds for exchange traded derivatives (ETDs) are viewed more critical.

FESE supports Option 2 as this proposal sets the grounds to preserve current levels of transparency. However, it should be noted that it may result in some product classes or maturities to be considered liquid irrespective of actually fulfilling any of the criteria defined on level I text.

(2) Qualitative criteria
We recommend that ESMA considers further granularity for both stock and index derivatives and defines liquidity on sub-classes level where the criteria for defining a sub-class is the underlying of the derivative instrument.

Furthermore, for the sub-classes ‘options on other underlying values’ and ‘futures on other underlying values’, the term other is too broad and could lead to less transparency than today. As stated in our response to Q63, we consider that there should be further granularity as follows:

i. Options on ETFs
ii. Futures on volatility indices
iii. Futures on ETFs
iv. Options on volatility indices

In Europe markets in these sub-classes are available today in a transparent form. This would allow consistency with the RTS, where these sub-classes can be considered liquid and the ‘other’ category reserved for illiquid classes.

(3) Parameters and thresholds
FESE suggest to consider as a parameter to define a sub-class as liquid, its ADT by introducing floor levels for each product class.

Furthermore, it should be mentioned that because of varying levels in liquidity of the underlying, potentially, a number of tailored levels would be acknowledging the reality of the actual liquidity.

In essence, ESMA ultimately needs to analyse what the market impact would mean for the order book and define a size. It is strongly recommended for ESMA to take into account pre-trade information available in order-books. In principle, market impact begins after the best bid and best offer. ESMA shall retrieve the information of the aggregated volume in the order-books after the best bid and best offer. Exchange traded derivatives volume is usually referred to in traded contracts (see description above), which is visible in the order-books. However, a simple computation into notional volumes is possible and will certainly render thresholds for market impact, thus the true LIS, for the products. If this is not pursued by ESMA to define the real LIS, then this approach should be taken as a benchmark to double check with the thresholds resulting from the more rough ESMA approach. The double check is especially recommended for illiquid products, like in options markets, where the sizes are often estimated too high by ESMA, in order for the order-books to be able to absorb the sizes in practice after the law is applicable. The damage to transparent exchange-traded derivatives could be substantial.
<ESMA_QUESTION_CP_MIFID_64>

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.

<ESMA_QUESTION_CP_MIFID_65>
As stated in our response to Q63 & 64, FESE strongly recommends to change the tables and to include more granularity in the RTS for equity derivatives.
<ESMA_QUESTION_CP_MIFID_65>

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.

<ESMA_QUESTION_CP_MIFID_66>
In principle, FESE supports the results that ESMA has proposed for commodity derivatives for metals. However, we are concerned with the overall methodology and the impact this may have on future calibrations of the liquid market definition. We consider that any deviations from the current proposals could have negative impacts on these markets.
<ESMA_QUESTION_CP_MIFID_66>

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.

<ESMA_QUESTION_CP_MIFID_67>
In its response to ESMA's 2014 MIFID II Discussion Paper, we noted ESMA's preference for the COFIA approach and observed that the disadvantage with that approach is that it could result in products being regarded as "homogenous" and thus being placed in the same category, regardless of the fact that the liquidity of those products differs significantly. We further observed that such differences would be masked by the application of an averaging process in the calibration of the transparency requirements. To the extent that the transparency requirements for a category as a whole would be set by reference to the nominal "average" product within the category, products which are significantly higher or lower than the nominal average would be subject to inappropriate transparency requirements.

This is precisely what has happened in the case of oil futures, all of which have been categorised into one of two sub-classes (i.e. "Oil up to 3 months" and "Oil greater than 3 months")[1]. Those categories include an extensive array of heterogeneous products, ranging from highly liquid benchmark products such as the Brent Futures Contract and a myriad of niche and nascent products which, by their very nature, are much less liquid. A much more granular categorisation process is necessary in order to conduct an appropriate liquidity assessment, similar to that which has been applied by ESMA in other sectors.

At a minimum, the sub-classes for oil should distinguish between the many different grades of both crude and refined products, different geographical regions, and different types of futures contracts (drawing an appropriate distinction between contracts based on a single underlying on the one hand, and those which are based on the price differential between two separate

[1] Table 23, page 137 of the ESMA Consultation Paper.

underlyings on the other (e.g. a crude product and a refined product). Specifically, the sub-classes should be constructed using the following elements:

- Crude or refined product
- Region
- Underlying reference rate/Price Reporting Agency reference rate
- Outright or differential contract
- Different types of differential contracts, e.g. spread and crack contracts.

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

In addition to the above comments, we have specific comments relating to the other Energy contracts.

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

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

Given the serious shortcomings with ESMA's methodology for calculating LIS and SSTI thresholds, we recommend that ESMA adopts a more appropriate methodology and collects pre-trade data from trading venues in order to apply that methodology.
<ESMA_QUESTION_CP_MIFID_67>

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.

<ESMA_QUESTION_CP_MIFID_68>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_68>

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.

<ESMA_QUESTION_CP_MIFID_69>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_69>

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

<ESMA_QUESTION_CP_MIFID_70>

Request for Quote (RFQs)

FESE supports ESMA's proposal. However, we would like to ask ESMA for more clarity on two issues:

(1) We understand that some systems are executable and others are indicative and we would like to have further clarification on what information to be published from RFQ systems that only produces indicative quote replies.

(2) Similarly, we would ask ESMA specifically to clarify what information is required to be made public from systems operating by displaying indicative quotes but not using RFQ-functionality.

Voice Trading Systems

FESE agrees to support the ESMA proposed definition of voice trading systems. We agree that the bids and offers (including volume) from any member or participant which, if accepted, would lead to a transaction in the system being made public on an "information only" basis. This approach acknowledges the need for voice system in the trading of particular derivatives, whilst requiring them to operate in a more transparent way than is the case today.

However, we ask ESMA for clarity that they are not proposing to restrict the use of the voice trading waiver by trading venues, and instead trading venues being forced to use the size specific waiver.

Trading venue type 6 and transparency

In principle, FESE believes that transparency should favour price formation, protect end clients and liquidity providers in their risk taking activity. These should be general principles that apply to any trading venue and therefore the resulting level of pre-trade transparency and its calibration should not differ in any significant way between type of venues for the same type of trades (e.g. size of trade) as to avoid the risk of unlevelled playing field among venues and more important non-harmonized levels of transparency for the market participants.

Based on the above concerns, FESE would like to highlight specific concerns for the Type 6 Trading Venue:

Trading system not covered by first 5 rows	A hybrid system falling into two or more of the first five rows or a system where the price determination process is of a different nature than that applicable to the types of system covered by first five rows.	Adequate information as to the level of orders or quotes and of trading interest; in particular, the five best bid and offer price levels and/or two-way quotes of each market maker in the instrument, ***if the characteristics of the price***

		discovery mechanism so permit

We consider that there is not enough clarity in the level and nature of the information to be made public compared to what is required from the first 5 trading venue types. Specifically the wording *"if the characteristics of the price discovery mechanism so permit"* leaves too many uncertainties on the outcome.

This leaves too much flexibility for defining trading venue types that do not immediately fall in the first categories and that could benefit from a less certain and clear pre-trade transparency regime and potentially leading to less transparency and unlevelled playing field with other type of venues.

FESE suggests that the text *"if the characteristics of the price discovery mechanism so permit"* is removed from the text for hybrid trading systems and therefore ensure that a pre-trade transparency regime is not bended to the specifics of a trading system but rather the opposite.
<ESMA_QUESTION_CP_MIFID_70>

Q71. Do you agree with ESMA's proposal with regard to the order management facilities waiver? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_71>
<u>For Fixed Income</u>
FESE agrees with ESMA's proposal.

<u>For Derivatives</u>
FESE does not agree with this proposal.

Reserve orders are used when the broker/trader believes that displaying the total size of the order can impact the price formation in the lit order book. This assessment will be made considering the order's size in relation to the instrument and asset class in question not in relation to all non-equity instruments. As such it's inappropriate to define a general threshold for all non-equity instruments.

Moreover, FESE disagrees with the proposed level and considers it extremely low compared to how equity derivatives products are currently traded. Considering the underlying purpose of using reserve/iceberg orders we fail in finding the logic for such a low threshold which would potentially lead to the extreme case where the vast majority of orders traded today with full pre-trade transparency could be submitted with a non-displayed reserve volume.
<ESMA_QUESTION_CP_MIFID_71>

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?

<ESMA_QUESTION_CP_MIFID_72>
<u>For Fixed Income</u>
FESE agrees that the SSTI thresholds should be the same for pre- and post-trade.

Although in principle FESE agrees with the proposed methodology, we would like to ask ESMA for more clarity with regard to the meaning of 'close to the price of the trading interest'.

<u>For Derivatives</u>
FESE believes it would not be appropriate to leave to the trading venue's discretion to define the calculation methodology as it could lead to a multitude of different methodologies being

implemented by various trading venues for the purpose of complying to the exact same pre-trade transparency requirement. This could result in confusion for market participants rather than providing certainty on how to interpret market data.

Instead, we suggest a general rule being defined in the RTS for request-for-quote and voice trading systems to publish as a reference price for an instrument, the volume weighted average spread of the best bid and offer coming from actionable indications of interest above a size specific to the instrument, but below the large in scale size. Such reference price is suggested to be calculated accordingly:

$$\frac{Best\ Bid\ Price \times Best\ Bid\ Volume + Best\ Ask\ Price \times Best\ Ask\ Volume}{Best\ Bid\ Volume + Best\ Ask\ Volume}$$

It is equally important an indicative price is shown when only a bid or offer is available, a formula must be adopted for this also.
<ESMA_QUESTION_CP_MIFID_72>

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.

<ESMA_QUESTION_CP_MIFID_73>

For Fixed Income

While we fully agree with ESMA that the information content of data generated in trading should be comparable with the information content in Transaction Reporting we would like to strictly point out, that the requirements for a real-time dissemination are based on latency as well as competition and that the feeds used for this are strictly optimized for this purpose. To the contrary Transaction Reporting t+1 has no need to being latency optimized.

We therefore deem it indispensable to point out that the third column “Format” in Annex II Table 1 in RTS 9 in relation to trading venues seem to go above ESMAs tasks for L1, as it implicitly requires the use of one protocol only, while dispending of those being applied as of today, like ITCH and OUCH would be absolutely disproportionate.

In addition to the fields already mentioned in RTS9 Annex I, settlement date should be required. A significant proportion of bond trades have another settlement date than spot, in particular those trades that are conducted outside the electronic trading systems. Without information on settlement date it will not be possible for market participants to calculate the yield for a trade. This calculation is necessary for the market when trading. Marking these trades using the “non-price forming trade flag” would not be sufficient as trades having deviating settlement cycle give information on future expectations on market rates. Yield is also vital for trading venues and competent authority to be able to perform proper market surveillance. A possible solution could be to require this only for bond trades that do not have standard settlement cycle, leaving it optional for trades having standard settlement cycle.

Also, as stated in our response to the Discussion Paper, we will support a non-discretionary regime for the identification of the Systematic Internaliser to the investment firms as we see no reason to differentiate between SIs and exchange venue transactions in reporting. The information value of trades is significant to the market, regardless of a trade nature as internalized or not.

For Derivatives

FESE does not support “date and time of publication” as an additional mandatory data field in the Annex II, Table 1 of RTS 9 and question the sense behind it. Time of the trade execution

or time of quote is the time which is important to publish to understand how “fresh” or “old” the data is. Furthermore, we do not see the necessity to add further data fields.
<ESMA_QUESTION_CP_MIFID_73>

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.

<ESMA_QUESTION_CP_MIFID_74>
FESE cannot agree with ESMA on the proposed set of flags for non-equity post-trade transparency and would like to suggest that ESMA liaises with the MMT Group on this issue.

We appreciate that ESMA sees value in the work of the Market Model Typology Group for the standardization of trade flags. While this has been a very successful Industry Initiative with many market participants already having implemented those standard flags already in their data feeds, we need to point out that the suggestion by ESMA might not be compatible with the MMT model for some asset classes. We deem that there currently might be an MMT coverage gap for different market models in the fixed-income and derivatives area. But this would need to be evaluated and analysed, which would require slightly more time.

The MMT trade flag model and logic originates from the plain vanilla equity area. MMT solution is by extension applicable to equity-like instruments. The type of market model is in fact much more relevant than the incorporation of individual financial instrument into one or the other asset class. Some major market operators have by the way already implemented the MMT tagging logic for trades on Fixed-income or structured product securities. As MMT cover their existing market model across multiple asset classes, there was no logical gap in the MMT coverage. All trade messages could therefore transport the appropriate MMT trade flag irrespective of the type of asset class categorisation.

However, for some non-equity asset classes we would need to conduct further analysis in order to ensure suitability. For the sake of EU harmonized standards we therefore strongly recommend to stick to the MMT model, and to liaise with the MMT Group as regards this issue.
<ESMA_QUESTION_CP_MIFID_74>

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.**

<ESMA_QUESTION_CP_MIFID_75>
<u>For Fixed Income</u>
FESE strongly supports the proposed implementation plan.

<u>For Derivatives</u>
FESE considers the approach to have one proposal for all derivatives is very limited and does not take into account the large diversity of market dynamics among different asset classes. Equity derivatives markets are highly automated in the execution with near-to real-time publication from the trading systems. The proposed delays are de-facto a step back and would allow trading activity to be conducted at less transparent conditions than today when it comes to post-trade publication. This can only be detrimental for the price discovery process and reduce overall transparency, thus negatively impacting end investors.

We agree with ESMA that the fundamental aim of these RTS should be to at least preserve the current levels of transparency as suggested by ESMA in 3.5 – 90 Liquid Markets (pp 132, CP). Therefore, while FESE agrees with the 5 minutes proposal, we believe that in circumstances in which real time transparency requirements apply, trade publication should take place as close to real time as possible. MIFID II should promote greater efficiency in the trade publication process and encourage an evolution away from manual processes to automated processes. Within that context, a 5 minute standard is appropriate with the clear timetable established for reducing it in order to achieve a standard which is closer to real time.

FESE would like to clarify that the flags required, have to be delivered only if the relevant aspect is applicable at the trading venue.
<ESMA_QUESTION_CP_MIFID_75>

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.

<ESMA_QUESTION_CP_MIFID_76>
FESE supports that securities financing transactions should be under the scope of these requirements. This activity is currently based on bilateral relationships and non-transparent and we consider that this legislation could be opportunity to bring transparency to this market.
<ESMA_QUESTION_CP_MIFID_76>

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.

<ESMA_QUESTION_CP_MIFID_77>
(1) Deferral period set to 48 hours
We do not support a 48 hours deferral, as that would mean we would see trades delayed and published continuously during a trading day, which could disturb the price formation. Delayed trades published continuously during normal trading hours could – even if these trades would be flagged as delayed – potentially still confuse some market participants, especially in fast markets.

We would rather see a daily fixed time for publication, i.e. EoD or beginning of T+2 trading day. We do realise that some markets operate more hours than morning to afternoon, but most markets do still operate inside normal hours and as such there would be no need for the 48 hours deferral for these markets. They could instead use a fixed time for publication of deferred information.

The fixed time approach is also used for the possibility to grant further deferrals by the NCA, where they instead ask for aggregated data prior to 9:00 CET every day – or on a specific day every week. As an alternative, we propose that a LIS deferral should be deferred until 9:00 CET on T+2 instead of 48 hours, or even a shorter time period.

We also note that in some markets, EoD or early next morning deferrals are standard practice and it would be contradictory to the intent of this regulation to introduce longer delays. This would lead to “less” transparency than is currently the case. Moreover, after 48 hours there is a risk to impact the accuracy of the data published.

FESE members are also concerned about the general waiver for illiquid bonds. We believe that there should be a lower threshold under which all trades should be published in real time and this should apply to illiquid instruments as well. The difference to trades in liquid instruments should be expressed by a lower threshold for LIS and SSTI for illiquid instruments.

(2) Size specific to the instrument threshold set as 50% of the large in scale threshold
FESE would agree to set the SSTI threshold at 50% of the LIS threshold provided that the latter is set at an appropriate level. As we point out in our response to point 5 below, we consider that the thresholds proposed for 2017 are rather low in the light of the transparency objectives embedded in the MiFID review.

We consider 50% as an appropriate percentage to operate RFQ and voice trading systems on regulated platforms. In the absence of a trading mandate for bonds, a threshold set at 50% of the LIS should allow regulated trading venues to provide a halfway house between pure OTC and fully transparent order book trading, thereby encouraging regulated electronic trading in the fixed income space.

(3) Volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
FESE agrees with these measures as they correspond to current market practice.

(4) Pre-trade and post-trade thresholds set at the same size
FESE agrees with it as it would ensure simplicity and clarity for market participants. If a transaction is pre-trade transparent, there is no reason why it should not be post-trade transparent as the trading interests have already been revealed to the market.

(5) Large in scale thresholds:
FESE strongly supports Option 2 as it will enable an annual recalculation of the thresholds based on accurate and comprehensive data from 2018 onwards. A dynamic system with recalculation will also make it possible to adapt the thresholds to global market conditions and the expected positive impact of MiFID II on fixed income markets.

We consider a yearly recalculation to be the most appropriate. A one-year period strikes the right balance between the need to timely adjust the thresholds and a clear and predictable framework that reacts to macroeconomic trends in the industry rather than to microeconomic events and volatility. Reviewing the thresholds every year will enable ESMA to let economic and market cycles unfold as well as take into account the broader life cycle of fixed income instruments. From an operational and technical point of view, annual recalculations are manageable for both platforms and market participants as they would allow to inform markets of threshold changes with sufficient notice. In addition, we note that the MiFID framework foresees a specific waiver from transparency to cope with unforeseen events causing sudden drops in liquidity.

Moreover, FESE agrees with the granularity of the classes on which the classes will be performed. We believe the COFIA approach based on the issuance size provides sufficient granularity while maintaining simplicity. The chosen level of granularity of classes will not cause operational implementation issues and can be easily read and understood by market participants.

In addition, FESE is fully supportive of the methodology chosen to recalculate the thresholds as it completely reflects the core objectives of MiFID, i.e. to bring more transparency to institutional fixed-income markets. Indeed, the chosen methodology will guarantee that at least 70% of volume or 90% of transactions are transparent, while keeping the 2017 figures as an absolute floor threshold.

Commenting on the thresholds proposed for 2017, FESE considers that they are rather low. In the current environment, retail markets are already transparent. On the pre-trade side, institutional investors are currently comfortable with posting transparent orders of on average €1.5 million in the corporate liquid bond market. Keeping in mind MiFID's objective to increase overall levels of transparency, setting the thresholds at €1.5 million for liquid corporate bonds would not bring about any material change to current levels of pre-trade transparency in bond markets.
<ESMA_QUESTION_CP_MIFID_77>

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)?

<ESMA_QUESTION_CP_MIFID_78>
FESE has strong reservations against the ESMA proposal. Although the general direction can be partially agreed with, the framework lacks the required substance applicable with market practice. Especially the approach chosen by exchanges and exchange traded derivatives ensures the highest level of transparency and this seems to be severely impaired by the ESMA proposals put forward. Also, the notion ESMA follows that the pre-trade LIS can be equal to the post trade LIS cannot be supported. Especially not in light of the proposed much lower SSTI levels that are computed for the pre-trade waivers.

Clear divergences between ESMA proposals current threshold levels

Regarding short term interest rate derivative instruments, FESE analysis has revealed major anomalies from the current market practices. The reason for these anomalies is the fact that the calibrations are based on post-trade data, which is not the primary set of data for current calculations. These are as follows:

Table 7

Underlying	ESMA proposed LIS	Current LIS
Three month euro (Euribor)	€ 10 million	€ 3 billion

Table 11

Underlying	ESMA proposed LIS	Current LIS
Three month euro (Euribor)	€ 15 billion	€ 3 billion

This example shows that the proposed LIS threshold (Table 7) is significantly smaller than the current levels which will reduce overall levels of transparency, while the LIS threshold on the Option (Table 11) is so large that it will reduce on-exchange trading volumes in this product.

(1) Deferral period set to 48 hours

Regarding point (1) a deferral period of 48 hours will not be acceptable for bond futures products as market participants are accustomed to a high degree of transparency. In bond futures for example there are no forms of deferrals (=LIS for Post trade transparency) trades allowed as the majority of market participants were completely against it. If deferrals are allowed than 24 hours would be an appropriate level.

To provide a more appropriate example, Eurex allows a form of deferred publication, also known as non-disclosure, mostly for equity options. In this case, non-disclosure is limited to a set of instruments. Furthermore, the intention at Eurex is to only allows this form of deferred publication in multiples of the block size. In addition, only a small fraction of the trading in block sizes is deferred under non-disclosure till after end-of-day, with reporting after the end-of-day batch run.

(2) Size specific to the instrument threshold set as 50% of the large in scale threshold

Regarding point (2) the relation is not applicable for bond futures. As the bond futures market is a highly standardized market with high degree of transparency the large in scale threshold for post trade transparency measures must be significantly higher than the size specific to instrument or pre-trade LIS.

(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

In respect to point (3) using the volume measure in general to determine the thresholds of LIS and SSTI seems appropriate. In addition, for bond futures it is important to take the different durations into account (see also below feedback on point (5)).

According to article 11 of the RTS9 FESE recommends to determine the LIS as the greater of 95% of all the transactions executed for this class instead of the 90%.

(4) Pre-trade and post-trade thresholds set at the same size

Furthermore, ESMA must consider that the characteristic of these markets and the various degrees of liquidity formation demand a dynamic approach to achieve the goal to attract products to the public central order book. Thus higher transparency thresholds often cannot be justified, because these would contradict the overarching goal to bring instruments onto a multilateral environment and damage transparency, because the order book cannot absorb such sizes and market participants will not be able to support such sizes.

In essence, ESMA ultimately needs to analyse what the market impact would mean for the order book and define a size. It is strongly recommended for ESMA to take into account pre-trade information available in order-books. In principle, market impact begins after the best bid and best offer. ESMA shall retrieve the information of the aggregated volume in the order-books after the best bid and best offer. Exchange traded derivatives volume is usually referred to in traded contracts, which is visible in the order-books. However, a simple computation into notional volumes is possible and will certainly render thresholds for market impact, thus the true LIS, for the products. If this is not pursued by ESMA to define the real LIS, then this approach should be taken as a benchmark to double check with the thresholds resulting from the more rough ESMA approach. The double check is especially recommended for illiquid products, like in options markets, where the sizes are often estimated too high by ESMA, in order for the order-books to be able to absorb the sizes in practice after the law is applicable. The damage to transparent exchange-traded derivatives could be substantial.

Concerning point (4): pre trade LIS and post trade LIS shall not be set at the same size, but shall be multiples of the pre trade LIS or SSTI. Multiples can be 5, 10 or even more, according to the liquidity profile. On a side note, the SSTI shall be defined as 95% of the pre-trade LIS, not 50%.

(5) Large in scale thresholds

In regards to point (5) the levels for LIS and SSTI set out too low in table 5 to a significant degree. These kinds of levels would endanger a liquid order book trading which in turn guarantees the high transparency of liquid ETDs.

As mentioned before, pre-trade LIS thresholds have to take the average trade size of the product into account. In bond futures the average trade size tends to be higher the smaller the duration of the respective bond futures contract is, i.e. 2-year Schatz Futures have a bigger trade sizes than 5-year Bobl Futures. Bobl Futures have a bigger trade size than 10-year Bund Futures etc. The trade size is proportional to the duration, i.e. Ceteris paribus 2-year Schatz Futures have a 4 times higher trade size than 10-year Bund futures. This rule of thumb has to be corrected by the factor of overall liquidity.

As ADT can change year on year, we consider that a yearly recalculation/check is preferable. As previously stated, levels should be set on an instrument by instrument approach mainly based on the ADT of the product and the level should be set at the trade size bigger than 95% of the order book trades.

In order to equip ESMA with an approach pursued by exchanges when determining potential deferrals, some important aspects and principles are enumerated below:

1. When thinking of deferrals, some similar approach is undertaken by exchanges today, called the non-disclosure levels. Non-disclosure thresholds are set as multiples of block trade thresholds. This is currently available for equity futures, equity options and select index products resulting in delayed reporting after the end-of-day batch run. These levels are critical from a trading and risk management perspective and must balance the interests of those involved and not involved in such trades. Such, deferred publication allows a market participant involved in very large trades to hedge and risk manage these and to provide this service. However, the size of such trades can impact price levels for the given instrument; hence the non-involved parties are interested in immediate publication to minimize their risk of mispricing.
2. In the past, a range of alternatives of objectives have been discussed with market participants:
   - 99.5 % of all trades should be disclosed
   - Only trades bigger than 5% of the average daily volume should be non-disclosed
   - Trades of sizes counting for less than 95% of all volumes should be disclosed
   - 10 times the Minimum Block Trade size should define non-disclosure
3. In equity options, Eurex has set the non-disclosure limits so that on an annual average of the top 5% of block trades are subject to deferred publication.

<ESMA_QUESTION_CP_MIFID_78>

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.

<ESMA_QUESTION_CP_MIFID_79>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_79>

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.

<ESMA_QUESTION_CP_MIFID_80>

(1) Deferral period set to 48 hours

FESE does not agree on the suggested deferral period of 48 hours for liquid standardised index, stock and stock dividend derivatives. A maximum deferral period longer than end-of the regular trading session is inappropriate as a liquidity provider is expected to have hedged its immediate risks associated with a trade during the same day and in the regular (most liquid) trading session.

Currently most of the exchange trades are shown immediately. Only for a smaller number of products non-publication for very large trades is sometimes applicable. The proposed steps here would limit the post-trade transparency dramatically in exchange traded derivatives, rather than increase it. In addition, the trades which are not directly disclosed are normally much higher than the Minimum Block trade size (i.e. Large-in-scale). In Equity options the non-publication levels are set in a way that approximately 99% of the traded volume is shown without deferral.

Deferred publication is already currently offered by most of the main exchanges for equity derivatives in Europe and the fact that no one offers a longer maximum deferral time than end-of-day or the following morning before trading begins. We consider it evident that giving NCAs the possibility to grant longer deferrals would only impact transparency negatively.

As to not contradict the principle of supporting current levels of transparency as expressed by ESMA in 3.5 – 90 (pp 132, CP) for defining liquid markets, FESE encourages ESMA to have a deferral period of end-of-day for all equity derivatives products.

(2) Size specific to the instrument threshold set as 50% of the large in scale threshold

The pre-trade LIS threshold will for regulated equity derivatives markets in practice correspond to the minimum block size threshold. I.e. the minimum size eligible for negotiated transactions (“block trades”) to be formalised by the trading venue and be waived from pre-trade transparency.

Since smaller sizes on negotiated transactions cannot be accepted by the regulated market (as they are not able to acquire a waiver for pre-trade transparency), the post-trade LIS threshold will correspond to the minimum size required for deferred publication of block trades on regulated markets.

Since the SSTI threshold however will decide whether a transaction concluded by an SI and its client outside of a trading venue is eligible for deferred publication, OTC transactions in standardised look-a-like derivatives between dealers and their clients will in general benefit from deferred publication at a 50% lower size than the corresponding transaction in an ETD on a regulated market.

This could actually incentivise dealers to trade sizes between the SSTI and the LIS thresholds OTC in order to avoid publishing the transaction to the public immediately. It appears to be an undesirable inconsistency which would counteract the general objectives of increased transparency in the MiFID II/MiFIR framework.

The alternative approach suggested by FESE is to set the threshold for SSTI equal to the LIS.

(3) Volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
The notional amount traded (contracts x size x strike/futures price) as volume measure makes sense and reasonable when comparing volumes across different strikes, maturities and underlying.

(4) Pre-trade and post-trade thresholds set at the same size
By setting the pre- and post-trade thresholds at the same size, ESMA implicitly states that all negotiated trades on trading venues would be eligible for deferral in asset classes where the NCA has approved deferred publication.

By comparing how current equity derivatives exchanges in Europe operate, we consider it evident that such approach would actually counteract the general objectives of increased transparency. In fact, currently the publication of block trades is deferred only on a small minority of volume, and for the largest transactions in size.

The reason is of course that most block trades are already properly hedged at the time of reporting to the exchange, so that a liquidity provider does not need to worry about moving the market if it needs to continue hedging the derivatives trade. E.g. an option's delta has been hedged immediately following, or simultaneously with the conclusion of the derivatives trade.
This is typically also the criteria exchanges use when deciding on thresholds for deferrals. I.e. at what size is it reasonable to expect that the liquidity provider reporting the transaction would need to continue hedging after reporting it to the exchange, and that the hedging process could be disrupted if the derivatives trade is published to the public immediately?

For this reason, the post trade thresholds should be set significantly higher than the pre-trade. This argument is strengthen by the fact that this is how the levels are currently implemented on the main derivatives exchanges in Europe. I.e. the threshold for deferred publication is set higher than the minimum block size. Typically, the average daily volume in underlying is considered when concluding reasonable thresholds for deferrals.

FESE is therefore proposing that:

- LIS = SSTI, both for pre- & post-trade transparency (or very close to); but
- $LIS/SSTI_{\text{Pre-trade}} < LIS/SSTI_{\text{Post-trade}}$; which would correspond to current practice of having
  - Minimum block trade size threshold < min size for deferrals.
  - This would result in ETD and SI regime OTC having same thresholds for pre- & post-trade transparency.

Furthermore, it should be mentioned that because of varying levels in liquidity of the underlying, potentially, a number of tailored levels would be acknowledging the reality of the actual liquidity.

In essence, ESMA ultimately needs to analyze what the market impact would mean for the order book and define a size. It is strongly recommended for ESMA to take into account pre-trade information available in order-books. In principle, market impact begins after the best bid and best offer. ESMA shall retrieve the information of the aggregated volume in the order-books after the best bid and best offer. Exchange traded derivatives volume is usually referred to in traded contracts (see description above), which is visible in the order-books. However, a simple computation into notional volumes is possible and will certainly render thresholds for market impact, thus the true LIS, for the products. If this is not pursued by ESMA to define the real LIS, then this approach should be taken as a benchmark to double check with the thresholds resulting from the more rough ESMA approach. The double check is especially recommended for illiquid products, like in options markets, where the sizes are often estimated too high by ESMA, in order for the order-books to be able to absorb the sizes in practice after the law is applicable. The damage to transparent exchange-traded derivatives could be substantial.

(5) Large in scale thresholds
FESE is concerned about the approach pursued by ESMA for equity derivatives. While in OTC derivatives every step towards transparency is welcomed, the attempts in specifying liquidity and resulting thresholds for exchange traded derivatives (ETDs) are viewed more critical.

The methodology completely ignores how transactions are concluded in the lit order book on a regulated market, that is – transactions are concluded by matching orders in full or in part. Also the complete order to either buy or sell an instrument isn't necessarily entered in full into the book at once. Instead the frequent usage of execution algorithms in futures markets naturally leads to many smaller transactions.

The result of this is that for derivatives such as index futures which are primarily traded in the lit order book, by only looking at transaction by transaction data, the methodology completely underestimate the size of the complete underlying orders resulting in the total volume traded. Everything else equal, a class containing one or several derivatives where lit order book trading is widely adopted, will typically see lower LIS levels than classes where most or all volume is negotiated outside of the LIT order book.

The approach currently chosen by exchanges and exchange traded derivatives ensures the highest level of transparency and this seems to be severely impaired by the ESMA proposals put forward. Exchanges are currently working on finding a workable solution for regulators to consider that will not harm the already existing level of transparency for ETDs. This approach includes using pre-trade data **as well as average daily turnover numbers** from EU venues to validate market activity and considering a floor and ceiling value for LIS. Exchanges are currently working on finding a workable solution for regulators to consider that will not harm the already existing level of transparency for ETDs. This approach includes using pre-trade data from EU venues to validate market activity and considering a floor and ceiling value for LIS. The floor value is motivated by the fact that liquid derivative classes have minimum market maker commitments and it's reasonable to anticipate that a minimum size can be traded in the LIT order book. The ceiling gives room for identifying a level where it's no longer possible to use average daily turnover in the derivative itself as an indication of liquidity available in the LIT order book, and where execution will be dependent on other factors such as possibility to hedge or combine instrument in a multi-leg trade.

<ESMA_QUESTION_CP_MIFID_80>

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.

<ESMA_QUESTION_CP_MIFID_81>

FESE would like to state that Exchange Traded Commodities (ETCs) and Exchange Traded Notes (ETNs) have similar characteristics to those of Exchange Traded Funds (ETFs). Therefore FESE suggests considering ETCs and ETNs as similar financial instruments to ETFs within this regulation. Consequently the same set of rules should apply whenever possible.

(1) Deferral period set to 48 hours

Therefore we do not agree with ESMA's proposal to set the maximum deferral period to 48 hours for ETCs and ETNs. Instead we suggest establishing the same post-trade transparency regime as is applied to ETFs. Referring to Option 2 of the proposed ETF deferred publication regime as detailed in Section 3.4 on page 91 of the CP, FESE proposes to set the maximum deferral period to the end of the trading day.

(2) Size specific to the instrument threshold

Given that there is no size specific to the instrument threshold for ETFs FESE proposes setting this threshold to 100% of the large in scale threshold for both ETCs and ETNs.

(3) Volume measure used to set the large in scale threshold

FESE agrees with the proposed volume measure used to set the large in scale threshold.

(4) Pre-trade and post-trade thresholds

To keep a level playing field between ETFs, ETCs and ETNs, FESE suggests applying the same pre-trade and post-trade thresholds for ETFs, ETCs and ETNs. Therefore we agree with ESMA's proposal and support that the single pre-trade transparency threshold should be set at a value of €1 million for both ETCs and ETNs.

With regards to post-trade transparency FESE also suggests requiring imminent publication of all transactions with a size below €10 million, permit a 60 minutes delay for transactions with a size between €10 million and €50 million and permit an EOD publication for transactions with a size of €50 million and above. We believe that with this proposal a well-balanced reporting regime could be reached that is well in line with ESMA's objective to provide meaningful post-trade transparency for ETFs and should therefore also apply to ETCs and ETNs.

(5) Large in scale thresholds

FESE does not agree with the proposed €100,000 threshold, but would prefer the same large in scale thresholds as proposed for ETFs in our responses to questions Q42 and Q55. Therefore we request requiring imminent publication of all transactions with a size below €10 million, permit a 60 minutes delay for transactions with a size between €10 million and €50 million and permit an EOD publication for transactions with a size of €50 million and above.

[Proposed amendment to Table 4 in Annex III of Draft RTS 9:

Table 4a

Pre-trade large in scale and size specific to instrument thresholds
Securitised derivatives – liquid classes

SECURITISED DERIVATIVES – LIQUID CLASSES	**Pre-trade LIS (€)**	**SSTI (€)**
Exchange Traded Commodities and Exchange Traded Notes	1,000,000	1,000,000
Other securitised derivatives	100,000	50,000

Table 4b

Deferred publication thresholds and delays
Securitised derivatives – liquid classes

SECURITISED DERIVATIVES – LIQUID CLASSES	**Minimum qualifying size of transaction for permitted delay in EUR**	**Timing of publication**
Exchange Traded Commodities and Exchange Traded Notes	10,000,000	60 minutes
Exchange Traded Commodities and Exchange Traded Notes	50,000,000	End of the day
Other securitised derivatives	100,000	48 hours

Proposed amendment to Table 47 in Annex III of Draft RTS 9:

Table 47

LIS threshold floors

CLASS OF FINANCIAL INSTRUMENT	LIS THRESHOLD FLOOR
…	…
SECURITISED DERIVATIVES	
Exchange Traded Commodities and Exchange Traded Notes (Pre-trade LIS threshold)	EUR 1,000,000
Exchange Traded Commodities and Exchange Traded Notes (Post-trade LIS threshold with 60 minutes maximum deferral period)	EUR 10,000,000
Exchange Traded Commodities and Exchange Traded Notes (Post-trade LIS threshold with EOD maximum deferral period)	EUR 50,000,000
Other securitised derivatives	EUR 100,000
…	…

<ESMA_QUESTION_CP_MIFID_81>

Q82. Do you agree with ESMA's proposal for emission allowances? Please specify if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

(1) deferral period set to 48 hours

(2) size specific to the instrument threshold set as 50% of the large in scale threshold

(3) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

(4) pre-trade and post-trade thresholds set at the same size

(5) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

<ESMA_QUESTION_CP_MIFID_82>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_82>

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

<ESMA_QUESTION_CP_MIFID_83>

For Fixed Income

FESE disagrees as this could lead to regulatory arbitrage. We also believe that an extended time period of deferral of 4 weeks is too long and we would rather suggest to set a shorter time frame, such as 1 or 2 weeks. A four week deferral would affect the quality of the information provided: after four weeks, the price provided would have a limited value to investors.

In addition, aggregated transaction prices do not reflect real size and price, and data is of lower quality to investors. In addition, we would like to ask ESMA for further clarity with regard to the aggregation of 'at least 5 transactions executed on same calendar day' and what the procedure is for when there are less than 5 transactions in a day. Lastly, we would like to reiterate that we would favour a fixed timing – as proposed in this case – also with regard to Q77

For Derivatives

FESE does not agree with the approach for exchange traded derivatives in scope of those proposals. The transparency levels provided by exchanges are the highest possible. Reporting is most meaningful in risk transfer markets close to real time. In certain exceptional circumstances exchanges today allow reporting end of day where the sizes are large.

There is a general concern that for highly liquid and transparent markets such as equity derivatives, different supplementary deferral regimes could be granted in different countries by the NCAs on the same product classes (e.g. German single stock options) offered for trading by different venues. In a fragmented landscape of derivative product, an NCA could allow real-time transparency (i.e. does not allow deferred publication at all) and another one could even grant an extended deferral period. Not requiring each NCA to adopt the same level of transparency for the same product could result in non-harmonized level of post-trade transparency for end investors, inefficient price discovery and potentially an unlevelled playing field among trading venues. The risk is further exacerbated when combining this with the extremely low LIS thresholds and the long deferral period (i.e. 48 hours) that are being proposed.

Allowing for longer arrangements as proposed by ESMA would undermine current levels of transparency and thus contradict the Level 1 mandate and the G20 goals. Deferrals should be allowed in a meaningful way, but they shall not be allowed to be substantially over 48 hours as proposed by ESMA. For sovereign debt, 1 week might be appropriate but for any other instrument it should not exceed 72 hours. In addition, any information should at least be reported end of day, until the extended period of deferral (48 to 72 hours) lapses.

Supplementary deferral regimes would go against any harmonization among the current EU regimes and combined with the other proposals (LIS, time of publication and deferral periods) would allow for an even more relaxed regime. Some of the negative aspects highlighted above could actually materialize even today but FESE believes that the intention of the transparency regime introduced with this regulation should be to improve the situation and eliminate such risks. FESE urges ESMA to consider and address these concerns by providing guidance to the NCAs on the application of supplementary regimes.

<ESMA_QUESTION_CP_MIFID_83>

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.

<ESMA_QUESTION_CP_MIFID_84>
FESE considers that it might be confusing to temporarily suspend instruments from transparency requirements or include them again and therefore would disagree. It is probably more adequate to determine liquidity in a more meaningful way, as proposed in alternative methodologies for interest rate and equity derivatives above. Furthermore, if instruments are characterized by extreme seasonality aspects, these cannot be considered liquid on a daily basis and should not receive LIS or SSTI sizes that are too high. While such instruments should fall under the trading obligation, these illiquid instruments shall benefit from more adequate LIS or SSTI levels.

FESE recommends that ESMA computes the adequate liquidity levels for instruments on a more granular COFIA approach to calibrate meaningful LIS thresholds to not run the risk of many temporary suspensions of transparency, because the levels cannot be adhered to.

Regarding the specific questions:

(1) We agree for derivatives classes
(2) We agree for derivatives classes. The point here has to be for the period to be short so when liquidity returns in seasonal products the suspension is lifted in a short timeframe
(3) We consider that in order to account for seasonal contracts, the percentage for derivatives should drop to 25% for liquid, and 10% for illiquid instruments for derivatives classes.

<ESMA_QUESTION_CP_MIFID_84>

Q85. Do you agree with ESMA's proposal with regard to the exemptions from transaprency requirements in respect of transactions executed by a member of the ESCB? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_85>
In FESE's opinion it needs to be made clear that electronic order books of regulated markets are already anonymous.

We consider that it is not necessary for a member of the ESCB to announce anything to the market operator and should not flag anything. In transaction reporting, the counterparty is made transparent towards the competent authority, but counterparty information is not included in trade reporting towards the market, only instrument related information, as well as price and size. Therefore, if trading venues are forced to omit information on trades and only report half trades, the market will derive that the counterparty must have been an ESCB member.

Thus, it is in the interest of the ESCB member, when using an anonymous public order book to not get flagged, so trade information like price and size is fully provided, otherwise the lack of the other half trade will provide a traceable hint as to the identity of the ESCB member being the counterparty when half trades are reported.

In the interest of the ESCB, the exemption is redundant for interaction in anonymous public order-books and not flagging the ESCB member is actually the desired goal and intention of the ESCB member and should not be insisted upon.

Since the obligation is on the trading venue to have procedures in place, it should be clear which classes of derivative may fall under this category. **We feel that this exemptions does provide added administrative burdens to the operation of trading venues so the procedure should be as clear as possible.**

<ESMA_QUESTION_CP_MIFID_85>

Q86. Do you agree with the articles on the double volume cap mechanism in the proposed draft RTS 10? Please provide reasons to support your answer.

<ESMA_QUESTION_CP_MIFID_86>

FESE does not fully agree with the content of RTS 10. We believe that ESMA should decide with regards to who should deliver the data, that is to say either the trading venues or a CTP as significant data amounts will need to be processed and using all sources at the same time is rather uneconomical. Given that it is unclear if there will be a CTP in future, we recommend that the trading venue should also submit this data. Therefore we recommend that ESMA adjusts the wording in Art. 6 or RTS 10 by adding a new point to it 1 (a) "Data as defined in the paragraphs below shall be made available to Competent Authorities either through trading venues **or** through a CTP." and consequently changes this where necessary by adjusting the word **and** to **or**.

1. **In case a** ~~A~~ trading venue shall submit to the competent authority for each financial instrument subject to the transparency requirements in Article 3 of MiFIR and for the period specified in paragraph 5 the following data:"

"2. **In case a** ~~A~~ CTP shall submit to the competent authority for each financial instrument which is subject to the transparency requirements in Article 3 of MiFIR and for the period specified in paragraph 5 the respective volumes referred to in paragraph 1."

"3. A trading venue ~~and~~ **or** a CTP shall determine the trading volumes executed in accordance with paragraph 1 by aggregating the volumes reported under the flags 'reference price' and **'negotiated transactions in liquid financial instruments'** in accordance with Table 2 of Annex I of Regulation (EU) No xx/xxxx [Equity transparency]."

"7. Notwithstanding paragraph 5, trading venues ~~and~~ **or** CTPs shall submit the first report on 3 January 2017 and include trading volumes from 3 January 2016 to 31 December 2016. For this purpose, trading venues ~~and~~ **or a** CTP shall report ~~separately~~, for each calendar month:"

This would then also be in alignment with Art. 7 of RTS 10 and Art. 8 or RTS 10 where the choice for ESMA between trading venues and CTP has already been taken into account with the appropriate wording of "or''.

For further comments on RTS 10 please refer to our answer in Q 87 below.

ESMA must also provide clarity on the issue of the submission of data to ESMA following a public holiday, and in fact should align the cut-off time with the usual mid and month end calculations i.e. 13.00CET on the first working day after the public holiday. Regarding the initial data gathering by ESMA, it must be noted that not all trading venues will be able to submit this data as of January 2016, therefore the initial figures that ESMA receives may appear artificially inflated. Furthermore, we have some concerns in relation to the tight timelines for the initial submission of full 2016 data by 3rd January 2017. Moreover, we would support that all data comes directly from trading venues or from CTPS in order to avoid confusion.

Additionally, we would appreciate further information and clarity on a number on the following points:

- We believe it would be beneficial to have information on how the suspension and resumption of these waivers will operate in practice. In particular, we are interested in how it will be achieved consistently across trading venues and jurisdictions. Additionally, it is not clear to us whether suspensions can result from the mid-month data request or if it is solely from the data submitted at the start of a month. In particular, when the 8% cap is breached, competent authorities have to suspend the use of the waiver within 2 days, however it is not clear how this will be harmonised or it could be possible that the waiver is suspended within different Member States on different days resulting in an un-level playing field.

The proposal mentions that conversions to Euro should be calculated using the ECB monthly average rate. However the RTS state that the End of Day conversion rate should be used. We would appreciate clarity on which rate should be used. Furthermore, we believe that in order to avoid the risk of inconsistent application, it would be more appropriate to use volume (i.e. the number of shares) as the metric for calculation for the cap mechanism, and not volume of trades multiplied by the price. This would be a simpler and more straight-forward approach and would avoid the issue of price and currency fluctuations.
<ESMA_QUESTION_CP_MIFID_86>

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

<ESMA_QUESTION_CP_MIFID_87>
FESE generally agrees with ESMAs proposal. However, we need to point out that in order to support ESMA in the best way possible ideally all data requests should be standardized so trading venues, APAs and CTPs would be able to implement hard-coded processes which would significantly reduce cost as well as speed up any data inquiry from Competent Authorities. It should be noted as well, that data deliveries within a rather short time frame, even if scheduled are otherwise difficult to achieve. Data deliveries in such tight time schedules as lined out in Art 6.5 or even more Art 6.8 can only be provided in case of standard process applications. Any manual work usually increases both cost and delivery times, as well as introduces potential errors into the process of data generation and submission, risking submission of unreliable data.

In order for trading venues, APAs and CTPs to be able to prepare in a timely fashion, ESMA should clarify the details of the requirements (including data fields and expected content) in due course taking into consideration planning and implementation times including necessary budget allocations. In this context we need to point out that we would appreciate as well a clarification of what exactly ESMA means with “type of market participant”. We would suggest differentiating between Agency and Proprietary firms. Furthermore, it must be absolutely clear, that requested data is allowed to be passed on to regulators. As regards formats of data submission to NCAs FESE would suggest CSV format.

In line with our arguments above we propose to complement the already suggested adaptions for RTS 10 lined out in our answer to Q 86 the following adaptions to RTS 10 are being suggested by FESE:

Art 3.1. A trading venue, APA and CTP shall submit **fully standardized** periodic reports to the competent authority at the times specified in the regulatory technical standards referred to in Articles 1 and as specified in Article 6 of this Regulation where those calculations occur at pre-set dates or in pre-defined frequencies.

Art 3.2. A trading venue, APA and CTP shall submit its response to ad hoc requests to the competent authority of its home Member State within four weeks of receipt of the initial request unless exceptional circumstances require a response within the shorter deadline specified in the request. **In case of non-standardized inquiries by the Competent Authority a trading venue, APA or CTP shall undertake all reasonable efforts to respond in the set time frame.**

Art 4 A competent authority shall request **according to a sufficiently pre-defined schedule** data in **a formats** ~~s~~ that is generally accepted and widely available in the market and, where appropriate, through the use of templates that facilitate an efficient and automated process of data delivery. **The data format shall be determined by ESMA and communicated to TV, CTPs and APAs at least 12 months in advance before the resumption of this regulation.**

Art 6.1 (new) Data as defined in the paragraphs below shall be made available to Competent Authorities either through trading venues and APAS or through a CTP.

Art 6.1. (b) **if applicable** the volume of trading executed under each reference price and negotiated trade waiver facility under Article 4(1)(a) or Article 4(1)(b)(i) of MiFIR separately.

Art 6.8. A trading venue and a CTP shall respond to any **standardized** ad hoc request on the volume of trading in relation to the calculation to be performed for monitoring the use of the reference price or negotiated trade waivers by close of business on the next working day following the request.
<ESMA_QUESTION_CP_MIFID_87>

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?

<ESMA_QUESTION_CP_MIFID_88>
FESE considers that ESMA should also take into account the liquidity in the underlying instrument for the derivative contract (e.g. for options this can be the cash underlying or the future depending on the product). Secondly, as a qualitative criterion ESMA should consider forward looking criteria. It should be understood when making a decision the effect for participants who cannot access today, whereas they will going forwards if subject to trading obligation.

Furthermore, it is our understanding that for bilateral trading two participants are necessary. For multilateral trading, where third party buying and selling interests are arranged, it is assumed that more than just the ‘same’ two would act with each other, hence at least three, since the operator of the trading venue is assumed to be neutral since ESMA specifically is addressing third-party buying and selling interests. If it is meant that a trade can only occur when at least two parties find each other on a multilateral trading platform, then the specified number of two in RTS 11 Article 4 (a) is appropriate. Otherwise this point in RTS 11 Article 4 (a) needs to be clarified so that ‘at least two participants’ are necessary on a platform that arranges third-party buying and selling interests.

Moreover, clarification is required in regards to spreads in RTS 11 Article 6. FESE would suggest to further specify RTS 11 Article 6(1)(b) by adding the aspect that the ‘notional’ volume weighted spreads shall be considered, while we would agree with the majority of market participants to the discussion paper (DP) last summer that determining meaningful spread information will be difficult and should only be considered where such meaningful information is available. Therefore we agree with the proposal in RTS 11 Article 6(2) that ‘ESMA shall consider using a proxy for the assessment of this criterion’.
<ESMA_QUESTION_CP_MIFID_88>

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

<ESMA_QUESTION_CP_MIFID_89>

General comment on Trading Obligation and lack of EMIR Clearing Obligation

With regards to the recital RTS 11 – paragraph (5), FESE reiterates the concern about the ability of this regulation to fulfil the G20 2009 Pittsburgh summit mandate that all standardized OTC derivative contract should be traded on exchanges or electronic trading platforms.

There is a loophole in the combined EMIR-MiFIR framework because of the MiFIR trading obligation's (TO) dependency to the EMIR clearing obligation (CO) and the current lack of an EMIR CO for standardized OTC equity derivatives classes.

Today in several regional markets, participants do internalize part of client flow and report them as on-exchange trades negotiated off-screen (effectively with pre-trade transparency being waived).

Such trades are conducted under the rules of the exchange, subject to surveillance, real-time publication by the exchange in the post-trade data and CCP cleared.

Under MiFIR transparency regime for liquid instrument, pre-trade transparency is waived only for trades that are Large in Scale (LIS) since for non-equities the regulation does not include any waiver for negotiated deals.

Going forward, for trades below LIS, participants are left with the alternative of trading with their clients OTC contracts that are equivalent to ETDs either as an SI (if they qualify for that) or purely OTC . This would result in deals being negotiated OTC on products that would be classified as OTC (under EMIR).

Such trades would therefore be conducted outside the exchange rules, not subject to surveillance and may or may not be CCP cleared - given that EMIR does not mandate central clearing for any OTC equity derivatives. This scenario would be very detrimental to the overall quality of the market, drive away liquidity from trading venues and potentially increase the size of bilateral exposure compared to current levels.

The result for the highly transparent equity derivatives market, there is now a concrete risk for MiFIR to suggest means that would incentivise trading OTC.

Overall approach proposed by ESMA

FESE supports the overall approach considered by ESMA in the application of the of the criteria and in addition recommends that ESMA includes also volumes from equivalent contracts traded OTC in order to assess whether a product is sufficiently liquid to trade only on venues. We also support:

- Introduction of an automatic EMIR CO on ETD look-a-likes to avoid the alternative of OTC trading in contracts equivalent to listed equity derivatives; or
- Ensure that under MiFIR, if an ETD is subject to the TO, it should not be possible to trade an equivalent contract OTC (i.e. impose a TO on OTC equivalents of ETDs)

The proposed RTS 11 Recital 1 correctly reflects the intention of the trading obligation. It is clarified that the criteria in this case are used for determining if sufficient third-party buying and selling interest are prevailing, i.e. if multilateral trading can be formed. The criteria used in this case are the ones reflected in the 'liquid market' definition in MiFIR Article 2(1)(17).

However, the criteria need adaptation for other purposes, as regards for example the transparency requirements for ETDs. While ETDs are certainly sufficiently liquid in light of the trading obligation, exchanges also offer instruments whose maturity is not as progressed as other instruments and thus do not show the highest level of liquidity of exchange traded derivatives that are widely known.

It is recommended for ESMA to take a more differentiated approach in regards to defining liquidity for the transparency requirement. Declaring all ETDs subject to the trading obligation would close any loopholes and the liquidity assessment for the transparency levels might result into more adequate thresholds and handling of instruments. Otherwise the results for thresholds will be blurred, if very immature, seasonal or otherwise structurally characterized instruments on exchanges are aggregated with instruments which are more liquid. Then the result will be that ETDs that are very liquid will suffer from future intransparency and instruments that are less mature will suffer from too high liquidity levels they will never reach and will not be able to cater to such strict transparency levels.
<ESMA_QUESTION_CP_MIFID_89>

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?

<ESMA_QUESTION_CP_MIFID_90>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_90>

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

<ESMA_QUESTION_CP_MIFID_91>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_91>

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

<ESMA_QUESTION_CP_MIFID_92>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_92>

- **Microstructural issues**

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

<ESMA_QUESTION_CP_MIFID_93>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_93>

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?

<ESMA_QUESTION_CP_MIFID_94>
FESE does not agree with the application of such strict rules and the applicability of the restricted deployment requirements to market makers, given the obligations of market makers to continuously quote. A restricted deployment as described in the CP would ultimately increase the risk of firms as they might not be able to hedge their risk adequately as products might be restricted and not available within the new/changed algorithm. A testing of algorithms is effectively only possible if all the information used within the code is available in a live/non-live test environment. This would cause enormous cost and effort on firms' side, as for each delivery they would have to line up all subsystems and even vendors of data.

Alternatively, this could be addressed either in RTS Article 12 or in section 4.3 by incorporating a relaxation of the continuous quoting obligations in the market making agreements where the firm is deploying a new trading algorithm or a pre-existing algorithm that was successfully deployed on other trading venues, or material changes to previous architecture. Otherwise the relevant requirements will conflict. (Please also see our response to Q106). In other aspects, such as the kill functionality we support ESMA's views.

Furthermore, the testing requirements for algos that are most of the time deployed by participants on multiple trading venues and not on a single one will not by themselves enable market to get a higher level of security. Pre-trade risk management at the level of participants and to some extent trading venues (whilst redundancies should be avoided in this areas) will be much more efficient to prevent incidents by offering to the market the tools to monitor and react in real-time to potential issues arising out of algo trading. Testing by itself will only contribute to give a false sense of security, whilst de facto offering very little protection.

However, if these testing requirements are maintained in the RTS, then we strongly support the proposal to enable venues to charge for them (Article 6, RTS 17) in order to compensate for the significant additional costs that such an obligation will incur to them.

Amendment proposal (regarding testing methodologies)

RTS 13

Article 10 – Initial testing

2. The testing methodologies for algorithms and trading strategies, shall include performance simulations or back testing ~~**and, for members or participants of a trading venue, non-live testing within a trading venue testing environment**~~.

(…)

3. Investment firms shall adapt algorithm tests~~**, including non-live tests within the trading venue trading environments**~~ to the strategy the firm will use the algorithm for (…).

Article 11 – Testing within a non-live environment

1. Members of participants of a trading venue and an investment forms accessing the trading venue through sponsored access shall test their trading strategies and algorithms ~~**in a non-live trading venue's testing environment**~~ to prevent disorderly trading.

2. Investment firms that are not accessing a trading venue as a member of participant, but through direct market access service, shall make use of such non-live ~~**trading venue**~~ testing environment where this is appropriate to the nature, scale, and complexity of their business and the risks that their trading algorithms or systems may pose to the orderly trading on the relevant trading venue.

3. When testing their trading strategies, algorithms and systems ~~**in a non-live trading venue testing environment**~~, the investment firm shall retain responsibility at all times for assessing the testing results and for making the required changes to the relevant algorithm, trading strategy or system as appropriate.

RTS 14

Article 11 – Testing the members' algorithms to avoid disorderly trading conditions

~~**2. Trading venues shall design a set of scenarios (…)**~~

~~**3. (…)**~~

~~**4 (…)**~~

~~**5. (…) to avoid disorderly trading conditions**~~.

<ESMA_QUESTION_CP_MIFID_94>

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

<ESMA_QUESTION_CP_MIFID_95>
FESE believes that the list of controls and limits appear to be quite comprehensive, however, we note that there are redundancies between (i) the controls requested for venues and (ii) the controls requested for participants which should be should therefore be avoided. We consider that the previous Guidelines on Systems and Controls[6] in a highly automated environment have proven to be sufficiently comprehensive and detailed to provide for the highest standard in terms of security and resiliency in an efficient manner. As such, we would recommend replacing the current proposals by the relevant provisions of the previous Guidelines.
<ESMA_QUESTION_CP_MIFID_95>

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

<ESMA_QUESTION_CP_MIFID_96>
FESE does not agree with this proposal. The implementation of such a market impact assessment would cause firms to intercept their orders, snap shot the order book situation and evaluate the impact. At the time when the decision on whether to send the order or not is taken, the snap is outdated and not of relevance anymore. The result would only lead to inappropriate delays in the order flow. We believe that maximum order value and volume are sufficient to prevent potential "fat finger" errors.
<ESMA_QUESTION_CP_MIFID_96>

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

<ESMA_QUESTION_CP_MIFID_97>
FESE believes that the list of controls and limits is quiet comprehensive and sufficient.
<ESMA_QUESTION_CP_MIFID_97>

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

<ESMA_QUESTION_CP_MIFID_98>
FESE believes it is important to ensure that the list of criteria set out in Article 28 are considered and applied with relevance to the scale and nature of the potential client and its business, as envisaged. In particular, due to the prescriptive detail and type of criteria included (with a particular focus on systems), we believe that in order to achieve ESMA's goal, it must be more clearly and explicitly stated that the requirements are applied in a proportionate way and as relevant, to ensure that smaller local brokers (who are usually key in supporting SMEs in smaller markets) are not disadvantaged or limited by these new proposals.

FESE believes whole the list of controls and limits appear to be quite comprehensive, however, we note that there are redundancies between (i) the controls requested for venues and (ii) the controls requested for participants which should be should therefore be avoided. We consider that the previous Guidelines on Systems and Controls[7] in a highly automated environment have proven to be sufficiently comprehensive and detailed to provide for the highest standard

[6] http://www.esma.europa.eu/system/files/esma_2012_122_en.pdf
[7] http://www.esma.europa.eu/system/files/esma_2012_122_en.pdf

in terms of security and resiliency in an efficient manner. As such, we would recommend replacing the current proposals by the relevant provisions of the previous Guidelines.

<ESMA_QUESTION_CP_MIFID_98>

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

<ESMA_QUESTION_CP_MIFID_99>

FESE has additional comments on the draft RTS 13 as follows:

- Article 1 (3)(b): We would like clarity on the expectation in relation to the 'kill functionality' embedded in the trading venue's system and whether the expectation is that the trading venue provides such functionality for use by its members, or by itself as we note the same definition has been used in both the section on obligations of investment firms and the section on obligations of trading venues. (RTS 14)
- Article 1 (4)(b): As 'multiple' generally means more than one, therefore, we believe that this needs to be re-worded to ensure it is referring to situations where there are '**significant**' multiples.
- Article 1 (6)(a): We believe this should include the word significant as per RTS 14 Article 2(5) i.e. "a **significant** increase or decrease…."
- Article 16(4): We question the ability of a firm to be able to implement/adopt a system which will provide alerts in real-time in relation to algorithms and DEA orders triggering volatility interruptions of the trading venue, and suggest that the obligation is either moved from the real-time monitoring section or is amended so that the alert identifies where the algorithm or order ***may*** have triggered a volatility interruption.
- Articles 27 to 30 refer to investment firms acting as general clearing members. However Article 1(1) defines 'investment firm' for the purpose of this specific Regulation as "an investment firm engaged in algorithmic trading". This therefore implies that Articles 27 to 30 applies to investment firms acting as general clearing members only if those firms also engage in algorithmic trading.

<ESMA_QUESTION_CP_MIFID_99>

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.

<ESMA_QUESTION_CP_MIFID_100>

FESE notes that the requirements under Article 48 apply to Regulated Markets (and to other trading venues by virtue of Article 18), and we welcome ESMA's pragmatic approach in recognising that these requirements are aimed at trading venues that provide or enable algorithmic trading. However, we believe that ESMA needs to take an even more granular approach by clarifying that the obligations apply only to the venues' specific systems or segments which enable algorithmic trading. Trading venues can have different systems and market models in place for different markets or asset classes, with only a subset of those systems enabling algorithmic trading. It would be impractical to require venues to meet these requirements for all systems and segments they operate, if not all of those systems enable algorithmic trading. We note that this is the approach that ESMA has taken in relation to market making in section 4.3, paragraph 50 (iii).

In addition, we have concerns regarding the proportionality principle proposed in Article 3 of RTS 14 on organisational requirements for trading venues. We understand this principle to mean that, on top of the minimum resiliency, security and investor protection requirements in Article 48 of MiFID II, additional requirements could be imposed on trading venues depending on their scale by the national competent authority. We fundamentally question the rationale underpinning the proportionality principle, as well as its compatibility with the clear intention in the Level 1 text to apply an identical set of rules to all types of trading venues – thereby departing from MiFID 1 and the proportionality principle applied to MTFs. Applying more stringent requirements than is required by MiFID to some trading venues would result in asymmetrical situations and a clear distortion of the level playing field on which European trading venues should be able to compete. We therefore recommend removing the proportionality principle in order to ensure that all venues are covered by the same requirements.

Business continuity

On business continuity we note that these requirements are taken from the CSD Regulation.

Due diligence

On the annual due diligence for members or participants of trading venues, we welcome ESMA's recognition that it is appropriate for trading venues to apply a risk-based approach to the annual due diligence assessment of its members, as referred to in paragraph 19 (iii) of the CP and in Recital 9. However we note that this has not been brought forward into the content of Article 8 (3). Therefore we are unclear whether the requirement remains for all trading venues to assess all members on an annual basis, which as previously highlighted would be considerably onerous. We therefore urge ESMA to incorporate the risk-based approach within Article 8 which requires trading venues to undertake a risk-based assessment each year to determine the level and frequency of the review of its members.

As venues, we have concerns regarding the provisions in Article 8(1b) requiring us to establish standards covering the '*experience of staff in key positions within the members'*. We question how, as venues, we would judge 'experience' across the range of Members on our market and, moreover, how we could dictate to our members the levels of experience they should have.

In addition, in respect of Article 8(1i) and the standards relating to a member's outsourcing policy, we question the additional value this would bring given that the member is already subject to outsourcing provisions elsewhere in the text.

Finally, the requirements in Article 8(3) regarding annual venue compliance assessment of the members would constitute an onerous and unnecessary obligation. Venues should instead be required to employ a risk-based approach in respect of identifying any compliance issues within Member firms.

Cancellation procedures

On the cancellation procedures as set out in Article 19 (3)(e)(iii), we are unclear if the intention of the text is to prescribe that the procedures must include all elements set out within the brackets i.e. reverse trade, transfer position, cash settlement and a price adjustment. We believe this is excessively prescriptive and that it should be left to the venue, together with their CCP if relevant, to determine the optimal process or processes for cancellation of a transaction.

On the provision of policies and procedures to the Competent Authority as set out in Article 19(5), the inclusion of the word 'intends' should be removed on the basis that it implies advance notification and potentially approval by the competent authority. Instead trading venues should be required to provide updated policies and procedures whenever they are amended.

Price movements

In relation to Article 20(2) requiring trading venues to notify their NCAs of significant price movements, we suggest that ESMA includes a recital in this RTS stating that trading venues and NCAs should agree on when it is expected that a TV should make such notifications (i.e. how significant would the price movement have to be to trigger the notification requirement) so as to avoid this becoming an overly onerous requirement. This follows the same approach

ESMA has taken in the Technical Advice p. 385 re suggesting market operators consult with their NCA regarding the NCA's expectation of when to notify of a significant infringement of rules, disorderly trading etc.

Pre-trade controls

On the pre-trade controls in Article 21(2)(b), we are very concerned with the wording in the proposed RTS which would place an obligation on trading venues to completely stop order entry of a member across all financial instruments due to one breach in one financial instrument. We don't believe this is in line with the intention of ESMA set out in paragraph 69 of the CP which states that the controls should "enable" trading venues to stop order submission entirely once a threshold is breached. We believe that while trading venues should have the ability to do this, it should not be mandated in all instances, particularly when the trading venue is also required to have mechanisms in place to authorise orders above pre-set limits. In practical terms, this could mean restricting order submission completely for a short period due to a breach by an order that is then permitted, with the potential compromise of best execution for legitimate (client) orders.

Definition of real time – Recital 11

In respect of the definition of what constitutes real-time, we consider that the notion of real-time monitoring should be clarified. This covers provisions in Recital 11 and Article 2. In respect of surveillance obligations, we suggest that venues are required to operate systems which trigger alerts on a real-time basis. However, the investigation and resulting assessment - by the trading venue and/or regulator – naturally takes place later.

Kill functionality – defining the scope (Article 2)

In respect of defining a 'kill functionality' in Article 2(2), while we agree with the proposed list, we would suggest a third element should be added to cover the responsibility of the clearing house. This should reflect the fact that it is the responsibility of the clearing house to monitor intraday position limits and require suspension of trading activity to the trading venue in cases where the limits are breached.

In addition, it is also important to clarify that trading venues only have a responsibility vis-à-vis their members. The relationship between the member and client is subject to NCA oversight.

Disorderly trading conditions – defining the concept (Article 2)

We have significant concerns around Article 2(3b), specifically the reference to '*cases where orders are not resting for* ***sufficient*** *time to be executed*'. It is unclear exactly what is meant by 'sufficient' and in any case we question how it could capture a variety of order strategies. This is also not in conformance with the documents from the Level 1 mandate and also in contradiction with definition of 'disorderly trading conditions 'within other RTS, for example RTS 13. As in our answer to question 104 (where it also appears in RTS 15) we suggest to delete it. Furthermore, we question whether the principle underlying the proposal is not already dealt with as part of the order-to-trade requirements. We also believe that it should be clarified that it is a 'significant multiple' that is the criteria to be applied as the use of 'multiple' alone implies two erroneous orders is sufficient to meet the criteria.

Recovery Point Objective – defining the concept (Article 2)

We would like further clarification on what is intended by the Article 2(10) reference to 'maximum tolerable amount of data' in terms of '*the maximum tolerable amount of data that might be lost from an IT service due to a major incident and beyond which data has to be recovered*.'

Compliance function within the governance process (Article 5)
We question the potential conflicting roles between the compliance function and that of a trading venue's legal and regulatory teams in Article 5(1). The two roles are often distinct. We would suggest replacing the reference to compliance function with '*governance structures'*.

Trading venues' capacity (Article 12)
FESE generally agrees with ESMA's approach to ensuring the robustness and resilience of trading systems. The policy objective focuses on orders and message volumes, whereas the technical proposal refers only to messages across the entire trading infrastructure. We interpret this to mean that the focus will be on message types relevant to ensuring proper operation and reliable order management over the whole order or trade lifecycle (e.g., 'no transaction lost,' as stated in the discussion paper). We strongly recommend that a distinction be made between continuous load and peak load when defining trading venues' capacity (see RTS Chapter III Section 3 Article 12). Peak loads occur rarely and are short-term events; they can be handled by systems with sufficient headroom (which is less than twice the highest peak ever recorded). A reasonable baseline and procedure should be defined in the interests of potential downsizing.

RTS 14 Chapter III Section 3 Article 12 should thus be amended as follows: 1. Trading venues shall ensure that their trading systems have sufficient capacity to accommodate at least twice the **average** ~~**highest**~~ number of messages per second and per value *on a yearly basis* as the maximum recorded on that system in one day **on a yearly basis** ~~**(historical peak)**~~.

As an alternative to the proposed definitions for trading system capacity baselines, it might be more useful to consider Service Level Agreements between trading venues and their members and participants. The procedure for informing the NCA is reasonable in conjunction with the statements in the draft regulatory standards.

General monitoring obligations (Article 13)
We are concerned with the obligation in Article 13(1) to ensure a maximum level of continuity and regularity in respect of the performance of the markets operated. While this is Exchanges' clear intention, we believe some wiggle room has to be given. As a result, we would suggest deleting the *'at all times'* provision and complementing 'continuity' with *'reasonable'.*

In addition, we question whether the provision in Article 13(2) is driven by a belief that concentration of order flow is by definition a negative phenomenon. In our view, such activity should not be automatically deemed to be a negative phenomenon since it does happen under justified circumstances.

Prevention of disorderly trading conditions (Article 19)
In respect of Article 19(1), while we generally support the proposed set of arrangements, we question what trading venues can impose on their members in respect of the latter's post-trade controls.

Mechanisms to manage volatility (Article 20)
We note that ESMA proposes in (6) that "any modification" should be reported to the competent authority. However we believe this proposal goes beyond the requirements of Level 1 as Article 48(5) requires "any material changes" to be reported to the competent authority. Therefore we request that ESMA updates the RTS to include the word "material" to ensure it is in line with the Level 1 text.

Pre-trade controls (Article 21)

In respect of Article 21, we would request a clarification of the intent behind paragraph 1. In our view, it is the role of the competent authority to ensure that investment firms are in compliance with the requirements in the future RTS 13.
<ESMA_QUESTION_CP_MIFID_100>

Q101. Is there any element in particular that should be clarified with respect to the outsourcing obligations for trading venues?

<ESMA_QUESTION_CP_MIFID_101>
FESE considers that the ESMA proposal goes too far with regard to the rights of NCAs to access the offices of the outsource provider. We believe that ensuring a level of co-operation should be sufficient, and that requests for information should be processed either via the trading venue or via the competent authority of the service provider, still enabling the competent authority of the trading venue to receive the information it needs. Furthermore, where both the trading venue and the service provider are authorised within the EU, we believe co-operation between the competent authorities is a more appropriate approach.

Furthermore, we question the RTS with regard to need for authorisation of outsourcing for ‘critical’ functions. We believe that the trading venue should be required to provide notification with relevant information as required, however explicit authorisation should not be required. Instead the competent authority should have the right to object to the outsourcing if they has identified it is not in compliance with Article 7(1).

Therefore ESMA should rethink the intention to introduce such reporting obligations.
<ESMA_QUESTION_CP_MIFID_101>

Q102. Is there any additional element to be addressed with respect to the testing obligations?

<ESMA_QUESTION_CP_MIFID_102>
Conformance testing

Conformance tests should concern members of the trading venue but also companies that develop software interacting with the matching engine at the application level. We agree that Conformance tests have to take place in a dedicated environment. This environment has to:

- Be accessible via the same access means as the production environment;
- Resemble production environment;
- Be fully supported by a dedicated team.

There are mainly three events that trigger the need of a conformance test:

- A prospect currently in the process of getting his membership;
- A technical change or a new requirement initiated by an existing customer;
- A technical change at the Trading venue level, the launch of a new service or a new functionality.

In the first two cases this process is considered as a customer on-boarding, a business as usual activity whereas in the third case, the change is delivered through a project. The phase during which customers are asked to conduct conformance tests is the customer readiness period. The go live of the project is subsequent to the state of readiness of the customers' community.

We believe that ESMA should provide some guidance on the type of detail the technical changes that requires a new conformance test and would like to make the following suggestions which could be included in a list of possible scenarios. However it is important that venues have the flexibility to alter or adopt other scenarios and therefore ESMA should not be overly prescriptive but just provide examples:

- In respect of technical changes or new requirements initiated by the customer:

  - Externalization of software developments to an ISV or the opposite, an internalization of developments;
  - A switch of Independent Software Vendors;
  - An upgrade of customer's software to a new version;
  - An extension of current access to a new platform, a new product, or a new market that requires specific developments;
  - A switch of protocol;
  - A change of clearing house;
  - A new membership status.

- In respect of technical changes at Trading Venue Level and launch of new services and functionalities:

  - Upgrade of an existing piece of software interacting with customers' software: order entry gateways, market data gateways and matching engines;
  - Replacement of one of these software with a brand new one;
  - Switch from a technical infrastructure to a new one;
  - Launch of a new platform, a new product, a new service, a new functionality.

The type of Conformance Test the Member is required to take is determined by the scope of the change required or imposed. Therefore, we suggest it could be either a full test or a partial test. In the case of an on-boarding, it is the customer's responsibility to identify, in conjunction with the Trading Venue staff, the type and depth (partial/full) of the test he needs to take.

Testing the members' algorithms to avoid disorderly trading conditions (Article 11)
In respect of the general approach taken under Article 11, we would like to stress that trading venues should be under an obligation to require their members to undertake testing that is reasonable designed to avoid disorderly trading conditions. This is a more balanced approach to the currently drafted absolute requirement. In addition, the venue requirement should only pertain to new or modified algos traded on its venue

Moreover, we are very concerned with the proposal in Article 11(2) since it is very difficult to design scenarios which will reproduce live environments. This is because it is hard to replicate what customers do: while we could replay a day's trading we question the value since algos are being changed all the time. In addition, considering that most algos are deployed on multiple venues, testing scenarios on one single venue may bring little benefits in terms of improving the overall security of trading and would be redundant with pre-trade risk management requirements on participants. The pre-trade risk management requirements on participants, including in respect to the technology they use to trade, are sufficient in themselves to meet the overall objective of this provision.

The only way to effectively test an algorithm is to do so with the participant. Trading venues can only require their participants to test those in the respective instruments in simulation environment, but as the code and possible parameter settings are unknown to the venue, there cannot be a positive or negative certification for those. The full responsibility stays with the participants and venues should ensure that they have procedures in place that they can stop individual participants/traders/algorithms from affecting their markets.

In particular, Article 11(2) cannot be fulfilled by a trading venue. As the environment will be open to all participants for testing, the reconstruction of disorderly trading behaviors (which needs to be defined) highly depends on participants reaction. Even with the highest effort a venue cannot ensure that it will be able to reproduce disorderly trading circumstance.

A potential solution could be an environment that “replays” production data but to the extent that market activity is simulated according to market specific behavior gathered from live production environments, as replaying real data would be unproductive because of a potentially different behavior of members compared to production environments.

The testing requirements for algos that are most of the time deployed by participants on multiple trading venues and not on a single one will not by themselves enable market to get a higher level of security. Pre-trade risk management at the level of participants and to some extent trading venues (whilst redundancies should be avoided in this areas) will be much more efficient to prevent incidents by offering to the market the tools to monitor and react in real-time to potential issues arising out of algo trading. Testing by itself will only contribute to give a false sense of security, whilst de facto offering very little protection.

Testing the member’s capacity to access trading systems (Article 10)
We would suggest that the scope of Article 10 should be clarified to ensure that it refers only to an obligation to venues to require Conformance testing in respect of algos deployed on their own venue. There is a potential source of confusion in Article 10(1b). In addition, we believe that it should be clarified in Article 10(3) that the list of financial instruments available for testing is materially consistent with the ones available in the live environment.
<ESMA_QUESTION_CP_MIFID_102>

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

<ESMA_QUESTION_CP_MIFID_103>
Pre-determination of the conditions to provide direct electronic access (Article 23)
In respect of Article 23, we are concerned the definition of DEA proposed appears to be disproportionality broad, which could result in a situation where all clients of a firms could be considered as DEA users, therefore both implying disproportionate requirements both from venues (which will be responsible for monitoring DEA provision) and for DEA users (as they will have to be registered under MiFID). A tighter definition, precisely targeting Sponsored access and DMA would be more appropriate for this purpose. Furthermore, the notion of ‘permitting DEA’ is confusing, as basically all venues admitting members with an agency capacity could be deemed to permit DEA. Yet, trading venues do not necessarily have the information concerning whether their members provide DEA services or not. As such, venues should not be held liable for not having this information, as they rely on the willingness of members in this respect. The requirement as drafted seems, in this respect, disproportionate and raises important issues as to the responsibility of venues in respect to elements on which they have no controls by themselves.

Therefore we propose the following amendment to Article 23, RTS 14(1):

> “Trading venues **offering** ~~permitting~~ direct electronic access (DEA), **as defined in Directive 2014/65/EU Article 4(41),** through their systems shall set out and make public the rules and conditions pursuant to which their members may provide DEA **[DEA providers]** to their own clients [DEA users]. These rules and conditions shall at least cover:

Systems and controls of DEA providers and trading venues permitting DEA through their systems (Article 24)

In respect of Article 24(1), we suggest that it be clarified that the systems referred to are indeed members' systems. We believe the requirement should be for the DEA provider to stop order flow by **any of** their DMA users. Currently it could be interpreted that they must stop all order flow, without the flexibility to stop it for only some members, where appropriate to do so.

RTS 36: Clock Synchronisation - Article 3: Level of accuracy and granularity / Timestamps

We have a major issue with the provision in Article 3(2) by which '*trading venues measuring its gateway-to-gateway latency time in less than one millisecond shall synchronise its business clocks in accordance with Table 1 of Annex 1 based on the trading venue's gateway-to-gateway latency*'. In many cases, this would effectively impose a maximum divergence of 1 nanosecond in terms of clock synchronisation. However, this proposal is completely impractical in the sense that no currently available technology (or technology expected to be available in the short term) is able to deliver such minimal levels of divergence.

As ESMA states in its own Cost-Benefit Analysis (page 440, Table 1) that the most precise synchronisation protocol (PTP) achieves only an accuracy of 20-100 nanoseconds. Moreover, there are very few examples of achieving accuracy in the order of nanoseconds at all, let along 1 nanosecond. The National Physical Laboratory, the UK standard for time keeping, is accurate to within 4 nanoseconds of UTC[8] whilst the OPERA experiment at CERN, which famously published results describing faster than light particles due to a time measurement anomaly, achieved an accuracy of less than 10 nanoseconds when measuring particle flight time[9]. The fact that these publicly funded, national institutes of advanced technology cannot achieve clock accuracies of 1 nanosecond highlights the impracticality of instructing financial institutions to succeed where they have not.

As a result, we would strongly recommend deleting this provision from the text. Without this provision, the table in Annex 1 presents a workable framework for venues. In addition, we believe the timestamp definition is ambiguous enough to invalidate attempts at clock accuracy:

> ESMA/2014/1570, RTS 35, Annex I, Table 1 and 2 state timestamps should be applied at "*the date and exact time of the receipt of the order or making a decision to deal*".

For example, is the receipt of the order when the network packet is first seen on the venues network or when it reaches the first software component or the matching engine? Similarly the '*decision to deal'* can be interpreted as several points along a decision path that include risk and limit checks.

Rather than mandate a specific point that could imply the prescription of specific technology that must be used for clock synchronisation, and as a consequence perhaps not be applicable to a specific firm's architecture, we would propose that ESMA simply state that a timestamp should be applied at '*an internally documented, consistent point throughout an organisation*'.
<ESMA_QUESTION_CP_MIFID_103>

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

[8] See http://www.npl.co.uk/educate-explore/what-is-time/why-do-we-need-accurate-time
[9] See http://press.web.cern.ch/press-releases/2011/09/opera-experiment-reports-anomaly-flight-time-neutrinos-cern-gran-sasso

<ESMA_QUESTION_CP_MIFID_104>
In principle, FESE supports the ESMA approach that trading venues should not be required to identify market making strategies involving more than one venue. Moreover, we support the approach that trading venues are left with sufficient discretion and flexibility to set out the specific quoting parameters relevant to their markets (p. 387 of CP). This also applies to other aspects such as determining the specifics in commercial contracts between the trading venue and the trading participant engaged in algorithmic trading pursuing a market making strategy and in the market making scheme, respectively.

However, we strongly disagree with the proposal that trading venues must be able to detect market making strategies. The obligation should clearly rest with the firm to notify the venue, however if a venue does identify that such a strategy is in place of which it was not notified, then it should require the firm to enter into a market making agreement. We would like to highlight that the Level 1 text, specifically Article 48 (3), requires the trading venue to "monitor and enforce compliance". Therefore we do not agree with ESMA's proposal to enforce a more onerous requirement in Level 2.

In addition, the draft RTS could negatively affect the function of liquidity providers who are essential for price guidance and liquidity, in particular in illiquid and new products, and thus for ensuring market quality and integrity. The scope of instruments has been extended to all instruments and we believe that this should be revised and limited to liquid instruments only, as those engaged in algorithmic trading are mainly trading in these instruments. The ESMA proposals pose the risk that not only would new and illiquid products fail at market, but also that liquidity is reduced in liquid instruments, which would contradict MiFID's goal to ensure liquid markets.

RTS Ch. I Article 8 1. (b)(iii) highlights a regulatory misperception of market making and incentives: "Incentives offered in stressed market conditions to compensate for the additional risks taken by investment firms engaged in a market making agreement".

The schematics of the market maker regime must be questioned as they are based on the notion that market maker incentives will ensure quote presence by market makers in times of market stress. The revenue a trading venue generates is given by the fees charged per traded unit such as notional amount (cash equities) or number of contracts (futures/options). These fees are a fraction of an instrument's minimum price movement and therefore much lower than the profit or loss potential of the smallest market price move in a given instrument. The trading venue's ability to set incentives depends highly on its cost base to ensure the viability of its business model of operating markets in listed financial instruments. A trading venue's revenues from trading in an instrument will be exhausted and exceeded by potential market making incentives to ensure quotation in stressed market conditions, as soon as one market maker is negatively affected by an unfavorable development of its distribution of trading returns.

Therefore, if system load metrics reach levels of concern, providing incentives to participants to keep on quoting or even increase their quoting (e.g. to gain more benefits), might only worsen the situation (i.e. snowball effect) leading to an instable trading environment. As long as these metrics are within the system capacity of the trading venue, they should not be of a concern and if they instead reach levels that are of concern, such situation should be considered as one of the "Exceptional Circumstances".

We would also recommend clarifying RTS on incentives: These should not be limited to fees etc. but should also be understood as encompassing relaxed quoting requirements

Furthermore, we are concerned with the approach of ESMA to the definitions of stressed market conditions and disorderly trading conditions and in particular the proposal for a trading venue to 'declare' when there is a stressed market condition. While such situations can sometimes be clear, there are cases where it may not be immediately apparent depending on the security, general market conditions and the speed with which it happens. Moreover, the actual definitions of these terms are not the exact same in the different Regulatory Technical Standards, even those that refer to the same Article in Level 1 e.g. RTS 13 and RTS 15. Therefore we believe it is not reasonable to expect a trading venue to declare such instances as they occur.

The marker maker schematics must be simplified so that market making scheme and incentives are set generally without any distinction between different market conditions~~:~~

- RTS 15 Ch. III Article 8 point 1 should be amended so that market making schemes apply to the entire trading period.

Also, regulation that suggests compensation of market risks in stressed market conditions by means of setting incentives stands in contrast to trading venues' neutrality to ensure fair and orderly price finding as they should not be exposed to market risks linked to trading strategies.

- RTS 15 Ch. III Article 8 point 1. (b) iii second bullet should be deleted: "- Incentives offered in stressed market conditions to compensate for the additional risks taken by investment firms engaged in a market making agreement".

The definition of competitive prices should reflect the maximum bid-ask spreads set by a trading venue for market making in a given instrument. Therefore,

- RTS 15 Ch. I Article 1 (7). should be amended as follows: 'competitive prices' means quotes posted within the ~~**average**~~ ***maximum*** bid-ask spread **calculated by the trading venue and made public**.

Similarly the ability to set incentives for best performing market makers should also be set generally and not distinguished by different market.

- RTS 15 Ch. III Article 8 point 1. (b) iii first bullet first sentence should be deleted so that only the second sentence remains and should be applied to the entire trading period: "Trading venues may establish that only the best performers under the market making agreement will access those incentives "

Erroneous orders and the possible subsequent deletion or price correction of erroneous trades are evaluated based on the traded price versus the reference price of the instrument only. The resting time is not a material factor that constitutes an erroneous order or multiple erroneous orders, and this reference should respectively be deleted in RTS 15 Art. 1 (9). See proposed amendment in our response to Q108.

We also are unclear on whether the inclusion of "when trading is resumed after volatility interruptions" in Article 4(1)(d), is proposing yet another level of incentives particular to these circumstances or whether it considers such a situation to be a stressed market condition. However this wording should also be removed so that trading venues are not expected to provide additional incentives to promote liquidity in the immediate period after a volatility interruption. See proposed amendment in our response to Q108.

FESE disagrees with the proposal (a) in RTS 15 – Chapter 1- Article 1 (8) Stressed Market condition. We consider that the described *"situations where a significant change in the number of messages being sent to and received from, the systems of a trading venue"* materializes may not per se represent a stress situation for the market and its participants. Significant changes in number of messages and transactions are natural in equity derivatives markets as

a result of volatility changes, macro and corporate news, specific situations such us roll weeks, etc. All market participants and operators of trading venues should size their trading systems to cope with peak conditions.
<ESMA_QUESTION_CP_MIFID_104>

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.

<ESMA_QUESTION_CP_MIFID_105>
FESE believes that the requirement for trading venues to detect market making strategies in accordance with the nature, scale and complexity of their business in combination with the criteria under which an investment firm qualifies as a market maker will create additional costs for trading venues in monitoring and operating IT systems for market making. Moreover, this activity will have no means for cost recovery. We believe that a quantitative detection of market making strategies is prone to error in the dimensions observation period, quote sizes as well as the measuring of quote presence. Therefore, we proposed a number changes to the current draft RTS.

It is suggested to make the **entrance presence and the ongoing presence requirement** symmetric with both at 50%. A trading strategy, or behavior, that makes up more than 50% of your time is a substantial activity rather than a 'side-line' or coincidental. It is important to capture only investment firms who intend to act as a market maker (a) to preserve commercial choice for participants and (b) to minimize the chance of risk incidents of imposing obligations on firms that may not be able or willing to take them on. Otherwise, the risk arises that firms will stop liquidity providing strategies to avoid unintended consequences, which will reduce rather than increase the amount of liquidity in European markets.

Also, an **observation period** for market makers of one day is too onerous and will lead to systematic misclassifications and is not feasible from an operational perspective. Such a low one day qualification threshold will discourage market participants from incrementally increasing their quoting presence to evolve from a market maker 'interested' in market making into a fully-fledged market maker. An observation period of 1 month is suggested, during which a market maker's quote presence must on average lie higher than the threshold defined by ESMA. Many trading venues do operate performance monitoring systems for registered market makers that can also be calibrated to allow only for a specified number of exception days within a given month. If for example the monthly average fulfillment is set with a quote coverage ratio of 50%, it can be ensured via this parameter that market makers do not merely quote the full trading day with 100% coverage for 10 days and then refrain from quoting on the remaining 10 trading days.

In the following month, a market maker must enter into a binding agreement with the trading venue, effective measurement starting upon registration, and sanctions effective in the month thereafter.

- RTS 15 Ch. II Article 3 (1). should be amended: "For the purposes of this Regulation, an investment firm shall be deemed to pursue a market making strategy if it is posting firm, simultaneous two-way quotes of comparable size not lower than a trading venues minimum and competitive prices in at least one financial instrument on a single trading venue for no less than **50%** **~~30%~~** of the daily trading hours during **~~one trading day~~ a rolling calendar month.**

ESMA suggests that the size of the opposite quotes posted in the order book does not diverge more than 50% of each other; this adds to the risks of false measurement and misclassification of market participants' trading activity as a market making strategy. Unbalanced quote sizes are not a valid market maker quote as it reflects a market maker's bias for a certain market direction, in which he is willing to take on significantly more risk than in the other. Both sides of a quote should be the same size set out in the trading venue's market making obligations.

- RTS 15 Ch. I Article 1 (6) '***comparable size***' means that the size of the opposite sides of the simultaneous two-way quote~~s~~ posted in the order book are equal to or bigger than the minimum quote size set by the trading venue **~~and/ or at least of the corresponding Standard Market Size for the instrument does not diverge more than 50% of each other~~.**

Two orders from one trading firm sent independent from one another (and in addition potentially by different traders) within one second cannot be considered as pursuing a market making strategy by virtue of their opposing market sides in sizes greater than the stipulated minimum quote size. The decisive factor for a market maker quote is not the time stamp at which the quote sides are sent. It should also be clarified that only the technical order type "quotes" should be considered for the assessment of MiFID II market making to avoid commingling of orders and misinterpretation of market activity.

- RTS 15 Ch. I Article 1 (4) should be amended: "(4) 'firm quote' means **~~an order or~~** a quote that is executable and can be matched against an opposite order or quote under the rules of a trading venue;
- RTS 15 Ch. I Article 1 (5) should be amended: "simultaneous two-way quote' is a two-way quote where both sides are entered into the order book **~~and present~~** at the same point in time **~~within one second of one another~~**;"

<ESMA_QUESTION_CP_MIFID_105>

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.

<ESMA_QUESTION_CP_MIFID_106>

FESE welcomes ESMA's approach in setting a threshold which still provides flexibility to the trading venues to set a higher threshold relevant to its market.

FESE welcome the suggested 50% minimum presence for market makers during "normal trading conditions". This level of quote presence will however not be attainable for market makers during periods of stressed market conditions as defined by the legislator. Relaxed market making requirements during stressed market conditions do not insulate market makers from severe trading losses as price action unfolds. Continuing to be *hit* on bids in a fast falling market produces immediate losses to market makers quoting, and hence, the majority of market makers opt to further widen quotes, quote one-sided prices, or to withdraw from the market temporarily during periods of 'stressed market conditions'. As outlined under Q104, trading venues cannot and should not compensate a market maker for trading risks in an instrument under stressed market conditions.

The marker maker schematics must be simplified so that market making scheme and incentives are set generally and do not distinguish between different market conditions, other than allowing for the quoting obligations to be relaxed during exceptional circumstances as permitted under the Level 1 text.

<ESMA_QUESTION_CP_MIFID_106>

Q107. Do you agree with the proposed circumstances included as "exceptional circumstances"? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_107>

FESE is concerned about the proposal for "exceptional circumstances". We do not believe that the list of exceptional circumstances set out by ESMA in Article 5 sufficiently captures all legitimate scenarios when a market maker may need to temporarily withdraw from its quoting obligations. In particular, ESMA has not recognised the fact that a firm may be prohibited from dealing on its own account when connected to the offeror or offeree in relation to a merger or acquisition situation. We also believe events that are specific to one or some stocks should also be included as an event should not have to affect all financial instruments on the market in order to be deemed exceptional circumstances. In addition we are of the view that this should be a non-exhaustive list in order to provide trading venues with some flexibility in determining when such a situation has arisen on their markets. We would also recommend clarifying that incentives should not be limited to fees etc. but should also be understood as encompassing relaxed quoting requirements.

The binary all-or-nothing treatment of stressed market conditions versus a trading halt is too restrictive. The proposal should acknowledge that not only exceptional circumstances resulting in market interruptions impede investment firms' ability to maintain prudent risk management practices. Extreme volatility should not be limited to an interruption of trading.

RTS 15 Ch. II Article 5 (2) should be extended to reflect further market circumstances. Exceptional circumstances shall include:

- Circumstances of extreme volatility, leading to ***but not limited to*** an interruption of trading with respect ***to an instrument*** traded on that venue;
- Political and macroeconomic events **~~such as~~ including** acts of war, industrial actions and civil unrest or acts of cyber sabotage;
- Circumstances when a firm is precluded from dealing on its own account where it is associated with either the offeror or the offeree in an acquisition or merger situation.

<ESMA_QUESTION_CP_MIFID_107>

Q108. Have you any additional proposal to ensure that market making schemes are fair and non-discriminatory? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_108>

We agree that general caps should not limit the **number of market makers**. However, incentive caps are part of existing market maker incentive schemes, in the sense that market makers frequently demand trading venues to limit the number of market makers accessing the highest level of incentives.

- RTS 15: Recital 13 should be amended: "This Regulation bans capping the number of members that may take part in a market making scheme. However, nothing prevents trading venues from establishing systems whereby only those firms providing a certain degree of quality in the liquidity provided, measured in terms of presence, size, ***volume*** and spread, can access the incentives.

A Three month pre-announcement is operationally inefficient and it will not be possible for trading venues to efficiently handle the high number of required market making schemes for its products. Regarding the 3 month advance notification to participants of changes to the market making scheme, in Article 9(2), we would like ESMA to clarify that this requirement only applies to significant changes to the terms of the market making scheme. As it is currently worded, it implies that changes in parameters should also be notified at least three months in advance, but this is not practical as trading venues need to be able to amend the parameters within a much shorter timeframe in line with changes in trading conditions for a security or the market as a whole.

- RTS 15 Ch. III Article 9(2) should be amended to read: "Any proposed material changes to the terms of the market making scheme shall be communicated to the existing participants not less than ***one month ~~three months~~*** ahead of the proposed effective date. ***A one month preannouncement also applies to new market making schemes***. This shall not preclude a trading venue from amending certain quoting parameters for particular instruments due to changes in trading conditions of those instruments within a shorter timeframe provided that sufficient notice is provided to the market makers in those instruments."

ESMA proposes that "**Trading venues not allowing for or enabling algorithmic trading** through their systems or a specific segment of their systems shall not be required to establish market making schemes…".Such regulation puts trading venues with public, electronic order books at a competitive disadvantage over trading venues that do not make algorithmic trading available through their systems.

However, in absence of their own publically transparent price finding, such matching systems or TCPs will utilize end of day settlement prices or centralized clearing from trading and clearing venues, without the necessity of operating and maintaining liquid markets with respective market making schemes and incentives.

- RTS 15 Ch III Article 7 should be amended to remove the exemptions for trading venues that opt not to offer algorithmic trading.

Adding volume to the dimensions of effective liquidity contribution would further ensure **proportionality of incentives** under RTS 15 Chapter III Article 9 point 5, as liquidity contributed by market maker quotes at best leads to trade executions that is reflected in traded volume. Restricting proportionality by scoring models bear the potential consequence that up to 2/3rds of market makers will not have access to these rebates and over time may reconsider operating liquidity providing strategies. This also raises barriers to entry such that only the market makers with the fastest systems and biggest balance sheet will remain active in the market.

- RTS 15 Ch III Article 9 point 5 should be amended as follows: "The incentives offered under the market making scheme have to be ~~**proportionate**~~ **appropriate** to the effective contribution to the liquidity in the trading venue measured in terms of ***volume***, presence, size and spread. ~~**In particular, those incentives shall promote the presence of members engaged in market making agreements in case of stressed market conditions**~~."

Regarding, "fair and non-discriminatory market making schemes" we propose that RTS 14 Chapter III Section 3 Article 12 should be amended. We consider that ESMA lacks sufficient justification to recommend Art. 9 Nr. 4, RTS 15 "Trading venues shall not limit the number of participants in a market maker scheme [...]." ESMA's authority is based on Art. 48 (12) f), MiFID II: "ESMA shall develop [...] requirements to ensure that market making schemes are fair and non-discriminatory." The article thus authorizes ESMA only to ensure minimal requirements for fair and non-discriminatory market-making systems; these requirements must take into consideration the specific needs of individual markets. Art. 48 explicitly does not authorize ESMA to regulate the number of market makers active at the concerned market. Trading venues must, as a matter of principle, be free to define (e.g., depending on the type of trading system) the various services that, as the case may be, can only be performed by a market maker. Similarly, the authorization in Art. 17 (7) b), MiFID II "ESMA shall determine conditions under which a securities firm is obliged to conclude a market-making agreement," does not permit ESMA to propose limits on the number of the market makers active at the regulated markets.

Regarding trading venue capacity, we consider that ESMA's approach does not allow trading venues to downsize their capacity even when drivers of trading system capacity requirements, for example the number of instruments traded, decrease. We recommend to differentiate between continuous load and peak load, defining trading venues' capacity (see RTS Chapter

III Section 3 Article 12). Peak loads occur rarely and short-term and shall be handled by the systems with enough headroom above (but less than twice ever). For an arithmetic average twice on p.a. yearly basis the load ever reached could be reasonable but the possibility of downsizing the relevant infrastructure components should be allowed as well. For the purpose of downsizing opportunities a reasonable baseline and procedure should by defined. RTS 14 Chapter III Section 3 Article 12 should be amended: 1. Trading venues shall ensure that their trading systems have sufficient capacity to accommodate at least twice the *average of the* highest number of messages per second and per value *on a yearly basis* as the maximum recorded on that system in one day ~~(historical peak)~~.

Alternatively to the proposed trading system capacity baseline definitions, it might be a feasible approach to think about Service Level Agreements between trading venues and their members and participants. The procedure to inform the NCA sounds feasible together with the statements given in the draft regulatory standards.

Amendment Proposal (on specific aspects of RTS indicated below)

Article 1 - **Definitions**

For the purpose of this Regulation:

(4) 'firm quote' means ~~**an order or**~~ a quote that is executable and can be matched against an opposite order or quote under the rules of a trading venue; "

(5) 'simultaneous two-way quote' is a two-way quote where both sides are **entered** ~~**present**~~ into the order book **at the same point in time** ~~**within one second of one another**~~;

(6) 'comparable size' means that the size of the opposite **sides of the simultaneous two-way** quote~~s~~ posted in the order book **are equal to or bigger than the minimum quote size set by the trading venue** ~~**does not diverge more than 50% of each other**~~.

(7) 'competitive prices' means quotes posted within the ~~**average**~~ **maximum** bid-ask spread **calculated by the trading venue and made public**.

(9) (b) 'multiple erroneous orders' or transactions, ~~including cases where the orders are not resting for sufficient time to be executed~~

Article 2 - **General requirements**

2. Investment firms engaged in algorithmic trading and pursuing a market making strategy shall sign a market making agreement ~~**following the notification by**~~ **with** the trading venue**.** ~~**in that respect, when the trading venue has detected the effective implementation of a market making strategy without prior notification.**~~

3. In cases where an investment firm is not willing to ~~**engage**~~ **sign a market making** ~~in~~ ~~**such**~~ agreement ~~**following the notification by**~~ **with** the trading venue, it shall disconnect the strategy identified.

Article 3 - **Circumstances in which an investment firm is deemed to pursue a market making strategy**

1. For the purposes of this Regulation, an investment firm shall be deemed to pursue a market making strategy if it is posting firm, simultaneous two-way quotes of comparable size and competitive prices in at least one financial instrument on a single trading venue for no less than **~~30~~ 50** % of the daily trading hours during **~~one trading day~~ a rolling monthly (calendar) period**.

4(1)(d) The incentives provided by the trading venue for the performance of the obligations according to the market making scheme **~~under the normal and stressed market conditions, and in particular when trading is resumed after volatility interruptions~~.**

Article 5 - **Exceptional circumstances impeding providing liquidity on a regular and predictable basis**

2. Exceptional circumstances shall only include:

(a) Circumstances of extreme volatility, leading to **but not limited to** an interruption of trading with respect to **an ~~all~~** instrument~~s~~ traded on that venue;

(b) Political and macroeconomic events**, including** **~~such as~~** acts of war, industrial actions and civil unrest or acts of cyber sabotage;

(c) System and operational matters that imply disorderly trading conditions;

(d) Circumstances which impede the investment firm's ability to maintain prudent risk management practices which are either:

> (i) Technological issues including problems with a data feed or other system that is essential in order to be able to carry out a market making strategy;
>
> (ii) Risk management issues, **~~which would encompass problems~~** **including** in relation to capital or clearing; and,

(e) Circumstances when a firm is precluded from dealing on its own account where it is associated with either the offeror or the offeree in an acquisition or merger situation.

Article 9 - **Fair and non-discriminatory market making schemes**

~~2. Any proposed changes to the terms of the market making scheme shall be communicated to the existing participants not less than~~ **~~one month~~ ~~three months~~** ~~ahead of the proposed effective date.~~

Any proposed material changes to the terms of the market making scheme shall be communicated to the existing participants not less than ***one month*** ahead of the proposed effective date. ***A one month preannouncement also applies to new market making schemes***. This shall not preclude a trading venue from amending certain quoting parameters for particular instruments due to changes in trading conditions of those instruments within a shorter timeframe provided that sufficient notice is provided to the market makers in those instruments.

3. Trading venues shall provide the same incentives, terms and conditions to all **investment firms** ~~**members**~~ engaged in a market making agreement who perform equally in terms of presence, price and size, according to published, non-discriminatory and objective criteria.

4. Trading venues shall not limit the number of participants in a market making scheme, but may limit the access to the incentives to those **investment firms** ~~**members**~~ which have met certain parameters either providing a certain degree of quality in the liquidity provided, measured in terms of presence, size and spread, or rewarding only those which have met the requirements above a certain threshold measured in terms of presence, size and spread.

5. The incentives offered under the market making scheme have to be ~~**proportionate**~~ **appropriate** to the effective contribution to the liquidity in the trading venue measured in terms of **volume,** presence, size and spread. ~~**In particular, those incentives [which shall not be limited to fee incentives per se, but extended to setting up more adapted requirements] shall promote the presence of members engaged in market making agreements in case of stressed market conditions.**~~

Article 10 - **Responsibilities of the trading venue**

~~**1. A trading venue shall have in place arrangements in accordance with the nature, scale and complexity of their business to identify market making strategies as defined by Article 17(4) of Directive 2014/65/EU pursued by its members in cases where they have not notified in advance their intention to pursue a market making strategy. Trading venues shall not be held liable for this.**~~

~~**2. Where it is not practically possible for a trading venue to identify strategies involving more than one venue or more than one financial instrument, it shall have arrangements in place to detect strategies affecting one instrument traded in its venue.**~~

3. Trading venues shall monitor and enforce compliance by investment firms of all requirements specified in this Regulation and the market making agreements. In particular, a trading venue shall:

(a) have the ability to set negative incentives to ensure that firms pursuing a market making strategy shall:

(i) ~~**Inform**~~ **Notify** the trading venue **prior to implementing** ~~**before the implementation of**~~ the strategy;

(ii) Sign a market making agreement ~~**following the notification by the trading venue where the firm has been detected as pursuing a market making strategy**~~;

~~**(b) Prevent those firms from implementing that strategy in cases where the firm rejects signing the market making agreement but shall not be held liable in cases these firms find other arrangements to access their platforms; and**~~

(c) Ensure that firms engaged in a market making agreement meet the respective requirements laid down in the agreement on a ~~**systematic**~~ **consistent** basis. In this respect, trading venues shall ensure that non-compliant firms are not only excluded from potential benefits, but also risk a ~~**significant**~~ fine;

(~~b~~**d**) put in place ~~**effective**~~ measures to verify the effective provision of liquidity on an ongoing basis, and to detect that the obligations under the market making agreements are fulfilled; and,

(~~d~~**e**) keep a detailed record **on** ~~**the measures and**~~ penalties adopted, as well as on the monitoring activity carried out on **members'** ~~**behaviour**~~ **compliance** with market making obligations.

4. Trading venues shall publicly disclose on their website:

(a) The terms of the market making scheme;

(b) The names of all **members** ~~**investment firms**~~ that have signed a market making agreement; and

(c) The financial instruments covered by those agreements.

Article 11 - **Requirement for trading venues with respect to market making agreements during stressed market conditions**

1. Trading venues shall identify and communicate to the **members** ~~investment firms~~ engaged in a market making agreement **in a timely, fair and non-discriminatory manner** the existence of stressed market conditions in ~~**their**~~ **such** market**s** ~~**through readily accessible channels**~~**.**

<ESMA_QUESTION_CP_MIFID_108>

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

<ESMA_QUESTION_CP_MIFID_109>
FESE does not fully agree with the draft RTS. We do agree with the applicability of the ratio regime to all Regulated Markets, MTF's and OTF's. Furthermore, FESE members agree with the monitoring period of one month, the calculation of one ratio per instrument and taking into account continuous trading plus auctions. We agree with the non-exhaustive list of order types and we also agree with the counting methodology in terms of the "volume ratio" by counting shares for equities, the nominal value for bonds and lot sizes for derivatives. We also agree with derogatory handling of market makers.

FESE strongly disagrees with a methodology involving no floor, counting indicative orders and quotes, a methodology where the trading venue is not in control of setting the max ratios independently.

Furthermore, we do not agree with a max ratio based on the absolute value of the previous year only and without taking into account other parameters the venue shall define, the determination period of the max ratio and having one binding max ratio, the grouping of instruments for the max ratio calculation, the definition of the max ratio and ratio calculation formula. We do not agree with the proposed methodology for counting the number of unexecuted orders and the number of transactions in terms of the number based ratio. Finally, we do not agree with assessing the ratios on a daily basis. Please find detailed explanation of the subjects below.

Counting methodology
FESE agrees with the "Volume based ratio" in terms of counting shares for equities and the nominal value for bonds and lot sizes for derivatives. We do not agree with the "Number based

ratio" with respect to counting the number of unexecuted orders and the number of transactions as we assume that the proposed methodology is focused on the prevention of a critical system load. A message, independently of add, modify or deletion of an order or quote, is only using system capacity once. We suggest to count each add, modify and cancel message as one message.

Market maker

FESE agrees considering market makers with derogative requirements. Especially for market making in illiquid products it cannot be guaranteed that quoting activity will always lead to transactions. Furthermore we want to draw attention to the following special case: Before signing a market making agreement a participant that has interest in acting as a market maker needs to adjust and fine tune his quoting behaviour. This testing typically will imply a relatively high ratio of unexecuted orders to transactions. Hence, for those members it is inevitable to allow for a special regime as well.

Review of the max ratio

ESMA suggests taking the max ratio derived from the previous year's trading activity. We do not agree as a downward-spiralling effect would occur in case the max ratio would not take into account other parameters. For instance, introducing a max ratio by taking a value of the previous year "t-1" would lead to the situation where all market participants would reduce their ratios in order to obey the max ratio in a current year "t". Hence, the ratio for the upcoming year t+1 would be calculated by those lower ratios of "t" and the new max ratio t+1 would be lower than the ratio of the current year "t". As a result the ratios would decrease yearly which would severely and seriously affect the well-functioning of markets.

Furthermore, historical participant behaviour will define the ratio going forward leaving out any performance and/or capacity considerations by the trading venue and leaves room for manipulation of the limits. To be more precise, with the formula proposed participants will be faced with moral hazard, as they can increase the observed max ratio by violating the limit and hence the permitted max ratios that will be allowed in future periods. We strongly recommend that the trading venue shall set the permitted max ratios, also taking into account system capacity and market conditions.

If the max ratio would be calculated by taking the maximum ratio of a participant of the previous year, this limit would often be set to a value that is very high and hence considered an outlier. Although the system was able to carry the load of that outlier, it may be critical to handle that load when several members show similar behaviour once the new limit is effective. Hence, the determination of the max ratio shall be calculated based across all members' activity and not based on the most extreme outliers.

Determination period of the max ratio

ESMA suggests the period of a year and the related trading activity in order to determine the max ratio. FESE does not agree as a whole year does not consider different market situations, i.e. low volume times or high volatile market phases. In addition, neither future volatility nor capacity of the trading platform would be considered. We suggest determining a max ratio annually and independently by the venue. Furthermore, ad-hoc adaptions have to be added as venues have to be able to act in high volatile market phases.

Grouping of instruments

ESMA suggests that each venue calculates the max ratio with respect to their experienced trading activity. With respect to equities, the max ratios are calculated by all members' activity in an instrument which can be grouped together per tick size band. FESE does not agree with the grouping per tick size band for equities as this would link the ratio regime with the tick size regime. The tick size parameters price and average daily trades are then the drivers to changes to the ratio regime. As the goals of the ratio regime are market integrity and system stability, the price level has no influence on the goals of the ratio regime or the parameters of it. Furthermore, the second tick size parameter is average daily trades; a link between the regimes would be redundant as the ratio regime considers trades in a volume perspective as well as in a number perspective. Those parameters, as additional influence to the parameters of the ratio regime, might lead to unnecessary noise. Furthermore, the linkage might lead to frequent and surprising changes in the max ratios as the tick size will change on a more frequent and surprising basis whenever the price of the instrument reaches another.

Bonds shall be grouped per liquidity class rather than the class of financial instruments.
We agree to group derivatives per group of instruments.

Max ratio calculation
FESE agrees to calculate the max ratio under consideration of all members and over the continuous trading including auctions. In addition the venues' trading system capacity and the trading behaviour of participants shall be considered.

Monitoring/Assessment timeframe
FESE does not agree with assessing the ratios on a daily basis as no balancing out of different market phases is possible. Hence, a daily ratio would not be sufficient. We suggest a month-to-date ratio calculation and a monthly assessment.

Floor
We do not agree with ESMA's suggestion to the methodology without a floor element. We strongly recommend the introduction of a floor as a floor is necessary in order to account for illiquid instruments. We propose that the floor determination shall be up to the venue and in accordance with the liquidity of the instruments traded. Therefore, we suggest including a floor in the calculation of the ratio:

$$\frac{number\ of\ unexecuted\ orders}{number\ of\ filled\ or\ partialy\ filled\ orders + \boldsymbol{floor}} \quad \text{and} \quad \frac{volume\ of\ unexecuted\ orders}{executed\ volume + \boldsymbol{floor}}$$

The ratio needs to distinguish between participant types by using different floors. The value of this floor shall depend on the participant type, e.g. market making or regular participant, where the market makers shall get a higher floor.

Indicative Quotes, orders
We do not agree with taking indicative orders/quotes into account. Most Market Makers use them in order to facilitate the market with the indication of prices even when continuous price determination is not possible. If indications would be considered in the ratios but no or fewer trades would take place, market makers would violate the max ratios per se and their business model as well as their function in the financial markets would be eliminated.

The maximum allowed OTR should be based on assessment related to trading venue and member's system capacity, latency problems, excessive market data flows, etc. to safeguard orderly and sound trading activity. The proposed method does not specifically focus on any of these aspects as it is based on the actual volumes seen in the previous 12 months.
<ESMA_QUESTION_CP_MIFID_109>

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.

<ESMA_QUESTION_CP_MIFID_110>
FESE does not agree with the ESMA proposal. The counting methodology of the ratio of the volume of unexecuted orders and the volume of executed orders is intended to stabilize market integrity.

Whereas the methodology using the ratio of the number of unexecuted orders and the number of executed orders is focused on the prevention of a critical system load. We do not agree with this methodology as the time to work an incoming message is independent of its content, i.e. a trading system does not differentiate between the types of messages received. Hence, we suggest an alternative counting methodology, which is counting all order/quote add, modifies and deletions equally as one message.
<ESMA_QUESTION_CP_MIFID_110>

Q111. Is the definition of "orders" sufficiently precise or does it need to be further supplemented? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_111>
FESE suggests an alternative approach with regard to the ratio of unexecuted orders to transactions focusing on the number of orders as described in the answer to the question 109 above.
<ESMA_QUESTION_CP_MIFID_111>

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

<ESMA_QUESTION_CP_MIFID_112>
FESE believes that there is no clarification needed.
<ESMA_QUESTION_CP_MIFID_112>

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.

<ESMA_QUESTION_CP_MIFID_113>
FESE agrees with an annual review cycle. In addition, ad-hoc adaptions have to be permitted in order to offer the ability to react on volatile market phases.
<ESMA_QUESTION_CP_MIFID_113>

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.

<ESMA_QUESTION_CP_MIFID_114>
FESE agrees to cover all trading phases and to monitor on a monthly basis except pre- and post-trading phases should be excluded since no execution can take place during those phases.
<ESMA_QUESTION_CP_MIFID_114>

Q115. Do you agree with the proposal included in the Technical Annex regarding the different order types? Is there any other type of order that should be reflected? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_115>
FESE agrees with the proposal.
<ESMA_QUESTION_CP_MIFID_115>

Q116. Do you agree with the proposed draft RTS with respect to co-location services? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_116>
FESE in general agrees. Particular the non-discriminatory practice in relation to 3rd party service providers is an essential obligation within the regulation. After all, to ensure that those providers offer the same non-discriminatory access can only be ensured on a contractual basis, but cannot be verified by the venues themselves. Therefore FESE is of the opinion that the task can only be to ensure that 3rd party service providers get the same access and have to fulfil the same obligations as investment firms, who want to directly use colocation services of venues.

The monitoring of connectivity and latency should stay with the venue. Venues, having outsourced the colocation services to a third party shall ensure on a contractual basis that the provider of those services fulfils the requirements of this regulation.
<ESMA_QUESTION_CP_MIFID_116>

Q117. Do you agree with the proposed draft RTS with respect to fee structures? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_117>
FESE notes that Article 4 concentrates on rebates, incentives and disincentives, where the definition of ‘rebate’ given in Article 1 (4) describes a rebate as a refund for market making activity. We believe this should be clarified in the Article.

“Any rebate, incentive or disincentive ***for market making activity*** provided under a fee structure shall be pre-determined by publicly available document of the trading venue and based on non-discriminatory, measurable and objective parameters including volumes effectively traded, services effectively used and the provision of specific services~~***, such as provision of liquidity provided by a market maker***~~**.”**

In addition, FESE strongly supports the ability for trading venues, under Article 6 RTS 17, to charge for testing if the testing requirements for venues remain drafted as such, considering the significant costs incurred by the testing requirements for algorithms considered as new on the trading venue.
<ESMA_QUESTION_CP_MIFID_117>

Q118. At which point rebates would be high enough to encourage improper trading? Please elaborate.

<ESMA_QUESTION_CP_MIFID_118>
FESE believes that rebate-levels should not have impact on improper trading. We think basic principles (e.g. transparency, discrimination, etc.) should be sufficient to encourage proper trading.

However, fee rebates, or fee rates more generally should ensure the sustainability of the trading venue. No trading venue should be able to operate at loss. Otherwise, there is a risk to undermine the capacity of trading venues to ensure the resiliency and security of their systems and therefore to undermine the overall resiliency and security of trading in the EU.

Amendment proposal

RTS 17

Article 5 – General

A trading venue shall not use a fee structure where, upon reaching a certain threshold of total trading volume, the total number of trades or the cumulated trading fees generated by a trade benefit from a discount including those trades already executed.

The fee structure of trading venues shall enable each of them to comply, at all times, with the organisational requirements provided in this Regulation.

<ESMA_QUESTION_CP_MIFID_118>

Q119. Is there any other type of incentives that should be described in the draft RTS?

<ESMA_QUESTION_CP_MIFID_119>
FESE believes that not be a limit for possible rebates, incentives and discounts with an enclosed list. We think maker-taker rebates shall be restricted to proprietary trading, otherwise the decision to which trading venue a particular order is routed could be based on the rebate granted to the participant rather than on best execution for the client.
<ESMA_QUESTION_CP_MIFID_119>

Q120. Can you provide further evidence about fee structures supporting payments for an "early look"? In particular, do you agree with ESMA's preliminary view regarding the differentiation between that activity and the provision of data feeds at different latencies?

<ESMA_QUESTION_CP_MIFID_120>
FESE is not aware of such kind of fee structures.
<ESMA_QUESTION_CP_MIFID_120>

Q121. Can you provide examples of fee structures that would support non-genuine orders, payments for uneven access to market data or any other type of abusive behaviour? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_121>
FESE is not aware of examples for such kind of fee structures.

However, fee rebates, or fee rates more generally should ensure the sustainability of the trading venue. No trading venue should be able to operate at loss. Otherwise, the risk is undermine the capacity of trading venues to ensure the resiliency and security of their systems and therefore to undermine the overall resiliency and security of trading in the EU.

Amendment proposal

RTS 17

Article 5 – General

A trading venue shall not use a fee structure where, upon reaching a certain threshold of total trading volume, the total number of trades or the cumulated trading fees generated by a trade benefit from a discount including those trades already executed.

The fee structure of trading venues shall enable each of them to comply, at all times, with the organisational requirements provided in this Regulation.
<ESMA_QUESTION_CP_MIFID_121>

Q122. Is the distinction between volume discounts and cliff edge type fee structures in this RTS sufficiently clear? Please elaborate

<ESMA_QUESTION_CP_MIFID_122>
FESE noted that the general concepts for volume discounts and cliff edge types are clearly described in Article 1 but not precisely in Article 5 of chapter IV ("Fee structures that may create incentives for disorderly trading"), therefore we proposed to adjust Art. 5.

However, we would suggest more flexibility over the definition of the party to which the volume discount may be applied, by not restricting it only to members but also to DEA users.

Amendment proposal

RTS 17

Article 1 – Definitions

(5) 'volume discount' means a price differentiation scheme based on the total trading volume, the total number of trades or the cumulated trading fees generated by one member **or client or user** whereby the marginal trader executed subsequent to reaching the thresholds is reduced;
<ESMA_QUESTION_CP_MIFID_122>

Q123. Do you agree that the average number of trades per day should be considered on the most relevant market in terms of liquidity? Or should it be considered on another market such as the primary listing market (the trading venue where the financial instrument was originally listed)? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_123>
General comments – Need for harmonised tick size regime across all markets
FESE would like to make some general comments on tick sizes before answering questions 123 to 131.

Firstly, our understanding is that the intention was always to introduce a harmonized tick size regime in Europe. Unfortunately, this is not the case as the regime will not become applicable to RFQs, SIs and OTC platforms. Essentially this means that for instance SIs can execute client orders at a better price than its publicly disclosed quotes. For example, if an SI's quote is 48.10 EUR to 48.30 EUR, the SI can execute at any price point, i.e. 48.11 EUR, 48.12 EUR etc. while trading venues can only execute at 48.15 EUR and 48.20 EUR etc. assuming the tick size would be 0.05 EUR. The consequence would be that liquidity might move away from public markets, which is the opposite of what is meant to be achieved with MiFID II.

FESE is aware that the Level 1 text can no longer be changed; however, we do have a solution/suggestion with regard to how this issue could be solved to some degree in the Level 2 text. FESE proposes that SIs can only execute one tick better than the quoted price for which the one tick better must comply with the instrument's minimum tick size, for example if the quote of an SI for a share (respectively also for ETFs, ETPs and ETNs) is at 48.10 EUR to 48.30 EUR, and that instrument has a tick size of 0.05 EUR, the SI should only be allowed to execute at 48.15 EUR or at 48.25 EUR and not within the bid and offer quote of 48.10 EUR to 48.30 EUR at any price point. This would be fairer and provide a true level-playing field.

In addition to this, as outlined in our answer to question 46, we suggest that ESMA considers extending the definition of "quotes reflecting prevailing market conditions" by specifying that only prices executed at price levels in compliance with the applicable tick size of that financial instrument should be deemed to reflect prevailing market conditions.

ESMA must recognise differing markets when implementing tick size regimes
Regarding setting the appropriate tick sizes, FESE wishes to insist on the fact that the current tick size regimes in place across Europe today, operated by trading venues, have proved to work consistently well. In accepting the transfer and centralisation of responsibility for tick size setting to ESMA, FESE considers it is critical that the current effective operation is not undermined.

Therefore, FESE is concerned that the suggested table of ESMA results in non-optimal tick sizes (too small or too large). The problem with too small tick sizes on the one side is that thin liquidity at the top of the book will be the consequence, which may push participants away from lit venues that want to trade larger sizes. On the other side if tick sizes are too large this will lead to too wide spreads, because volumes that are currently quoted at tight spreads will consolidate at new but wider spreads. This means that costs for end investors will go up, because liquidity takers will pay in the end more for the same liquidity which they can currently get at cheaper prices. Especially retail investors will be impacted by this. Besides, if absolute tick sizes increase, volume will concentrate at touch points of wider spreads. As a consequence queue priority will become more important as the time between posting and execution will increase and therefore speed in trading becomes more important. Again this is the opposite what was meant to be achieved, i.e. slow down trading. Overall non-optimal tick sizes have the effect that 1) they will push market participants away from trading at a venue (which contradicts with MiFID's explicit goal that trading should take place on transparent markets); 2) damage the price discovery process; 3) reduce liquidity and 4) make it difficult for firms wishing to raise capital.

Although we welcome that ESMA would like to give particular attention to analyse effects on spread-to-tick-ratios, OTRs, queuing time and other indicators during an annual review it would have been good to have seen such an analysis at this stage. Due to these reasons FESE would like ESMA to consider conducting a pilot program (mainly for liquid shares) similar to the US one as a change in tick sizes will have a massive impact on markets. If for legal reasons a pilot is not possible, FESE recommends doing at least a review after six months of the introduction of the new regime that will allow changing the concept at its full scope.

As an overall point, FESE suggests that NCAs in conjunction with ESMA should have the right to intervene and impose a temporary derogation from the tick size table in case of a "serious degradation of market microstructure". We suggest this be added to the scope of ESMA's annual review. Such degradation could be caused through, for example, market noise, announcements that might lead to a significant increase or decrease of trades, financial crisis etc.

Proposed amendment to Art. 2 (4a) of Draft RTS 18:
In conducting its annual review, if a degradation of market microstructure has been detected, the NCA in conjunction with ESMA may suggest to deviate from the existing regime which shall then become applicable to all other regulated markets and multilateral trading facilities where the share is traded on.

ESMA stated in the Consultation Paper "[..] that it is not possible to predict with certainty what the exact impact of a change in tick sizes will be to the spread-to-tick-ratio" which is worrying considering this shall be implemented in 2017 and does not allow for any flexibility. Some FESE members discovered that actually the spread-to-tick ratio for a significant number of their shares is below the suggested floor of 1.5, while other shares are above the proposed caps, all of which is extremely worrying.

FESE members agree that a one-size-fit all approach will not achieve the goal of accommodating all markets equally, from the largest most liquid to the smallest less liquid one. FESE members have identified that the proposed table will have a different impact for different FESE members depending on which FESE tick size table they currently implement[10]. Therefore, we do not have a single proposal which is supported by all members .This is further outlined below:

<u>Exchanges using FESE Table 2 (General view)</u>

In general most exchanges using FESE Table 2 are of the opinion that the proposed table works for their markets as the current Table 2 is similar as the proposed table based on a low spread to tick ratio. Regarding the calculation methodology FESE Table 2 members note that ESMA considers deducting all trades from any pre-trade transparency waiver. They support ESMA and believe that this should be the case with the exception of orders under the order management facility waiver. The reason for including such transactions is that the visible peak of reserve orders actually contributes to the information content to be used as a reference price. When looking at Article 1 (3) of Draft RTS 18 ESMA already follows this argument (see Art. 4 (1) paragraphs (a) to (c) of Regulation (EU) 600/2014). **This solution does not necessitate any changes to the draft RTS 18.**

<u>Exchanges using FESE Table 4 (General view)</u>

In general most FESE Table 4 members have concerns with the proposed table for their markets as the suggested floor for the spread-to-tick is often below 1.5 and some of their instruments experience more than 2 tick size jumps which they feel is out of proportion even if the general aim is to increase tick sizes. To balance this they suggest an alternative proposal by adjusting the calculation methodology that would be more appropriate for their markets. They suggest that the methodology for the calculation of the average number of trades per day should not be limited to only the most relevant market in terms of liquidity or the primary listing market. Instead, the methodology for the calculation should take account of all transactions in the instrument concerned, across all trading venues in Europe, i.e. Regulated Markets and MTFs plus SIs and OTC platforms. This could be addressed with the following proposed amendments.

[10] http://fese.eu/_lib/files/UPDATED_FESE_TICK_SIZE_TABLES_AS_OF_OCT_2012.pdf

Proposed amendment to Article 1 (1) (3) of Draft RTS 18:
'number of trades per day' means the number of transactions carried out in a given **share on all trading venues, SIs and OTC platforms in Europe** ~~**financial instrument on the most relevant market in terms of liquidity,**~~ excluding transactions executed in accordance with one of the pre-trade transparency waivers provided under Article 4(1)(a) to (c) of Regulation (EU) No 600/2014;

Proposed amendment to Article 1 (2) of Draft RTS 18:
For the purposes of this Regulation, the use of a quantitative metric shall use the data relating to **all trading venues, SIs and OTC platforms in Europe** ~~**the most relevant market in terms of liquidity**~~

Proposed amendment to Article 2 (2) of Draft RTS 18:
~~**Competent authorities of the most relevant market in terms of liquidity**~~ **ESMA** shall ensure that the identification of the liquidity band applicable to each share~~**, depositary receipt and certificate for which they are the relevant competent authority**~~ is provided. To that end, **all trading venues, SIs and OTC platforms in Europe** ~~**the most relevant market in terms of liquidity**~~ for each share~~**, depositary receipt and certificate**~~ traded or admitted to trading **on their venue** ~~**on a European Union trading venue**~~ shall **deliver to ESMA in a format that will be provided by ESMA (and which needs to be specified by ESMA in guidelines)** ~~**publish**~~ the average number of trades per day in that **share** ~~**financial instrument**~~ calculated over the previous twelve months of trading or, where applicable, that part of the year during which that financial instrument was admitted or traded on a trading venue. ~~**and was not suspended from trading.**~~ **Based on these figures ESMA shall then calculate the average number of trades on all trading venues, SIs and OTC platforms in Europe for each share admitted to trading or traded on a European trading venue.**

The above views in the both boxes are generally representative of the larger exchanges currently implementing Table 2 or Table 4. However there are other FESE members, in general operating smaller exchanges, that believe that the table proposed by ESMA will not accommodate shares with less liquidity and that this also needs to be addressed by ESMA, by carrying out a further review of the impact of the proposed table on those lower priced securities in the first liquidity band.
<ESMA_QUESTION_CP_MIFID_123>

Q124. Do you believe a more granular approach (i.e. additional liquidity bands) would be more suitable for very liquid stocks and/or for poorly liquid stocks? Do you consider the proposed tick sizes adequate in particular with respect to the smaller price ranges and less liquid instruments as well as higher price ranges and highly liquid instruments? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_124>
Again as pointed out in our answer to question 123 FESE members agree that a one-size-fit all approach will not achieve the goal of accommodating all markets equally, from the largest most liquid to the smallest less liquid one. FESE members have identified that the proposed table will have a different impact for different FESE members depending on which FESE tick size table they currently implement[11].

[11] http://fese.eu/_lib/files/UPDATED_FESE_TICK_SIZE_TABLES_AS_OF_OCT_2012.pdf

Again in general exchanges using FESE Table 2 are of the opinion that the proposed table works for their markets while FESE Table 4 members believe that the calculation methodology as described under the answer to question 123 would need to be change to accommodate for their markets.

Again as mentioned earlier FESE would like ESMA to consider conducting a pilot program similar to the US one as a change in tick sizes will have a massive impact on markets. If for legal reasons this is not possible, FESE recommends doing at least a review after six months of the introduction of the new regime that will allow changing the concept at its full scope. FESE therefore suggest that it should be as flexible as possible.

Furthermore, FESE suggests that NCAs in conjunction with ESMA should have the right to intervene and impose a temporary derogation from the tick size table in case of a "serious degradation of market microstructure". We suggest this be added to the scope of ESMA's annual review. Such degradation could be caused through, for example, market noise, announcements that might lead to a significant increase or decrease of trades, financial crisis etc.

Proposed amendment to Art. 2 (4a) of Draft RTS 18:
In conducting its annual review, if a degradation of market microstructure has been detected, the NCA in conjunction with ESMA may suggest to deviate from the existing regime which shall then become applicable to all other regulated markets and multilateral trading facilities where the share is traded on.

<ESMA_QUESTION_CP_MIFID_124>

Q125. Do you agree with the approach regarding instruments admitted to trading in fixing segments and shares newly admitted to trading? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_125>
First of all, FESE believes that it needs to be defined what a fixing segment is. This should be done in Art. 1 of RTS 18. If ESMA refers to the trading form "periodic auction trading only", FESE has concerns that the current approach as suggested by ESMA might not work. It could be the case that a stock might be continuously traded at a trading venue and be traded in a fixing segment (i.e. periodic auction trading only) at another trading venue. Although the aim is that a stock gets the same tick size, the current proposal would mean that the stock would have different tick sizes if the number of trades is larger than 100. Therefore the current proposal needs to be amended. The approach should only be followed if the stock is only being traded in fixing segments but not continuously. If this is not the case there should be no exemption from the standard procedure.

Proposed amendment to Art. 1 (1) (9) of DRAFT RTS 18:
Art 1(1)(9) 'fixing segment' means periodic auction trading only; and

Proposed amendment to Art. 2 (6) of DRAFT RTS 18:
Where **a share~~s, depositary receipts and certificates are~~ is** traded on a fixing segment, the relevant trading venue shall use the lowest liquidity band in the tick size table in the Annex **unless the share is traded in a fixing segment on one trading venue and in continuous trading at another venue this Regulation shall not apply if the share is assigned to the first liquidity band in the Annex**.

FESE agrees with the suggested approach with regards to shares newly admitted to trading. However FESE suggests clarifying what happens when the share will newly be admitted to trading on any day in February. In this case Art. 2 (3) and (4) of RTS 18 shall not apply.

Proposed amendment to Art. 3 (4) of DRAFT RTS 18:
In case the share will newly be admitted to trading on a day in February, Art. 2 (3) and 2 (4) shall not apply.

Furthermore we would like to highlight the importance of ensuring that data for new shares is available on the ESMA database in advance of that security's first day of trading in order to ensure that other venues can implement the same tick size from the first day of trading. Similarly, all updates should be published a number of days in advance of their effective date.
<ESMA_QUESTION_CP_MIFID_125>

Q126. Do you agree with the proposed approach regarding corporate actions? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_126>
FESE does not agree that a review within six weeks based on the first 4 weeks of trading makes sense. We suggest that for any corporate action the market with the highest turnover, i.e. in general the primary market should be in charge to decide if a tick size adjustment is necessary and what it should be. If the venue concludes a tick size change is appropriate ESMA should be informed and adjust the instrument to a new liquidity class. If that change happens to be just before the annual review, the proposed change should be applicable for the next year as obviously in a potential short timeframe the number of trades for the last year might not reflect the right liquidity class.

Proposed amendment to Art. 4 of Draft RTS 18:
If a **~~trading venue~~ most relevant market in terms of liquidity for a financial instrument** reasonably considers that a corporate action will cause the average number of trades per day relating to a particular financial instrument to no longer provide an accurate metric for the liquidity profile of that financial instrument, **~~the trading venue~~ that most relevant market in terms of liquidity** shall **~~treat that financial instrument as if it were admitted to trading or traded for the first time~~ have the means to deviate from the existing tick size. ESMA shall specify in guidelines the concrete exemption process.**

Furthermore, FESE suggests that the venue with the highest turnover, in general the primary market, should have the right for intervention and temporary derogation from the tick size table in case of "degradation of market microstructure". This could be caused through for example market noise, any kind of announcements that might lead to an increase or decrease of trades, financial crisis etc.

Proposed amendment to Art. 2 (4a) of Draft RTS 18:
ESMA shall conduct a review after six months after this Regulation shall become applicable. If a degradation of market microstructure has been detected, the most relevant market in terms of liquidity may suggest to deviate from the existing regime which shall then become applicable to all other regulated markets and multilateral trading facilities where the share is traded on until ESMA has the means to provide new terms of how to limit and enforce the minimum tick size**.**
<ESMA_QUESTION_CP_MIFID_126>

Q127. In your view, are there any other particular or exceptional circumstances for which the tick size may have to be specifically adjusted? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_127>
Yes, FESE believes this should be the case for ETFs, certificates and DRs:

(1) ETFs: The tick size approach taken by ESMA seems to be well-suited for a large number of ETFs. However, for some ETFs the proposed tick size is too large and we would therefore recommend adjusting it. Among the ETFs impacted most are commodity, indices and money market ETFs plus fixed income ETFs that invest in government bonds with short maturities ~~as~~. For instance some of the EONIA ETFs are currently trading at prices above 100 EUR with a tick size of 0.001 EUR and average daily spreads of approximately 0.005 EUR or lower. If the new proposal from ESMA would be implemented the tick size of these ETFs would be adjusted to 0.02 EUR (see table). This would mean that for these ETFs investors have to bear an increase of implicit transaction costs by approximately 300%. This is also true for some highly liquid equity ETFs. For instance for one of Europe's most actively traded ETF tracking the DAX index which currently shows average daily spreads of 0.025 EUR, priced at a level of approximately 100 EUR, the tick size under the proposed regime would be 0.02 EUR, resulting in a very low spread-to-tick size ratio of 1.25.

For each type of ETF, implementation of the proposed tick size regime will result in a significant increase of transaction costs for investors due to a substantial increase of bid-ask spreads, particularly for those ETFs priced greater than 1,000. Furthermore, given that the harmonized tick size regime will not be applicable to RFQs, SIs and OTC platforms (see above) as outlined above transaction volumes will likely move away from public markets as the proposed tick size regime will enable SIs to offer price improvement at virtually no cost. We therefore suggest that the proposed tick size regime should include an exemption process for those ETFs where investors would very likely have to bear a significant increase in transactions costs when compared to current spreads under the existing tick size regime defined by a trading venue.

FESE further proposes that the market with the highest turnover may establish a lower tick size for any ETF with a spread-to-tick size ratio below 3 to better reflect the liquidity of that ETF. The new tick sizes should then apply to all trading venues (i.e. regulated markets and MTFs) to ensure that the objective of a harmonized tick size regime in Europe is reached. The issuer should be consulted before the decision to deviate from the tick size regime is taken. FESE members' analysis shows that less than 10 percent of those products would need to be adjusted though it should be noted that many of these are have the highest turnover e.g. Gold ETFs. Therefore we believe an exemption process would be a good way forward. We are of the opinion that providing such flexibility with an exemption process is of highest importance as otherwise trading venues will not be able to maintain their competitiveness with other platforms such as RFQs, SIs and OTC platforms, for which no tick size regime applies and unlike as for share the trading obligation does not exist.

And finally FESE would like to point out that although we believe that for those ETFs an annual review is sufficient, for newly admitted ETFs we believe it makes sense to establish a review scheme similar to that for newly admitted shares, i.e. no later than six weeks after the ETF has started trading, the trading venue where the ETF has been first listed at shall determine if the ETF qualifies for a possible tick size exemption on the basis of spread data obtained from the first four weeks of trading. If it turns out that the ETF would qualify for a tick size exemption, the trading venue where the ETF has first been listed shall consider the previous trading history of ETFs having similar characteristics and determine on this basis the applicable tick size. Again the issuer of the ETF should be consulted.

Proposed amendment to Art 1 (1) (10) Draft RTS 18:
(10) '**E**xchange **T**raded **F**unds (ETFs)' for the purpose of this Regulation includes also **E**xchange **T**raded **Commodities** (ET**C**s) and **E**xchange **T**raded **N**otes (ETNs).

Proposed amendment to Art 5 (3) Draft RTS 18:
3. If the most relevant market in terms of liquidity reasonably considers that the tick size table corresponding to the most liquid liquidity band in the Annex does not accurately reflect the liquidity profile of a given ETF, it may apply a tick size lower than the tick size specified in the Annex. ESMA shall develop guidelines to specify the exemption process.

Proposed amendment to Art 5 (4) Draft RTS 18:
4. A trading venue shall apply to ETFs admitted to trading or traded for the first time the tick size table corresponding to the most liquid liquidity band in the Annex. No later than six weeks after the ETF has started trading, the most relevant market in terms of liquidity shall determine if the ETF qualifies for a tick size exemption according to Art. 5 (3) of Draft RTS 18 on the basis of the first four weeks of trading.

(2) Certificates: FESE believes that the proposed table does not make sense for certificates quoted in percent. If at all then only for certificates quoted per unit. However, because no data analysis has been done so far we suggest reconsidering this approach and to first do a proper analysis. However, in case ESMA still intends to implement it for certificates, we suggests to only implement it for certificates quoted in unit, for those quoted in percent it should be left to the issuer. The reason for that is that the tick size of a certificate quoted in percent depends on its maturity.

Proposed amendment to Draft RTS 18:
The term 'certificates' should be deleted from all relevant Articles in Draft RTS 18.

(3) Depository Receipts: Again FESE believes it is essential to do first a proper analysis for DRs before suggesting any regime where the impact is unclear or might be negative.
As previously stated above, FESE suggests that the venue with the highest turnover, in general the primary market, should have the right for intervention and temporary derogation from the tick size table in case of "degradation of market microstructure". This could be caused through for example market noise, any kind of announcements that might lead to an increase or decrease of trades, financial crisis etc. We recommend that this should be allowed for all asset classes.

Proposed amendment to Draft RTS 18:
The term 'depository receipts' should be deleted from all relevant Articles in Draft RTS 18.

Further, FESE noted in section 4.4 of the Consultation Paper on ratio of unexecuted orders to transactions the link to the tick size liquidity bands. FESE does not agree with the grouping per tick size bands for shares because it will lead to frequent changes in the bands and therefore to max ratios. The grouping of instruments should be left to the trading venues to avoid any unintended consequences. Please also see our response to question 109 on this matter.
<ESMA_QUESTION_CP_MIFID_127>

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.

<ESMA_QUESTION_CP_MIFID_128>

FESE believes no further instruments should fall in the scope. However, we believe that Exchange Traded Notes and Exchange Traded Commodities should be included in order to have a consistent approach.

Proposed amendment to Art 1 (1) (10) Draft RTS 18:
(10) '**E**xchange **T**raded **F**unds (ETFs)' for the purpose of this Regulation includes also **E**xchange **T**raded **Commodities** (ET**C**s) and **E**xchange **T**raded **N**otes (ETNs).
<ESMA_QUESTION_CP_MIFID_128>

Q129. To what extent does an annual revision of the liquidity bands (number and bounds) allow interacting efficiently with the market microstructure? Can you propose other way to interact efficiently with the market microstructure? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_129>
FESE believes that an annual revision of the liquidity bands is sufficient. However, as FESE is concerned that the new regime could lead to non-optimal tick sizes (too large or too small) we propose that a first review should take place after six months, i.e. the number of trades should be re-calculated and the effects on spread-to-tick-ratios, queuing time, OTRs etc. should be measured as well. If the new tick size regime would lead to a degradation of market microstructure we urge ESMA to change it.
<ESMA_QUESTION_CP_MIFID_129>

Q130. Do you envisage any short-term impacts following the implementation of the new regime that might need technical adjustments? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_130>
FESE envisages short-term impacts as trading venues as well as market participants need to make changes in their system. Further, FESE believes that a detailed description would be essential where ESMA informs the market about tick size changes that are made outside of the annual review due to corporate actions or whereas suggested further above a change was necessary due to degradation of market microstructure. We believe that ESMA needs to provide a list on its website that contains the respective liquidity class on a per instrument basis. That list needs to be updated daily so trading venues can ensure that the right tick size will be applied. From our perspective there is still a lot of work to be done on the communication process in case tick sizes change during the year.

Proposed amendment to Art. 2 (4a) of Draft RTS 18:
ESMA shall conduct a review after six months after this Regulation shall become applicable. If a degradation of market microstructure has been detected, the most relevant market in terms of liquidity may suggest to deviate from the existing regime which shall then become applicable to all other regulated markets and multilateral trading facilities where the share is traded on until ESMA has the means to provide new terms of how to limit and enforce the minimum tick size.

Proposed amendment to Art. 2 (5) of Draft RTS 18:
The tick size of a ~~Over the next twelve months the tick size of that~~ share shall **in general over a period of twelve months** evolve continuously as price changes within the liquidity band so that the tick size shall increase by one increment if the price crosses above the upper price threshold for that liquidity band and shall decrease by one increment if the price crosses below its lower price threshold.
<ESMA_QUESTION_CP_MIFID_130>

Q131. Do you agree with the definition of the "corporate action"? Please provide reasons for your answer.

<ESMA_QUESTION_CP_MIFID_131>
FESE does not agree with the definition of the "corporate actions". FESE believe that for example dividends are missing. We suggest changing the wording in Art. 1.1 (8) in a way that the list is not exhaustive. As explained above (see our answer to question 125) we vote for a

more flexible approach which means that for the purposes of corporate actions the venue with the highest turnover, i.e. in general the primary market should be allowed to adjust the tick size if deemed necessary.

Proposed amendment to Art. 1 (1) (8) of Draft RTS 18:
Art 9(1)(8) 'corporate action" means **dividends,** splits (sub-division), reverse splits (consolidation), scrip issues (capitalisation or bonus issue), capital repayments, rights issues or entitlement offers, takeovers and mergers and stock conversions**.**
<ESMA_QUESTION_CP_MIFID_131>

Q132. Do you agree with the proposed regulatory technical standards?

<ESMA_QUESTION_CP_MIFID_132>
FESE welcomes ESMA's recognition that a security may have its first admission to trading on more than one market and that each of those markets should be equally recognised. As material.

FESE agrees partly in that we support ESMA's proposal that a material market in terms of liquidity in a financial instrument is 8 (i): 'the trading venue where the financial instrument was first admitted to trading, including all the venues where the instrument was simultaneously admitted to trading in case of multiple listing'. Art. 1 (2) of RTS 19 should therefore be deleted.
<ESMA_QUESTION_CP_MIFID_132>

Q133. Which would be an adequate threshold in terms of turnover for the purposes of considering a market as "material in terms of liquidity"?

<ESMA_QUESTION_CP_MIFID_133>
FESE does not agree with Art. 1 (2) of RTS 19, see our response to question 132.
<ESMA_QUESTION_CP_MIFID_133>

- **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.

<ESMA_QUESTION_CP_MIFID_134>
FESE supports ESMA´s approach for detection and correction of errors and omissions by DRSPs. We also support that CTPs are not required to detect errors or omissions in the information they receive from APAs and trading venues.

We consider that it is not appropriate to have wide scale reconciliations but to have straightforward reconsolidations only for reporting entities.
<ESMA_QUESTION_CP_MIFID_134>

Q135. Do you agree with ESMA's proposal to establish maximum recovery times for DRSPs? Do you agree with the time periods proposed by ESMA for APAs and CTPs (six hours) and ARMs (close of next working day)? Please provide reasons.

<ESMA_QUESTION_CP_MIFID_135>
FESE does not agree with ESMA's proposal to establish maximum recovery times for DRSPs as this will be too prescriptive for the various providers while not providing for a quicker resumption of a business.

DSRPs will always aim to provide the best service under competition, however, in severe cases 6 hours might not be achievable and a legal requirement will not change the impracticalities of such recovery. Instead of imposing legal requirements in fixed terms, ESMA should require that service level descriptions shall contain information about business continuity arrangements and be transparent to the customer.
<ESMA_QUESTION_CP_MIFID_135>

Q136. Do you agree with the proposal to permit DRSPs to be able to establish their own operational hours provided they pre-establish their hours and make their operational hours public? Please provide reasons. Alternatively, please suggest an alternative method for setting operating hours.

<ESMA_QUESTION_CP_MIFID_136>
FESE agrees that DRSPs are able to establish their own operational hours.
<ESMA_QUESTION_CP_MIFID_136>

Q137. Do you agree with the draft technical standards in relation to data reporting services providers? Please provide reasons.

<ESMA_QUESTION_CP_MIFID_137>
FESE generally agrees with the draft technical standards apart from the following issues:

- ESMA suggests that an APA and CTP should be able to delete and amend the information which it received from the entity providing it with information. This will allow an APA and CTP to deal with situations where in exceptional circumstances the entity cannot delete or amend the information itself. FESE considers investment firms (IFs) as commercial entities like APAs and CTPs and they should also have business continuity plans in place. We consider that deleting and amending trade reports from IFs through a service provider can have legal consequences, which not every provider wants to assume. Therefore, we would strongly argue for the deletion of this requirement. This should be up to competing service providers to offer as an additional service.

- Requirements for stress tests are not being supported at all. DSRPs have a significant interest to provide their services at all times and usually cater for such tests. Therefore, we suggest the deletion of this requirement in Recital 15. Furthermore, the last sentence of the Recital should be amended and state: *"In order to handle this, the DRSP should ensure operating at sufficient capacity including headroom capacity"*. We consider that this would be sufficient.

- FESE recommends to delete Recital 20. While cyber-attacks are currently being discussed by regulators, necessary measures would need to be analysed before becoming enshrined into MiFID II / MiFIR.

- FESE strongly recommends to delete Recital 22. While we agree with ESMA that CTPs might provide additional services, it seems overly intrusive to define which services these might be. This would be both restrictive and exclusive in terms of excluding potential service providers like exchanges seeking authorization from NCAs. We therefore strongly suggest the delete this recital as well as the corresponding paragraph as outlined below.

- Regarding Art 5 2. (a), it is unclear why ESMA requires the submission of information on the remuneration policy. This seems unjustified and disproportionate and therefore we consider that this should be deleted.

- Regarding Art 8 2. (c), the determination of fees charged by the DSRPs and related third parties should be deleted. In a competitive market it is questionable why a NCA should be involved in the determination of price setting. This is disproportionate and unjustified, and therefore should be deleted.

- We suggest the introduction of a new Art 9 (5) (new) and Art 10 (5) (new) which states: *"where the DSRP is already regulated as a trading venue, it shall be considered to comply with these requirements"*. Regulated Markets (RMs) are already appropriately regulated and supervised and have significant experience as regards data processing and publication. We consider that imposing additional administrative burdens would be disproportionate and not in line with the Level 1 text. Therefore, we recommend to include these new paragraphs to state that RMs comply with these requirements.

- Regarding Art 11 5 (g), FESE does not agree with ESMAs proposal to establish maximum recovery times for DRSPs. This will be too prescriptive for the various providers while not providing for a quicker resumption of a business. DSRPs will always aim to provide the best service under competition, however, in severe cases 6 hours might not be achievable and a legal requirement will not change the impracticalities of such recovery. Instead of imposing legal requirements in fixed terms, ESMA should require that service level descriptions shall contain information about business continuity arrangements and be transparent to the customer.

- We proposed to delete Art 18 in RTS 20. We question why ESMA outlined additional services which may be provided by a CTP. We deem this an unjustified restriction, especially as services offered by RMs are not explicitly included in the description, while at the same time research services are being explicitly included. While we fully agree with ESMA that CTPs should be allowed to offer additional services, we do not support to include selected services in a "positive list" within the regulation. We consider that

CTPs can offer other services as long as this does not hinder the services provided as a CTP. We therefore strongly advice to delete Art 18 in RTS 20.

<ESMA_QUESTION_CP_MIFID_137>

Q138. Do you agree with ESMA's proposal**?**

<ESMA_QUESTION_CP_MIFID_138>

FESE believes that the proposed timeline makes it more cumbersome for CTPs to enter the market. We ask ESMA to reconsider their proposal and to consider a more quantitative approach to assess whether there are sufficient levels of liquidity for determining whether the venue should be included by the CTP.

We also consider that the proposed timeline is not realistic. We would consider that six months is an extremely short deadline, and therefore three months is not realistic. This would hinder the emergence of CTPs in the market. We believe that 9 – 12 months are a more appropriate timeline, both for establishing a sufficient infrastructure (including the development of the needed software together with a reasonable timeframe for testing) and to analyse whether the new trading venue has sufficient liquidity to be included by the CTP.

We also note that the ESMA cost-benefit analysis on this issue has stated that there is zero compliance cost to fulfil these requirements. We completely disagree with this assessment and believe it does not reflect the market reality.

<ESMA_QUESTION_CP_MIFID_138>

Q139. Do you agree with this definition of machine-readable format, especially with respect to the requirement for data to be accessible using free open source software, and the 1-month notice prior to any change in the instructions?

<ESMA_QUESTION_CP_MIFID_139>

FESE strongly appreciates ESMAs neutral approach; however, we do not agree with ESMA on using free open source software only or on a 1 month only notice period.

We do not agree with the wording provided by ESMA regarding Art 14. (iii). Currently, several exchanges provide APA like services already via the infrastructure and data feeds they operate for on-exchange trading purposes. This provides cost-effective solutions to their customers. While some exchanges apply proprietary protocols, others have applied more standard solutions. The source code is not always openly shared due to the fact that software contains certain assets as well as IP rights. Therefore, all of these protocols, regardless if they are proprietary or not, provide real-time data in push mode directly to the CTP/Consolidator, without them having to collect it. Therefore, we strongly suggest that ESMA in line with being neutral is not taking a bias position on whether a source code is open or not, but instead whether data is being delivered securely to the CTP/ Consolidator. Regardless, exchanges should not be required to apply different protocols than they currently use as they already provide reliable data to CTP/Consolidators while posing significantly less risk on them as regards the omission of data.

Furthermore, we disagree with the 1 month advance notice period suggested by ESMA and strongly suggest to increase it to a 3 month advance notice at least. This is the market standard while consolidators usually appreciate even longer advance notices where possible.

Regarding machine readability, one of the short-comings of MiFID I was the publication of OTC trade data on web-sites which resulted in non-consolidation of this data. This was due to the fact that the effort consolidate incurs contains significant costs, as well as significant risks for the CTP/Consolidator. Collecting data from web-sites is extremely costly and it significantly increases the risk for any CTP for omissions or errors. The complaints about a lack of a proper tape are well known to ESMA. The introduction of APAs was targeted at improving the quality of OTC data, both for the accuracy of the data as well as the completeness. Allowing web-based publication only will be reiterating again that same mistake of MiFID I, which led to current complaints by market participants about the lack of a reliable tape. The current acceptance of web-only publication by ESMA risks both non-consolidation of this data, as well as a further discouragement for a CTP to be the providers to enter the market. An acceptance of web-publication only is neither effective nor proportionate. Therefore, we strongly urge ESMA, to reconsider its approach for the sake of data consolidation. It must be clear that only real-time push data feeds applied by Trading Venues, as well as APAs, should have to be accepted by the CTP provider. There is no need to discuss microseconds or even milliseconds in cases where data would need to be consolidated from the web.

Furthermore, in its proposal referring to machine readability in 14 (2) ESMA refers to Article 12(7) of [draft RTS on the authorisation and organisational requirements for DRSPs] that enables automatic access, is robust and ensures adequate access in terms of speed. We cannot see any connection as this article refers to ARMs. We consider that there should be further clarification on this.
<ESMA_QUESTION_CP_MIFID_139>

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

<ESMA_QUESTION_CP_MIFID_140>
FESE agrees with the ESMA proposal. We consider this to be very straightforward and would welcome the approach for an investment firm to have exclusivity with an APA.

We consider that in the light of the shortcomings of MiFID I, it needs to be clear that the publication of post-trade data via a web-page alone and without a real-time push feed will result in the fact that this data will not be consolidated. The same mistakes made in MiFID I would be reiterated again, with the effect that there will be further complaints that a CT is not available.

As regards flagging of duplicates, FESE would recommend that the duplicates only should be flagged. It is our assumption that for the purpose of efficiency only very few IFs if at all will send double reports. Flagging originals with each trade will increase data traffic without creating a clear advantage.
<ESMA_QUESTION_CP_MIFID_140>

Q141. Do you agree that CTPs should assign trade IDs and add them to trade reports? Do you consider necessary to introduce a similar requirement for APAs?

<ESMA_QUESTION_CP_MIFID_141>
FESE considers ESMAs suggestion as one approach of at least two possible approaches. While ESMA refers to a CTP clearly identifying one set of information about a particular trade report, we agree that this could be quite helpful in order to refer to a particular trade report on one CTP provider's site. However, it should be clear that this would not refer to the actual UTI set by a trading venue or set by an APA.

Instead of creating a completely new ID which at the same time might be different across multiple CTPs, another solution could be to require TVs, and IFs to submit their UTI further down the reporting channel to the CTP which could display this in a separate data field. While this would allow to better refer to one and the same trade even across various CTPs, the applicability would result in the ability to provide a relevant UTI in a predefined data field.

Regardless of what is being displayed by the CTP, ideally it should always be possible to trace back a certain trade report published by a CTP. This can be done, as well in case the CTP publishes its own ID while maintaining submitted data including the original UTI either from the trading venue or from the APA. We therefore agree that APAs shall provide UTIs as well.

ESMA must consider this within the context of the CP questions on MiFIR post transparency Q49 and the list of pieces of information that must be included. We believe that this list is missing a key piece of information: Unique Trade Identifier (UTI). The UTI is used to flag uniqueness and would assist in identifying a trade cancellation. We believe that the trading venue must provide UTI otherwise the CTP cannot detect if there are duplications of trades.

Trading venues must retain the already existent identifier systems and complement them with a MIC code to ensure the uniqueness of information for each trade report.
<ESMA_QUESTION_CP_MIFID_141>

Q142. Do you agree with ESMA's proposal? In particular, do you consider it appropriate to require for trades taking place on a trading venue the publication time as assigned by the trading venue or would you recommend another timestamp (e.g. CTP timestamp), and if yes why?

<ESMA_QUESTION_CP_MIFID_142>
FESE considers that it is important for ESMA to understand that the most important time stamp is the order matching / execution time. Regarding the publication time stamp, we consider that this should have additional time.
<ESMA_QUESTION_CP_MIFID_142>

Q143. Do you agree with ESMA's suggestions on timestamp accuracy required of APAs? What alternative would you recommend for the timestamp accuracy of APAs?

<ESMA_QUESTION_CP_MIFID_143>
FESE suggests that regarding the timestamp accuracy of an APA, accuracy to the second is sufficient (regardless of the trade being executed on an electronic system or not). This is to avoid confusion to the market (some trade reports would have an accuracy to the second and others an accuracy to the millisecond) and also because an APA is only relaying the information received by other sources and, therefore, the latency introduced by sending the report from the original source to the APA and the latency the APA itself will introduce so as to comply with the requirements for the detection of errors would make the accuracy to the millisecond useless.
<ESMA_QUESTION_CP_MIFID_143>

Q144. Do you agree with ESMA's proposal? Do you think that the CTP should identify the original APA collecting the information form the investment firm or the last source reporting it to the CTP? Please explain your rationale.

<ESMA_QUESTION_CP_MIFID_144>
FESE points out that the MMT proposal has existing standards which need to be used to flag the source of a trade. We consider that the MIC code is the best tool for this standardisation and that all trading venues must have a MIC code in place in order to make it more practical to consolidate data.
<ESMA_QUESTION_CP_MIFID_144>

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.

<ESMA_QUESTION_CP_MIFID_145>
FESE believes that ESMA must delete Article 2 of the proposed RTS 22.

Level of disaggregation required
While FESE strongly appreciates ESMAs considerate approach as regards a mandatory requirement focusing on 4 asset classes instead of 8, we do not agree with further disaggregation, as we strongly believe it will add to unmanageable complexity and potentially higher costs to the end user instead of lower cost and thus be neither proportionate nor efficient. It is also important to note that 90% of trading venue data is sent to data vendors and not directly to trading participants. (In this respect the assumption made in the Cost Benefit Analysis that Market Data Vendors will offer at least the same level of dis-aggregation is not correct and needs to be corrected).

We understand that the objective of data disaggregation is to offer the most appropriate data package to some more or less homogeneous groups of data consumers. Therefore, as stated in our response to the ESMA Discussion Paper we propose to aggregate the service around the three main groups of activities traditionally present in investment banking:

- Equities
- FICC (Fixed-Income, Currency, Commodities)
- Derivatives

Any further disaggregation especially of derivatives products is too granular and would face a too limited audience. As regards customer groups only very few retail investors would subscribe to derivatives packages. We also re-iterate our concerns that if a trading venue were forced to disaggregate by instrument but there was no requirement for a vendor to do the same, then the vendor would most likely just re-bundle the data.

We like to point out that unlike stated in the cost benefit analysis no trading venue in the EU currently provides a full unbundling/disaggregation of pre- and post-trade data. In fact this is not the case.

Unintended consequences of increased data packages
Greater disaggregation will not only result in significantly higher costs in distributing market data, but it will also lead to confusion among investors who no longer can rely on receiving all the relevant market data. As the administration of market data already represents a burden for trading venues, vendors and end users, anything which adds to this burden is unhelpful and does not serve the purpose. In our view, market forces should decide on the level of disaggregation. Unless the regulator is in the position to control the way data vendors proceed with the data, there is no point in imposing such an obligation on trading venues which might as well then be ignored by data vendors.

In addition:

- Trading venues, data vendors and brokers would have to massively enlarge their administration operations to manage access rights. This would, as a consequence, add to the cost of market data instead of reducing it. Thus it would be both, disproportionate as well as ineffective.
- Categorising in an unambiguous manner a very large universe of securities according to hard scientific criteria is a burdensome task. Specialised vendors and proprietary

standard owners (ICB, GICS) charge some substantial amount of money for this type of activity.
- While the classification of securities is advanced for plain-vanilla equities, it is fragmented, incomplete and not widely accepted for other asset classes.
- Disaggregation based on multiple securities classification standard simultaneously will trigger confusion and costly bug fixing considering the large complexity of the market segmentation matrix.

All these attempts to structure market data alongside the above mentioned criteria would generate large additional costs for market participants.

Moreover, ESMA must consider that there will be additional costs that infrastructures must face when striving to provide additional data packages. Therefore, the more granular the data disaggregation that is required, the more cost will be incurred. This will not help to reduce costs for investors. Moreover, increased number of data packages could add a lot of confusion in the market, i.e. more products and more data streams for investors to consider.

Furthermore, the disaggregation by trading venues, as well as possible re-aggregation by vendors will add latency giving an edge to HFTs that take the full range of data directly from the primary sources.
<ESMA_QUESTION_CP_MIFID_145>

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.

<ESMA_QUESTION_CP_MIFID_146>
FESE does not fully agree with ESMAs approach. While FESE appreciates further clarity as regards who is responsible for trade publication, which will hopefully lead to reduced errors as regards OTC trade publication, we need to point out that the RTS is missing a reference to a trade where the seller is an entity located outside the EU. We therefore strongly suggest to incorporate an additional paragraph into Art 1 RTS 23, stating that in case the seller in a trade is located outside of the EU while the buyer is located within the EU, the buyer will have to ensure trade publication. We deem this to be an essential point in order to properly calculate the volume of OTC trades.
<ESMA_QUESTION_CP_MIFID_146>

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?

<ESMA_QUESTION_CP_MIFID_147>
FESE agrees that the seller should be responsible to report the trade, unless the counterparty is located outside the EU. In this case the buyer – who is located in the EU - would need to publish the trade.
<ESMA_QUESTION_CP_MIFID_147>

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.

<ESMA_QUESTION_CP_MIFID_148>
FESE agrees with certain elements. However, there are some fundamental issues where FESE would expect ESMA to consider changes to the draft. The main issues in the current draft are as follows:

(1) RTS 24 Recital (7): Extension of CCP EMIR authorization

- In essence, a CCP has a natural interest in pursuing new opportunities including the provision of clearing services for new asset classes and markets including the respective trading venues. Based on our experience access arrangements require a consensual approach to appreciate the fair sharing of investments and revenue potential for both parties when entering a new market.
- The economic viability of a mutually agreed business case and the sustained support of clearing members and trading participants are central to such an undertaking and the timelines defined in MIFIR Level 1 might not leave time for appropriate progress in such arrangements.

Against this background and contrary to Recital (7), FESE does not consider it the intent of the MIFIR Level 1 text to require, that a CCP would be expected mandatorily to agree to clear any and all forms of financial instruments. In our view this would incentivize opportunistic access requests which fail to deliver economic viability and market support. CCPs should not become test labs for callow business ideas at the expense of the industry.

Hence, imposing an obligation on a CCP to extend its authorization goes far beyond the primary objective of Level 1 to promote competition.

Consequently, FESE proposes to amend Recital (7) and to include a new sub-article Art. 1 (5) to clarify that a CCP is not mandatorily expected to clear instruments outside the scope of its current EMIR Authorization and that a CCP may therefore reject any access request falling outside of its current EMIR authorization. Accordingly, an additional sub-article Art. 4 (1) (a) should be added to cover this aspect.

(2) RTS 24 Art. 1: All reasonable efforts in due time

- In line with the considerations above on the need for consensual access arrangements in cases where investment needs, required changes to the operating models and the immanent business risk associated with an access request go far beyond the primary objective and defined timelines of MIFIR Level 1, FESE would seek clarification for the CCP's and Trading Venues' ability to deny access, any denial in Art. 2-6 should be made subject to having undertaken all reasonable efforts to manage risks in due time according to the timelines defined in MIFIR Level 1 Art. 35 (3) and Art. 36 (3).
- In addition, FESE would expect that the obligations to undertake all reasonable efforts in due time should also be imposed on the party requesting access. Further, where there is an objectively justified alternative the efforts should in principle be undertaken by the requesting party. Such amendments should also be considered in cases where a CCP requests access to a Trading Venue.

(3) RTS 24 Art. 3 (2) (a): Incompatibility of CCP and Trading Venue IT systems

- Art. 35 (1) of MIFIR Level 1 addresses compatibility issues. The reading of that provision is that a CCP can demand that, in order for the Trading Venue to gain access, it must connect to the CCP's IT systems. If it does not, then the requesting trading venue fails the Level 1 requirement to comply with the CCP's operational and technical requirements. Therefore, the provisions regarding incompatibility of IT systems should remain as drafted and must not be diluted.
- FESE is of the view that there is a likelihood that incompatibilities may not be resolvable with all reasonable efforts and in due time as they may arise from the technical, functional and legal integration of systems and operations like for example advanced risk protection mechanisms by the CCP only. But where there

is an objectively justified alternative the efforts should in principle be undertaken by the requesting party.

(4) RTS 24 Art. 4 (1) (b): Threaten economic viability and ability to meet capital requirements

- It is disproportionate and must not be in the spirit of MIFID II / MIFIR that the only backstop for denying an access request which lacks economic viability and carries the anticipated risk of causing substantial losses would be the CCP's overall economic viability and ability to meet its capital requirements. This is in conflict with the going concern of a CCP and sets incentives for opportunistic access requests which could force a CCP to the brink.
- As the provisions in RTS 24 also lack elements considering the impact on clearing members and their readiness to support an access request as grounds for denial, FESE is strongly concerned that the provisions will cause opportunistic behaviour of requestors at the expense of the industry and the market participants, clearing members in particular.
- FESE is of the view that the term "economic viability" needs further refinement and the respective provisions should allow for denial of economically inviable access requests on an individual basis by taking into account objective criteria to assess the investments, volume and revenue projections.

(5) RTS 24 Art. 4 (1) (c): Legal risk

- Any legal risk that creates undue risk that cannot be managed by the CCP should be a ground to deny access. FESE's opinion is that the current drafting of Art. 4 (1) (c) together with the finite list of only two specific legal risks in Art 4 (2) is not acceptable. The list must not be finite, i.e. Art. 4 (2) should be removed or become an illustrative rather than a finite list.
- As a more general point the sub-articles in Art. 4 suggest that a CCP is supposed to accept exposure to risks, except where this risk is undue and significant. This runs contrary to EMIR and the CPMI-IOSCO principles, which require CCPs to ensure that they are not exposed to any unmitigated risk at all.

(6) RTS 24 Art.4 (1) (d): Incompatibility of CCP and Trading Venue rules

Art. 35 (1) of MIFIR Level 1 addresses compatibility issues. It states "A CCP may require that the Trading Venue comply with the operational and technical requirements established by the CCP including the risk management requirements." The reading of that provision is that a CCP can demand that, in order for the Trading Venue to gain access, it must comply to the CCP's rules and procedures. If it does not, then the requesting Trading Venue fails the Level 1 requirement to comply with the CCP's operational and technical requirements. Therefore, the provisions regarding incompatibility of rules should remain as drafted and must not be diluted.

Please note: Nasdaq does not agree with the comments made in relation to RTS 24 art 3(2)(a), 4(1)(b), 4(1)(c), 4(1)(d).
<ESMA_QUESTION_CP_MIFID_148>

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.

<ESMA_QUESTION_CP_MIFID_149>
FESE agrees in general with the draft RTS. However, we do wish to underpin that the reasons for the denial of access for a Trading Venue towards a CCP and vice versa should in principle be balanced. The main issue in the current draft RTS is as follows

(1) RTS 24 Art. 6 (1): Legal Risk

- As for CCPs a Trading Venue should also be able to deny access based on legal risk. On grounds of systemic integrity and market stability, it is not appropriate for Trading Venues to take on significant undue risk that cannot be mitigated. Legal risks should be added as a new sub-paragraph Art. 6 (1) (c). Accordingly, FESE proposes to add a non-definitive list of grounds.

Please also note that the general point made above regarding Art. 4 also holds for Art. 5 and Art. 6, i.e., the current drafting of Art. 5 and 6 suggests that a Trading Venue is supposed to accept exposure to risks, except where this risk is undue and significant. A Trading Venue however, shall not be exposed to any unmitigated risk at all.

Please note: Nasdaq does not agree with these comments.
<ESMA_QUESTION_CP_MIFID_149>

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?

<ESMA_QUESTION_CP_MIFID_150>
FESE does not agree. It is indeed important that Trading Venues just as well as CCPs must have sufficient human resources to fulfil their duties. There is no justification why this reason to deny access should not apply to Trading Venues. Arguably, such situation may occur less likely. However, if a Trading Venue is unable to acquire the necessary resources in due time, then such situation must also be a valid reason for denial.

Please note: Nasdaq does not agree with these comments.
<ESMA_QUESTION_CP_MIFID_150>

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

<ESMA_QUESTION_CP_MIFID_151>
FESE does not agree. The CAs of the CCPs and Trading Venues are the direct supervisory authorities and therefore are closest to the matter and based on continuous surveillance and inspections are best positioned and informed to assess the implications of access requests. FESE believes that the draft RTS 24 in Art. 7 disproportionately and unreasonably limit the ability for CAs to deny access. We have set out our proposed draft changes at the bottom of this section.

(1) Art. 7 (a) and (b): Grounds for denial must not be cumulative

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

In FESE's view the list of grounds for denial of access by a CA should neither be cumulative nor definite.

In addition, FESE would like to advocate for inclusion of aspects addressing adverse impacts on and potential undue risks for clearing members, trading participants and clients thereof into the considerations for grounds for denying access requests. As outlined in the Consultation Paper, ESMA considers access arrangements as a purely bilateral matter between Trading Venues and CCPs and, thereby, ignores the fact that trading participants and clearing members need to update their IT systems, operational, legal and risk management processes within the same timeframes as the venues themselves. If undue risks remain on any level of the value chain it is also critical for systemic risk and market stability reasons. Therefore, the consideration of the impact on clearing members, trading participants and clients thereof need to form reason for denial for CAs.

Please note: Nasdaq does not agree with these comments.
<ESMA_QUESTION_CP_MIFID_151>

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.

<ESMA_QUESTION_CP_MIFID_152>
In principle, FESE agrees with the draft RTS..
<ESMA_QUESTION_CP_MIFID_152>

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.

<ESMA_QUESTION_CP_MIFID_153>
FESE broadly agrees with the provisions.

Art. 9 (1) and (2) state that all clearing members (and in Article 9 (1), where applicable, their clients) must be charged the same schedule of fees. Art. 35 (6) (b) of MiFIR Level 1 states that it is the fees relating to access (i.e. the access by one Trading Venue to the CCP rather than another) that must be non-discriminatory. That is not the same as saying that all fees charged to all clearing members must be the same in all circumstances. Particularly, the same fees should be charged by the CCP for the same/economically equivalent products, regardless of where that product is traded, so long as all costs of granting and giving effect to the access request have been taken into account.

Please note: Nasdaq does not agree with these comments.
<ESMA_QUESTION_CP_MIFID_153>

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.

<ESMA_QUESTION_CP_MIFID_154>
FESE disagrees with the proposed draft RTS in respect to the provisions set out in Art. 11 to 13. In taking the extremely broad determination of "economic equivalence" by reference to EMIR authorization categories ESMA fails to deliver on the Level 1 mandate to provide an objectively demonstrable and applicable definition of the term. The determination should be made on economic grounds, not by reference to regulatory constructs. We further note that the definition of "economically equivalent" in Article 11 of RTS 24 and the discussion in recital

(11) to not match the statement made by ESMA in paragraph 4.3.72 of the Consultation Paper that it the CCPs should have discretion to determine economic equivalence.

In line with the proposals made by FIA Europe, FESE encourages ESMA to consider the determination of economic equivalence along the lines of the precedent already set 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), such 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”. This proposal would then tie-in Recital 11, Articles 11 and 12 of RTS 24 with Article 13 of RTS 24, which already refers to Article 27 of that Commission Delegated Regulation.

In addition, ESMA materially misinterpreted MIFIR Art. 35 (e). The RTS 24 repeatedly refers to the <u>same</u> collateral and margin requirements in Art. 11 (2), the <u>same</u> netting process in Art. 12 (1) and in respect to portfolio margining in Art. 13. According to MIFIR Art. 35 (e) it should be on a <u>non-discriminatory basis rather than the same</u>.

Please note: Nasdaq does not agree with these comments.
<ESMA_QUESTION_CP_MIFID_154>

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.

<ESMA_QUESTION_CP_MIFID_155>
FESE agrees with the elements of the draft RTS.
<ESMA_QUESTION_CP_MIFID_155>

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.

<ESMA_QUESTION_CP_MIFID_156>
FESE agrees with the elements of the draft RTS.
<ESMA_QUESTION_CP_MIFID_156>

Q157. Do you agree with the elements of the draft RTS that cover relevant benchmark information? If not, please explain why and, where possible, propose an alternative approach. In particular, how could information requirements reflect the different nature and characteristics of benchmarks?

<ESMA_QUESTION_CP_MIFID_157>
FESE agrees that benchmark data can be required for the purpose of trading and clearing; however, as each product is different the information requirements should be agreed upon by both parties as a commercial relationship. Outlining the specific information needs in the RTS which can cover all potential products may cause a breach of data distribution policies and a unforeseen cost burden. As this will be a commercial relationship between the trading venue

or CCP and the benchmark provider, the data needed should be negotiable and tailored to the specific requirements and commercial benefits to the product traded or cleared.

Below we will provide further specific comments on elements of the Draft RTS:

Article 21.1.a
FESE believes that on the basis of this provision "a feed of the relevant benchmark's values" needs to be provided. While we agree that the feed (i.e. the benchmark values) should be provided, we do not see the need to provide any further (market data). What is troubling with the quoted language above, is that it can be interpreted as the administrator will need to provide a dedicated feed directly to the trading or clearing venue. Which is generally cost prohibitive and normal business practice is that this will be supplied through an intermediary, such as a data vendor. Any underlying or further information is regular trading information that can be obtained via the regular commercial venues (market data providers).

Additionally, the provision of a benchmark license is a commercial agreement and is tailored to suit the needs of both participants. As each trading and clearing venue is different along with the products are traded and cleared, the data and requirements will change per venue and product. Stipulating all of the required data, access and usage rights for a wide variety of products may have the inverse effect on the pricing of index license as this will not allow for a tailored approach to provide only the exact data needed to trade or clear the product by having to bundle the data, access and usage rights into a larger package.

Article 21.1.c
FESE understands the need for a CCP to assess the historical risk of an index to set internal margin and other thresholds; however, trading venues do not require such requirements. As this will be a commercial relationship between the parties, we don't understand why this the data should be a mandated requirement. As the access to historical data is generally available to all participants either via a subscription directly through the Benchmark Administrator or a

vendor, with clearly defined usage rights depending on the commercial relationship, we would suggest to delete this requirement form article 21.

An alternative proposal would be to have the CCP or trading venue explain why it needs the historical value and how it intends to use it. This will allow the Index Administrator to retain control of its intellectual property rights and ensure fair usage and availability to all participants.

Article 21.2
FESE would suggest replacing the word “developed” by “created”. The term ‘created’ more adequately recognises the intellectual property rights of the benchmark owner.

Article 21.2(b)
Instead of requiring all criteria and procedures to be provided, we would argue that the relevant criteria and procedures would be provided. The following elements will be relevant:
- The components
- When the components are derived
- The timetable
- The current composition and weighting
- The intraday and end of day levels
- Proposed changes and schedules

FESE would like to point out that these elements are also covered in the Commission’s Proposal to regulate Benchmarks.

Article 21.3
FESE considers that this provision seems to be superfluous as paragraph 1 already stipulates that the benchmark values need to be included. In paragraph 2 under (b) the specific elements of the benchmark values are even further defined. We question the need for the text in paragraph 3.
<ESMA_QUESTION_CP_MIFID_157>

Q158. Do you agree with the elements of the draft RTS that cover licensing conditions? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_158>
In principle, FESE agrees with these elements. Our concerns are with reference to making the criteria publicly available and the retro-activeness nature of changing agreements should a new licensee negotiate new clauses to the licensing conditions. Each agreement should be made on the commercial and economic value between the two parties taking into account the cost and benefit structure of each party in association with the license. By having the same conditions apply to each licensee an unforeseen benefit may arise if retro-actively applied. Setting the minimum requirements in a package of data, usage and rights can lead an adverse effect on cost by including more commercial value than the commercial relationship requires. We believe that in principle the potential differences in conditions between different entities

would not constitute an un-level playing field across trading venues or clearing agencies and can be objectively justified.
Below we will provide further specific comments on the Draft RTS:

Article 20.4 and 20.5
The same basis for providing the information to different trading venues should be dependent on the product. Only if the venues references the same (element of) the benchmark, should the basis for information be the same. We would suggest the following text amendment:

“20.4. A person with proprietary rights to a benchmark shall provide information to a trading venue on the same basis as it provides to other trading venues, provided the request covers the same scope of product, unless a different basis can be objectively justified.”

“20.5. A person with proprietary rights to a benchmark shall provide information to a CCP on the same basis as it provides to other CCPs, provided the request covers the same scope of product, unless a different basis can be objectively justified.”

Article 20.8
FESE agrees that it should be possible to refer to information that can be obtained via other (commercial) resources. We have some concerns about the condition of that information being timely and reliable though. It is not clear which party needs to establish whether that information is timely and reliable. Also, lacking a standard to compare the information flow to, it will be difficult to come to some sort of common understanding of what is “timely” and “reliable”.

Article 22 – fees
FESE considers that the scope of article 22 of the draft RTS is wider than the MiFIR mandate allows for. Article 22 sets the ‘other conditions’ as stipulated in article 37(4)(b). According to the wording, ESMA is to draft regulatory technical standards to specify: "other conditions under which access is granted, including confidentiality of information provided". This is mirrored in the first part of Article 22(2) draft RTS: "A person with proprietary rights to a benchmark shall set the conditions in paragraph 5 for licensing agreements pursuant to Article 37 of Regulation (EU) No 600/2014". But the second part of Article 22(2) draft RTS introduces a new obligation ("and shall make freely available to a trading venue or CCP upon request the conditions for the category") which is not found at Level 1.

The Level 1 text does not mandate transparency for access to benchmarks. In that respect the suggested wording of article 22(2) and (3) should be adapted and the requirement to make the conditions available to a trading venue or CCP upon request should be deleted.

A supporting argument can be found in article 36 MiFIR according to which a trading venue is to "provide trade feeds on a non-discriminatory and transparent basis, including as regards fees related to access"). This text is very clear on what is to be transparent. Article 37 MiFIR is equally clear in the sense that it does not mandate transparency on the conditions or fees and therefore it should not be in scope of the draft RTS.

FESE suggest that article 22 of the draft RTS is limited to the scope of article 37(4) MIFIR and sets the conditions (to which we are commenting further below) only. Any reference to transparency of conditions or fees should be removed (paragraphs 2 and 3). In any case, in order to ensure common practice, any trading venue or CCP asking for a fee schedule applicable to its specific request will have to enter into an NDA or LOI before receiving a fee proposal. As this is common practice for any commercial business (as this shows actual intent by the person requesting the information), we expect this procedure to be in place after implementation of MiFIR.

Article 22.4
The conditions need to be the same including if the person with proprietary rights to a benchmark and a trading venue or CCP are connected by close links. It is not clear what is intended with the language “by close links”.

Article 22.5
While we understand the intent of the commission to provide an equal starting point for terms and conditions, we believe this is best served using existing IP rights and infrastructure in place. Due to the relationship this will be of a commercial nature and terms and conditions should be negotiated between the licensee and licensor. We suggest this should not be a minimum mandate but an example of conditions.

Article 22.6
Tailoring per individual licensee should remain possible as this is common practice within the benchmark licensing business and often because of specific requests by licensees. Each client will have individual needs and requests depending on the nature of their business, their commercial offering to their clients and the overall goal it wishes to achieve.

Article 22.7
We refer to the comments for 22.5.
<ESMA_QUESTION_CP_MIFID_158>

Q159. Do you agree with the elements of the draft RTS that cover new benchmarks? If not, please explain why and, where possible, propose an alternative approach.

<ESMA_QUESTION_CP_MIFID_159>
In principle, FESE agrees with Art 23. However, as Art 23 seems unclear in various ways, and a new index would need to substantially differentiate itself from an existing index we would like to strongly suggest a clearer wording as lined out below:

Art 23. 2. When considering if a benchmark is new the following factors may be cumulatively taken into account when comparing the respective benchmark with any pre-existing benchmarks:
~~**(a) Contracts based on the newer benchmark are capable of being netted or substantially offset with contracts based on the relevant existing benchmark by a CCP.**~~
(b) The regions and industry sectors covered by the relevant benchmarks are **not** the same, or ~~**relatively**~~ **materially** similar.
(c) The values of the relevant benchmarks are **not** highly correlated.
(d) The composition of the relevant benchmarks, having regard to the number of constituents, the actual constituents, their values and their weightings, are **not** the same, or ~~**relatively**~~ **materially** similar and
(e) The methodologies of each relevant benchmark are **not** the same, or ~~**relatively**~~ **materially** similar.

Methodologies are not materially similar if there is a difference in at least one of the following respects:

(a) universe of input data
(b) model to identify and approximate input data; ,
(c) algorithm to filter, rank, select and weight components and to calculate the index; or,
(d) periodic review/rebalancing of the index composition

Rationale for adaption Art 23: *Criteria need to be based on facts in order to allow for a clear decision base. Close correlations only do not constitute at all constitute a new benchmark, and can be exist by accident. It is not adequate to say that a benchmark is not new if it is comparable to another benchmark in one isolated aspect. The above wording will support a fair and fact based decision as regards potential questions of the newness of indices in the context of Art 37 MiFIR.*

Finally, FESE wants to point out that the "interims-cost benefit analysis" contains unclear and contradictory wording compared to the RTS as well as the CP. Full comments will be provided by FESE once the consults on the full cost-benefit analysis.
<ESMA_QUESTION_CP_MIFID_159>

- ## Requirements applying on and to trading venues

Q160. Do you agree with the attached draft technical standard on admission to trading?

<ESMA_QUESTION_CP_MIFID_160>

In general, FESE agrees with RTS 25 as long as no arrangements come into effect, which might clash with existing regulation dealing with the admission rules with respect to the admission process and the securities considered to be admitted to a regulated market. FESE is of the opinion that (1) the existing admission process, (2) existing arrangements with regard to the aforementioned securities and (2) existing regulations concerning information to be available about the securities/the underlying securities are reasonable and sufficient. Consequently FESE sees RTS 25 only in place to clarify existing regulations. It does certainly not significantly change them. This view is also confirmed in the cost benefit analysis (page 363). With regards to ETFs FESE is of the opinion that it is not necessary to deviate from the current practice

Therefore, we welcome that Article 1(5) carries forward the established position from MiFID I and clearly sets out that a transferable security that is officially listed in accordance with Directive 2001/34/EC, and the listing of which is not suspended, shall be deemed to be freely negotiable and capable of being traded in a fair, orderly and efficient manner.

However, we have a number of concerns in relation to Art 4 as set out in Q161.
<ESMA_QUESTION_CP_MIFID_160>

Q161. In particular, do you agree with the arrangements proposed by ESMA for verifying compliance by issuers with obligations under Union law?

<ESMA_QUESTION_CP_MIFID_161>

In all FESE member states the monitoring of ongoing obligations of the regulated market is up to the national competent authorities and as a result of this regulated markets cannot be hold responsible for verifying compliance by issuers with obligations under Union law or for facilitating access to information published under Union law for members and participants of a regulated market. Nevertheless, FESE agrees with the arrangements proposed by ESMA for verifying compliance by issuers with obligations under Union law.

FESE does not fully agree with these arrangements. As a regulated market, we are obliged to publish conditions for admission to trading and must ensure an issuer complies with these. However, we believe these new requirements for publishing information on how we verify compliance by issuers with obligations under Union law go too far, as it should be the competent authority designated under the relevant EU legislation that is responsible for monitoring and enforcing this.

FESE agrees that market operators should verify issuers' compliance with disclosure obligations and prepare and publish a policy describing it, but only as far as the act of publishing the specific disclosure goes. We strongly believe that the verification of the content (e.g. sufficiency, truthfulness) of the disclosures is beyond market operators' competence; currently it is done by the NCA and it should remain this way. Therefore, we suggest that this distinction should be reflected in the text of the RTS more clearly.

ESMA suggests that a regulated market must publish its policy on its website which should give guidance to issuers on how best to demonstrate compliance with Union law; but in our view, each issuer must determine this for itself in accordance with the relevant legislation and

any guidance from relevant competent authority. It is unclear what regulatory risk or objective the proposed policy requirement is seeking to address and in our view could lead to the perverse outcome where a regulated market's policy is determining how an issuer best complies with the requirements of certain EU directives, rather than an issuer achieving compliance in a manner that is best suited to its own business and activities.
<ESMA_QUESTION_CP_MIFID_161>

Q162. Do you agree with the arrangements proposed by ESMA for facilitating access to information published under Union law for members and participants of a regulated market?

<ESMA_QUESTION_CP_MIFID_162>
The monitoring of ongoing obligations of the regulated market is up to the national competent authorities and, as a result of this, regulated markets cannot be held responsible for verifying compliance by issuers with obligations under Union law or for facilitating access to information published under Union law for members and participants of a regulated market.

Therefore, FESE believes that the proposals are adequate if the intention is that the regulated market's obligation in facilitating access can be met if it provides a link to where the information is available i.e. to the national appointed storage mechanism (the OAM) under the Transparency Directive. As the obligation to make this information public under Union law falls on the issuers themselves, we do not think any further requirements should be applied to the trading venue, other than to direct members to where the relevant information is available.
<ESMA_QUESTION_CP_MIFID_162>

Q163. Do you agree with the proposed RTS? What and how should it be changed?

<ESMA_QUESTION_CP_MIFID_163>
FESE agrees with the proposed RTS.
<ESMA_QUESTION_CP_MIFID_163>

Q164. Do you agree with the approach of providing an exhaustive list of details that the MTF/OTF should fulfil?

<ESMA_QUESTION_CP_MIFID_164>
FESE agrees that this should be an exhaustive list for MTFs.
<ESMA_QUESTION_CP_MIFID_164>

Q165. Do you agree with the proposed list? Are there any other factors that should be considered?

<ESMA_QUESTION_CP_MIFID_165>
FESE agrees this list is sufficient for MTFs.
<ESMA_QUESTION_CP_MIFID_165>

Q166. Do you think that there should be one standard format to provide the information to the competent authority? Do you agree with the proposed format?

<ESMA_QUESTION_CP_MIFID_166>
FESE would generally welcome standardised formatting. FESE agrees with one streamlined process for an MTF application. In relation to the proposed format, we would question why a column is necessary for the "relevant operator" as we would expect the entire

document/application to be provided by the same operator, and therefore we suggest deleting this column.
<ESMA_QUESTION_CP_MIFID_166>

Q167. Do you think that there should be one standard format to notify to ESMA the authorisation of an investment firm or market operator as an MTF or an OTF? Do you agree with the proposed format?

<ESMA_QUESTION_CP_MIFID_167>
FESE would generally welcome standardised formatting.
<ESMA_QUESTION_CP_MIFID_167>

- **Commodity derivatives**

Q168. Do you agree with the approach suggested by ESMA in relation to the overall application of the thresholds? If you do not agree please provide reasons.

<ESMA_QUESTION_CP_MIFID_168>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_168>

Q169. Do you agree with ESMA's approach to include non-EU activities with regard to the scope of the main business?

<ESMA_QUESTION_CP_MIFID_169>
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<ESMA_QUESTION_CP_MIFID_169>

Q170. Do you consider the revised method of calculation for the first test (i.e. capital employed for ancillary activity relative to capital employed for main business) as being appropriate? Please provide reasons if you do not agree with the revised approach.

<ESMA_QUESTION_CP_MIFID_170>
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<ESMA_QUESTION_CP_MIFID_170>

Q171. With regard to trading activity undertaken by a MiFID licensed subsidiary of the group, do you agree that this activity should be deducted from the ancillary activity (i.e. the numerator)?

<ESMA_QUESTION_CP_MIFID_171>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_171>

Q172. ESMA suggests that in relation to the ancillary activity (numerator) the calculation should be done on the basis of the group rather than on the basis of the person. What are the advantages or disadvantages in relation to this approach? Do you think that it would be preferable to do the calculation on the basis of the person? Please provide reasons. (Please note that altering the suggested approach may also have an impact on the threshold suggested further below).

<ESMA_QUESTION_CP_MIFID_172>
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<ESMA_QUESTION_CP_MIFID_172>

Q173. Do you consider that a threshold of 5% in relation to the first test is appropriate? Please provide reasons and alternative proposals if you do not agree.

<ESMA_QUESTION_CP_MIFID_173>
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<ESMA_QUESTION_CP_MIFID_173>

Q174. Do you agree with ESMA's intention to use an accounting capital measure?

<ESMA_QUESTION_CP_MIFID_174>
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<ESMA_QUESTION_CP_MIFID_174>

Q175. Do you agree that the term capital should encompass equity, current debt and non-current debt? If you see a need for further clarification of the term capital, please provide concrete suggestions.

<ESMA_QUESTION_CP_MIFID_175>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_175>

Q176. Do you agree with the proposal to use the gross notional value of contracts? Please provide reasons if you do not agree.

<ESMA_QUESTION_CP_MIFID_176>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_176>

Q177. Do you agree that the calculation in relation to the size of the trading activity (numerator) should be done on the basis of the group rather than on the basis of the person? (Please note that that altering the suggested approach may also have an impact on the threshold suggested further below)

<ESMA_QUESTION_CP_MIFID_177>
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<ESMA_QUESTION_CP_MIFID_177>

Q178. Do you agree with the introduction of a separate asset class for commodities referred to in Section C 10 of Annex I and subsuming freight under this new asset class?

<ESMA_QUESTION_CP_MIFID_178>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_178>

Q179. Do you agree with the threshold of 0.5% proposed by ESMA for all asset classes? If you do not agree please provide reasons and alternative proposals.

<ESMA_QUESTION_CP_MIFID_179>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_179>

Q180. Do you think that the introduction of a de minimis threshold on the basis of a limited scope as described above is useful?

<ESMA_QUESTION_CP_MIFID_180>
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<ESMA_QUESTION_CP_MIFID_180>

Q181. Do you agree with the conclusions drawn by ESMA in relation to the privileged transactions?

<ESMA_QUESTION_CP_MIFID_181>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_181>

Q182. Do you agree with ESMA's conclusions in relation to the period for the calculation of the thresholds? Do you agree with the calculation approach in the initial period

suggested by ESMA? If you do not agree, please provide reasons and alternative proposals.

<ESMA_QUESTION_CP_MIFID_182>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_CP_MIFID_182>

Q183. Do you have any comments on the proposed framework of the methodology for calculating position limits?

<ESMA_QUESTION_CP_MIFID_183>
FESE supports the framework which has been proposed by ESMA. We agree with ESMA that deliverable supply is the most appropriate basis for the EU position limits regime, both for the spot month and for other months. This is because undue influence and control over deliverable supply, coupled with holding a significant futures position, is the key factor which can give rise to a disorderly market. In contrast, holding a significant proportion of open interest in the futures contract in isolation does not raise this issue.

Furthermore, FESE agrees that trading venues are well placed organisations to source and provide data in relation to deliverable supply to the relevant National Competent Authority.

This is because trading venues:

- Have ready access to such data;
- Are independent of the trading interests of the participants which are active in the market; and,
- Have legal obligations to apply associated position management controls in relation to the commodity derivatives concerned[12].

Those deliverable supply data can then be used by National Competent Authorities in order to calculate the baseline levels for determining the position limits for the commodity contracts in question.
<ESMA_QUESTION_CP_MIFID_183>

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?

<ESMA_QUESTION_CP_MIFID_184>
FESE considers that a 25% baseline level is a suitable starting point for calculating the position limits which will be applicable to commodity derivatives within the EU. Having established the baseline for each commodity derivative, it will of course be necessary to consider the extent to which the seven factors enumerated in the MIFID Level 1 text should increase or decrease that level in order to establish the spot month and other months' position limits for each commodity derivative.
<ESMA_QUESTION_CP_MIFID_184>

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?

<ESMA_QUESTION_CP_MIFID_185>
FESE considers that 40% of deliverable supply should be an appropriate maximum level.

[12] Article 57(8), MIFID II (Directive 2014/65/EU).

<ESMA_QUESTION_CP_MIFID_185>

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?

<ESMA_QUESTION_CP_MIFID_186>

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

<ESMA_QUESTION_CP_MIFID_186>

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

<ESMA_QUESTION_CP_MIFID_187>

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

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

Open interest is potentially most useful as a minimum check on the level of position limit. The proposals set forth the sensible principle that the position limit, however derived, will never be less than 10% of deliverable supply. Some contracts, however, that are not physically delivered are so widely used as hedging tools that they simultaneously exhibit very large open interest. To avoid the risk that a limit derived from deliverable supply inadvertently constrains legitimate trading in any such liquid - but not physically deliverable - contract, it makes sense to have a further “sense check” lower bound for the limit that relates it broadly to open interest. I.e. however derived, the single-month limit should not be set at any level that is less than some appropriate percentage of open interest.

We would suggest 1% as such a minimum level, i.e. if there are 1 million lots of open interest in a contract, the single month limit would be the greater than 25% of deliverable supply or 1% of that open interest. A position amounting to 1% of the open interest cannot be considered to be distortive, but to force all positions below that level could become so.

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

Such distortions may occur as a contract approaches maturity and they would be mitigated by the maturity factor which ESMA articulates in the present Consultation Paper, and which it described in paragraph 96(i) of its 2014 Discussion Paper by noting that “the longer the maturity, the higher the limit may be as this gives market participants time to adjust to ensure an orderly meeting of their settlement obligations”. The corollary of that statement is that the position limit should become tighter as a contract approaches maturity in order to mitigate the risk of pricing distortions as delivery obligations begin to crystallise.
<ESMA_QUESTION_CP_MIFID_187>

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?

<ESMA_QUESTION_CP_MIFID_188>
FESE agrees with ESMA proposal that the baseline level for both the spot month position limit and the other months’ position limit should be based on deliverable supply. This is because it is undue influence and control over deliverable supply, coupled with holding a significant futures position, which can give rise to a disorderly market.

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

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

As a result, position limits will be broader in relation to delivery months which are far from maturity (i.e. the “other months”) and will become narrower and more restrictive as maturity approaches (i.e. once the delivery month in question becomes the spot month). This will reflect the availability of deliverable supply during two distinct phases in the life cycle of the delivery month. By doing so, the level of position limits during those different phases will reflect the extent to which the price of the delivery month is susceptible to distortion or manipulation.
<ESMA_QUESTION_CP_MIFID_188>

Q189. How do you suggest establishing a methodology that balances providing greater flexibility for new and illiquid contracts whilst still providing a level of constraint in a clear and quantifiable way? What limit would you consider as appropriate per product class? Could the assessment of whether a contract is illiquid, triggering a potential wider limit, be based on the technical standard ESMA is proposing for non-equity transparency?

<ESMA_QUESTION_CP_MIFID_189>
FESE considers that care needs to be taken in applying the position limits regime to nascent or niche markets, in which there may be only a handful of active market participants either at the outset or on an ongoing basis. It might be necessary to apply a threshold test – possibly expressed as a number of active market participants - below which the application of position limits would be suspended until such time as participation increased. If such a measure is not introduced, it is possible that many nascent and niche markets will not be able to co-exist with the position limits regime.

FESE does not regard ESMA's non-equity liquidity analysis as a suitable basis for determining the applicability of position limits to nascent or niche products because the product classes which have been devised under ESMA's COFIA approach are too broad for this purpose. For example, under the COFIA approach "Oil" is regarded as a single class (split into two maturities). That class covers an extremely broad complex of products, some of which are established, liquid benchmarks and others of which are nascent or niche products.
<ESMA_QUESTION_CP_MIFID_189>

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

<ESMA_QUESTION_CP_MIFID_190>
FESE considers that in relation to the "other months", the key factor is the number of production/harvest periods between the time at which the position limit is set and the maturity date of the relevant contracts. In most cases, the trading venue should have considered this in calculating a deliverable supply measure for the "other months".

In relation to the spot month, the key factor will vary depending on the product concerned (again, the trading venue should have already taken this into account in calculating a deliverable supply measure for the spot month). For commodities which are delivered on an "in store" basis, the key factor might be the amount of physical stock which has been certified as meeting the contract standard or which could readily be certified. In contrast, for commodities which are delivered on a "Free on Board" basis, the key factor might be whatever supply is potentially available at the delivery points. This would be, at minimum, the capacity of the local storage infrastructure and, at maximum, some multiple of that based on whatever delivery volume the infrastructure could ultimately support.
<ESMA_QUESTION_CP_MIFID_190>

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

<ESMA_QUESTION_CP_MIFID_191>
FESE believes that the trading venue and National Competent Authority will need to consider the impact of scheduled maintenance periods (e.g. in relation to oil production) and seasonality in relation to the harvesting, processing and shipment of agricultural and soft commodities. They will also need to consider the likely impact of any exogenous events or longer-term trends, which could affect future deliverable supply positively or negatively.
<ESMA_QUESTION_CP_MIFID_191>

Q192. How should 'less-liquid' be considered and defined in the context of position limits and meeting the position limit objectives?

<ESMA_QUESTION_CP_MIFID_192>
FESE considers that open interest should not be viewed in isolation. It is unavoidably backward-looking and it further presupposes a certain number of participants in the market in order to work. For instance, a per-participant limit of 5% of the open interest would require there to be at least 20 participants. This cannot be assumed always to be the case. Moreover, holding a significant proportion of open interest in isolation dos not raise orderly markets issues.

Instead, the open interest in a contract should be compared with the deliverable supply of the physical commodity in order to ascertain whether it would be feasible, from a practical perspective, for a market participant to hold a significant proportion of each. Where this is the case, position limits should apply on the basis of deliverable supply. Where it is not the case

(e.g. where the open interest in a contract is small relative to deliverable supply and where the ownership of the deliverable supply is diverse), there would be a strong case for treating the product as a nascent or niche product as described in the answers to Questions 189 and 193.
<ESMA_QUESTION_CP_MIFID_192>

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

<ESMA_QUESTION_CP_MIFID_193>
FESE considers that care needs to be taken in applying the position limits regime to nascent or niche markets, in which there may be only a handful of active market participants either at the outset or on an ongoing basis. It might be necessary to apply a threshold test – for instance, expressed as a number of active market participants - below which the application of position limits would be suspended until such time as participation increased. If such a measure is not introduced, it is possible that many nascent and niche markets will not be able to co-exist with the position limits regime.
<ESMA_QUESTION_CP_MIFID_193>

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?

<ESMA_QUESTION_CP_MIFID_194>
FESE believes that ESMA has correctly identified the main features of the underlying commodity markets which would need to be taken into account by National Competent Authorities in establishing position limits.
<ESMA_QUESTION_CP_MIFID_194>

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

<ESMA_QUESTION_CP_MIFID_195>
FESE believes that it is not possible to quantify a meaningful time period because:

- contracts mature at different rates;
- once they are mature, some contracts will become benchmark products whilst others will remain niche products that are characterised by limited participation.

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

Please also see the answer to Question 193, which is related to this issue.
<ESMA_QUESTION_CP_MIFID_195>

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

<ESMA_QUESTION_CP_MIFID_196>
Please see the answer to Question 195.

<ESMA_QUESTION_CP_MIFID_196>

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?

<ESMA_QUESTION_CP_MIFID_197>
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<ESMA_QUESTION_CP_MIFID_197>

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

<ESMA_QUESTION_CP_MIFID_198>
FESE agrees that the factors enumerated under Article 57(3)(a)-(g) of MIFID II, and the manner in which ESMA proposes to frame the methodology, provides National Competent Authorities with sufficient scope to take into account the specificities of different markets without incorporating asset-class specific elements into the methodology.
<ESMA_QUESTION_CP_MIFID_198>

Q199. How are the seven factors (listed under Article 57(3)(a) to (g) and discussed above) currently taken into account in the setting and management of existing position limits?

<ESMA_QUESTION_CP_MIFID_199>
The main factors which are taken into account in the design and application of existing limits and controls by EU trading venues (e.g. delivery limits and accountability levels) are deliverable supply, the length of time to contract maturity, and – during the delivery period itself – the size of position which is capable of being delivered without causing logistical problems or delivery failure.
<ESMA_QUESTION_CP_MIFID_199>

Q200. Do you agree with the proposed draft RTS regarding risk reducing positions?

<ESMA_QUESTION_CP_MIFID_200>
FESE agrees with ESMA's proposed approach of defining "risk reducing positions" in a manner which is consistent with the relevant definition under EMIR (EMIR (Regulation (EU) 638/2012), Article 10(4)(a), and Commission Delegated Regulation (EU) No. 149/2013, Article 10). The purpose of EMIR Article 10(4)(a) is to identify a non-financial counterparty's positions which are "objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity of the non-financial counterparty". Such positions are disregarded for the purposes of calculating whether the non-financial counterparty's overall position in OTC derivatives exceeds the EMIR clearing threshold. This is analogous to the process under MIFID II whereby position limits in respect of commodity derivatives shall be dis-applied to the positions of a non-financial entity which are "objectively measurable as reducing risks related to that entity's commercial activity". In both cases, ESMA has been requested to produce RTS which define the hedging activities of non-financial entities and it is appropriate that those RTS are consistent.
<ESMA_QUESTION_CP_MIFID_200>

Q201. Do you have any comments regarding ESMA's proposal regarding what is a non-financial entity?

<ESMA_QUESTION_CP_MIFID_201>
In its 2014 MIFID II Discussion Paper, ESMA noted that "non-financial entity" is not defined in MIFID II, and that it proposed to consider "non-financial entities" to be any entities which are not financial institutions under MIFID II or other relevant EU legislation. FESE observed that such an approach may not work effectively in the context of MIFID II position limits, given that

the participants in commodity markets are located across the globe. For example, a strict application of such an approach would suggest that an investment firm or bank located in a third country would be treated as a “non-financial entity” rather than a financial entity.

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

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

However, the draft Regulatory Technical Standards appear to be silent on this point, so it is unclear how ESMA’s conclusion will be given practical effect.
<ESMA_QUESTION_CP_MIFID_201>

Q202. Do you agree with the proposed draft RTS regarding the aggregation of a person’s positions?

<ESMA_QUESTION_CP_MIFID_202>
FESE is concerned that the draft RTS does not contain any information of specifying the chain of the reporting process, only the parameters to be reported. Our concern is that the statistics of the trading venues are highly dependent on the type of the venue, their partners, and the information provided to them, described in detail as follows:

According to Article 58 (4) in Point 7.4 “persons holding positions in a commodity derivative or emission allowance or derivative thereof shall be classified by the investment firm or market operator operating that trading venue according to the nature of their main business, taking account of any applicable authorisation.” Exchanges mainly have access to trading information where the end-users are just codes and do not have direct contact with the end-users, but the brokers and investment firms. We are concerned as to how the exchange has the information about end-users based on which persons could be categorised. In the lack of the such information about the end users, the only way how it can be carried out by an exchange is that positions of an investment firm exchange member goes to a). We cannot see how this will be carried out differently.

We suggest that both the information collection and the categorization roles (with the same logic as at the monitoring procedure) have to be delegated to the investment firm with the same logic as it is done at the monitoring procedure in Article 58 (3). The exchange has no way of monitoring and evaluating end-users on the commodity derivatives market.
<ESMA_QUESTION_CP_MIFID_202>

Q203. Do you agree with ESMA’s proposal that a person’s position in a commodity derivative should be aggregated on a ‘whole’ position basis with those that are under the beneficial ownership of the position holder? If not, please provide reasons.

<ESMA_QUESTION_CP_MIFID_203>
FESE believes that the methodology for aggregating positions - in a situation in which one company has an ownership interest in another - should be based on a discrete percentage threshold which is used as a proxy for “control”. It suggests that the threshold should be set at 50%. Where the threshold is met, the totality of the position of the controlled entity should be added to the position of the controlling entity for the purposes of calculating the overall net position.

<ESMA_QUESTION_CP_MIFID_203>

Q204. Do you agree with the proposed draft RTS regarding the criteria for determining whether a contract is an economically equivalent OTC contract?

<ESMA_QUESTION_CP_MIFID_204>
FESE agrees with the proposed RTS. ESMA's proposed approach is similar to the CFTC's proposal in relation to economic equivalence of swaps and futures contracts, which is designed to identify an entity's overall influence on the demand and supply conditions in a particular commodity sector, whilst recognising that the component contracts of that entity's position are not necessarily legally identical. Given the global nature of many commodity markets, there would be clear benefits in the EU and US applying consistent definitions of "economically equivalent" for the purposes of operating their position limits regimes.
<ESMA_QUESTION_CP_MIFID_204>

Q205. Do you agree with the proposed draft RTS regarding the definition of same derivative contract?

<ESMA_QUESTION_CP_MIFID_205>
FESE considers that care needs to be taken when using the term "same derivatives contract". The purpose of the term (as it is used in Article 57(12)(d) of MIFID II) is to manage a situation whereby a single position limit needs to be set in relation to the trading of commodity derivatives at competing trading venues. In that context, ICE has no further comment on the proposed approach.
<ESMA_QUESTION_CP_MIFID_205>

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

<ESMA_QUESTION_CP_MIFID_206>
FESE agrees with the proposed draft RTS. <ESMA_QUESTION_CP_MIFID_206>

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

<ESMA_QUESTION_CP_MIFID_207>
Please see the answer to Question 204.
<ESMA_QUESTION_CP_MIFID_207>

Q208. Do you agree with the proposed draft RTS regarding the procedure for the application for exemption from the Article 57 position limits regime?

<ESMA_QUESTION_CP_MIFID_208>
The draft RTS (Article 7 of RTS 30) state that a National Competent Authority shall have up to 30 calendar days to approve an application for an exemption. This is a significant period, during which the non-financial entity will face uncertainty about whether or not an exemption will be available to it. In contrast, many trading venues approve or reject applications for delivery limit exemptions within a week of receiving a complete application.
<ESMA_QUESTION_CP_MIFID_208>

Q209. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

<ESMA_QUESTION_CP_MIFID_209>
Please see the answer to Question 204.

<ESMA_QUESTION_CP_MIFID_209>

Q210. Do you agree with the reporting format for CoT reports?

<ESMA_QUESTION_CP_MIFID_210>
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Q211. Do you agree with the reporting format for the daily Position Reports?

<ESMA_QUESTION_CP_MIFID_211>
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Q212. What other reporting arrangements should ESMA consider specifying to facilitate position reporting arrangements?

<ESMA_QUESTION_CP_MIFID_212>
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<ESMA_QUESTION_CP_MIFID_212>

- **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.

<ESMA_QUESTION_CP_MIFID_213>
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Q214. Do you anticipate any difficulties with the proposed definition for a transaction and execution?

<ESMA_QUESTION_CP_MIFID_214>
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Q215. In your view, is there any other outcome or activity that should be excluded from the definition of transaction or execution? Please justify.

<ESMA_QUESTION_CP_MIFID_215>
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<ESMA_QUESTION_CP_MIFID_215>

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

<ESMA_QUESTION_CP_MIFID_216>
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<ESMA_QUESTION_CP_MIFID_216>

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

<ESMA_QUESTION_CP_MIFID_217>
FESE asks ESMA for clarity on their inclusion of a 'trading venue' as a counter party to a trade. We consider this that this is a misunderstanding of the role of a trading venue and we consider that a trading venue can never be a 'counter party' to a trade.

We consider that this may refer to the possible liability of a trading venue to a transaction report that's is reported by a third country firm outside of the EU.
<ESMA_QUESTION_CP_MIFID_217>

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.

<ESMA_QUESTION_CP_MIFID_218>
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Q219. Do you agree with the proposed approach to flag trading capacities?

<ESMA_QUESTION_CP_MIFID_219>
FESE strongly disagrees with the proposals under Article 1(b) concerning matched principal trading. Under Section 8.3 of the CP, ESMA explains that the definition of matched principal

trading included in Article 1 is based on the results of the 2014 ESMA CP consultation, together with the July 24 CWG Meeting where *'stakeholders requested for interpretative guidance from ESMA on the application of the principal and agency concepts'.*

As a result of these discussions, **Article 1(b)** states that:

'Matched principal capacity' means dealing on own account as defined in Article 4(1)(6) where the concerned entity enters into a transaction as defined in Article 4(1)(38) of Directive 2014/65/EU as a facilitator by interposing the firm between the buyer and the seller to the transaction in a way whereby the firm is never exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction.

FESE has a major problem with the cross-reference to Article 4(1)(6) in this provision. Article 4 includes both a definition of dealing on own account (point 6) and matched principal trading (point 38). For the purposes of clarifying reporting obligations under MIFIR Article 26, we believe that the reference to matched principal trading should ***only*** refer back to the definition in the Level 1 text.

This is important in the sense that it respects the definitions established in Article 4 regarding the systematic internaliser. Article 4(1)(20) defines an SI as:

'systematic internaliser' means an investment firm which, on an organised, frequent systematic and substantial basis, ***deals on own account*** when executing client orders outside a regulated market, an MTF or an OTF without operating a multilateral system;

The critical definition of dealing on own account is outlined in Article 4(1)(6):

(6) ***'dealing on own account'*** means trading against proprietary capital resulting in the conclusion of transactions in one or more financial instruments;

Including the cross-reference to Article 4(1)(6) in the RTS 13 undermines the definitions in Article 4 which are clear in determining that an SI can only deal on own account. In contrast, it is the OTF which has the ability to trade on a matched principal basis under certain conditions, these being outlined in MIFIR Article 20 based on the definition of matched principal trading in Article 4(1)(38).

Amendment Proposal:
FESE suggests amending Article 1(b) of RTS 32 as follows:

'Matched principal capacity' **~~means dealing on own account as defined in Article 4(1)(6)~~** where the concerned entity enters into a transaction as defined in Article 4(1)(38) of Directive 2014/65/EU as a facilitator by interposing the firm between the buyer and the seller to the transaction in a way whereby the firm is never exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction.
<ESMA_QUESTION_CP_MIFID_219>

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

<ESMA_QUESTION_CP_MIFID_220>
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Q221. Do you agree with ESMA's approach for deciding whether financial instruments based on baskets or indices are reportable?

<ESMA_QUESTION_CP_MIFID_221>
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Q222. Do you agree with the proposed standards for identifying these instruments in the transaction reports?

<ESMA_QUESTION_CP_MIFID_222>
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<ESMA_QUESTION_CP_MIFID_222>

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?

<ESMA_QUESTION_CP_MIFID_223>
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Q224. Do you anticipate any significant difficulties related to the implementation of LEI validation?

<ESMA_QUESTION_CP_MIFID_224>
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Q225. Do you foresee any difficulties with the proposed requirements? Please elaborate.

<ESMA_QUESTION_CP_MIFID_225>
Article 26 (5) of MiFIR obliges trading venues to "report the details of transactions in financial Instruments traded on its platform which are executed through its systems by a firm which is not subject to this Regulation in accordance with paragraphs 1 and 3" (of the Article 26). In this respect the FESE would like to stress the following issues:

First, a trading venue might not obtain all the requested information from its clients, provided data protection constraints, for example a firm might not disseminate client identification data to third parties. Thus a trading venue will not be able to fulfil its reporting duties when reporting on the behalf of firms that are not subject to this regulation. It is therefore of utmost importance to have a clear definition of mandatory fields which should be reported in this case, a definition that will take data protection confidentiality in to account.

Second, FESE requests that a clear guidance as to how a trading venue can identify firms that are not subject to this regulation in order for it to report on its behalf. The lack of such provisions will ultimately result in over or under reporting.

Finally, it is crucial to point out that a trading venue is not and **shall not** be responsible to determining whether or not a given counterparty is subject to MiFIR or not.
<ESMA_QUESTION_CP_MIFID_225>

Q226. Are there any cases other than the AGGREGATED scenario where the client ID information could not be submitted to the trading venue operator at the time of order submission? If yes, please elaborate.

<ESMA_QUESTION_CP_MIFID_226>
FESE has major issues with Article 3(1) in RTS 34 which covers the designations trading venues shall maintain for each order received. We have the following issues: (i) applying disproportionate costs on trading venues to gather and store all the required information, (ii) whether the provisions are compatible with EU Data Protection rules and (iii) how we would implement them given we do not have contractual relationships with the end client and are not able to gather the requested data. In relation to the client ID, as this information is not always available at the time of order entry and as it will also be provided in transaction reports, we therefore request that it is removed from Article 3.

In addition, we have an issue in respect of Article 10 covering elements relating to the functioning of the order book. We are concerned that we do not have some of the elements required and, in any case, to do so would break confidentiality agreements.
<ESMA_QUESTION_CP_MIFID_226>

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

<ESMA_QUESTION_CP_MIFID_227>
FESE does not agree with the proposed approach to flag liquidity provision activity. Flagging liquidity provision with the proposed approach creates inappropriate effort for trading venues and members of trading venues. The benefit is very limited and the characteristics of an order already signal the intention either to provide liquidity or to take it. Flagging actively liquidity provision is not necessary.

In addition to market makers corresponding to the definition provided in MiFID 2, and to the liquidity provider definition proposed here, venues should be able to operate other liquidity provision / market making schemes, falling outside of these definitions, but corresponding, for instance to the French FTT definition or short selling definition of this activity.
<ESMA_QUESTION_CP_MIFID_227>

Q228. Do you foresee any difficulties with the proposed differentiation between electronic trading venues and voice trading venues for the purposes of time stamping? Do you believe that other criteria should be considered as a basis for differentiating between trading venues?

<ESMA_QUESTION_CP_MIFID_228>
FESE does not foresee any difficulties with the proposed differentiation. However if voice trading venues receive orders electronically the same time stamping requirements should apply for these transactions as for electronic trading venues.
<ESMA_QUESTION_CP_MIFID_228>

Q229. Is the approach taken, particularly in relation to maintaining prices of implied orders, in line with industry practice? Please describe any differences?

<ESMA_QUESTION_CP_MIFID_229>
FESE disagrees with the ESMA proposal as it does not reflect standard market practice. Typically trading venues store data in the respective order books and are able to replay actual markets using the relevant order books. The matching engine principles/market models give advice on how to use and combine different order books and thereby reconstruct the actual

order flow and information for the market participants. Therefore, market data dissemination procedures always cover the aspect of implied prices during live data dissemination.

Market participants are used to this procedure already as they do this on every single trading day. We consider that listening and recording market data dissemination would give the full picture of the order book situation at any given point in time.

For the purpose of passing information to an NCA this information can easily be reconstructed and provided. As order references are available in trade information as well as order book information the reconstruction can take place at any time. A double listing of orders in different order books would thereby only increase inappropriately the efforts (e.g. cost & storage) on the trading venue side without further benefit for participants or regulators.

FESE strongly suggest not storing implied orders within single order books but to maintain industry standards and keep orders only in their origin instrument. Therefore Article 6 (3) of the RTS should be deleted.
<ESMA_QUESTION_CP_MIFID_229>

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

<ESMA_QUESTION_CP_MIFID_230>
As trading venues, FESE members do not have insight into the provided and stored information within investment firm's data warehouse concerning client data and internal factors. From a theoretical perspective, due to the inability to separate different trading strategies into HFT and non-HFT business, the whole firm would be deemed to provide that information. Hence, large investment firms having different strategies implemented would always have to stick to HFT characteristic and thereby would have to timestamp in micro seconds even if the majority of their business is customer related, non-HFT business. That could lead to disadvantages for investment firms having a distributed business model. Firms purely engaged in HFT business strategies should typically have no problems fulfilling the respective requirements for all business areas they engage in.
<ESMA_QUESTION_CP_MIFID_230>

Q231. In your view, are there additional key pieces of information that an investment firm that engages in a high-frequency algorithmic trading technique has to maintain to comply with its record-keeping obligations under Article 17 of MiFID II? Please elaborate.

<ESMA_QUESTION_CP_MIFID_231>
FESE does not consider that there are additional key pieces of information.
<ESMA_QUESTION_CP_MIFID_231>

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

<ESMA_QUESTION_CP_MIFID_232>
FESE agrees with ESMA's proposal. Typically the requirement to store data is already part of market risk and structural risk assessments of NCAs and thereby already incorporated into national regulation. In practice, 5 years may be already shorter than national regulation foresees.
<ESMA_QUESTION_CP_MIFID_232>

Q233. Do you agree with the proposed criteria for calibrating the level of accuracy required for the purpose of clock synchronisation? Please elaborate.

<ESMA_QUESTION_CP_MIFID_233>
In principle, FESE agrees with the proposed criteria, however, we do ultimately still believe that the usage of the industry standard NTP for network clock synchronization, which is able to synchronize clocks up to 1 millisecond, would be sufficient and should be the only level of accuracy available. It is in the interest of investment firms to have the most accurate available timestamp within their systems as it is used to analyse their competitiveness. Using the 99th percentile sufficiently covers the spectrum of order transactions and offers a reliable baseline.

If ESMA would follow the approach having more than the one level of accuracy (milliseconds) the trading venue decreasing its latency below the next lowest threshold would face economical pressure from investment firms, as trading at the venue would lead to additional costs for enhancing the internal systems to cater for the same bucket as the venue. This will lead to a change in the business distribution of investment firms if alternative, slower venues offer the same instrument. This could harm the principle of best execution and the quality of markets as such could decrease, which is a contradiction to the purpose of this regulation.

Therefore, we would strongly suggest requesting only timestamps of a granularity of 1 milliseconds and rely on the interest of the investment firm to have better precision on a voluntarily basis. As different exchanges will have different granularity, a possible consolidated tape, the aim of this RTS, would always have a maximum tolerance of twice the maximum granularity of the venue an investment firm trades on which is 2 milliseconds, independent of the fact how the investment firm or other venues timestamp their transactions.
<ESMA_QUESTION_CP_MIFID_233>

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.

<ESMA_QUESTION_CP_MIFID_234>
FESE foresees certain difficulties as investment firms do not always know about upgrades of the hardware / software of trading venues, especially if those upgrades only have venue internal dependencies. This could lead to situations where the upgrade of internal systems to the new bucket of a venue could cause a complete overhaul of their systems even if they only trade a minor share of their total order flow with this venue.

An investment firms will always end up in a position where the economic benefit will be challenged by the cost to upgrade their systems and fosters the move of their liquidity to another venue that does not force them to upgrade. Unpredictable liquidity moves are a consequence which can increase the risk of investment firms bound to trade at a particular venue.

In a situation where a venue faces 99th percentile latency close to the borderline of the level of accuracy, it can be hard to predict which latency effect will be caused by the upgrade in a production environment. Hence, this leads to an inner resistance to upgrade to the technically possible best solution for the market.
<ESMA_QUESTION_CP_MIFID_234>

Q235. Do you agree with the proposed list of instrument reference data fields and population of the fields? Please provide specific references to the fields which you are discussing in your response.

<ESMA_QUESTION_CP_MIFID_235>
FESE needs to clarify ESMAs draft regulatory technical standard (RTS 33) on the obligation to supply financial instrument reference data (Article 27 MiFIR) in order to avoid any potentially disproportionate burden on trading venues or even a legal dilemma situation for some FESE members.

Art 27 1 MiFIR trading venues as well as SIs "shall provide competent authorities with identifying reference data **for the purpose of transaction reporting under Art 26**."
Furthermore, Art 27 1 MIFIR states that "The financial instrument reference data shall be updated whenever there are changes to the data with respect to a financial instrument. **Those notifications are to be transmitted** by the competent authorities without delay **to ESMA, wish shall publish them immediately on its web-site**. **ESMA shall give competent authorities access to those data."**

In RTS 33 ESMA is developing technical standards both for MAR with MiFID II at the same time. While "notifications" in the context of L1 are clearly defined within MAR as encompassing four data fields only (ref Art 4 3. MAR), MiFID clearly refers to reference data for the purpose of transaction reporting only. In this context the scope of reference data ESMA has specified within L2 is a) significantly too broad and not required for NCAs in order to fulfil their obligations as regards Art 26 MiFIR, and b) substantially more than requested by MAR c) even infringes IP rights of third parties.

The world of reference data is not harmonized, neither on a global scale nor on EU level. While reference data information is very costly to produce and maintain, and most important different IP holders exist in this field, and in many cases trading venues are not the ones holding the IP rights. While this fact has been generally neglected at L1 discussions already, it seems to be neglected at L2 again, creating difficult legal situations especially for German trading venues as well as IFs as in Germany as the National Numbering Agency is WM Wertpapiermitteilungen, holding the IP rights on the requested instrument data.

The problem we see with the large set of data point suggested by ESMA is twofold. While we still cannot see the pressing needs for such a large set of data for the issue of transaction reporting, providing access to the regulator to a larger set of data is in no way the biggest problem. In contrast, a publication of the large set of data by requested by ESMA on the ESMA web-site would clearly infringe existing IP rights of reference data provider, by no means only trading venues. In order to achieve a proportionate solution and in order to support ESMA while paying attention to the business of Third Parties, there are two potential ways to solve this dilemma:

a) Align scope of reference data fields for both public and regulator to a standard set of data which can be made available to a broad public free of charge. Data fields free of data license fees usually encompass the following data fields (e.g. as defined by Association of National Numbering Agencies ANNA):

- ISIN
- Instrument status
- Instrument category
- Issue description
- Issue currency
- Maturity/expiry date
- Type of interest
- Issuer long name
- Issuer legal registration country

Any additional data field submission above those mentioned above would require a license agreement between the user of the data (in this case the NCA, ESMA and any other data user who accesses the ESMA webpage) and obviously public display of that data (apart from the free of charge data) on the ESMA web-page would not be allowed.

In case the NCA or ESMA would need additional data for NCA or ESMA internal use only, a contract with the respective NNA would usually be necessary (e.g. in Germany WM Wertpapiermitteilungen), though trading venues would be in the position to provide the technical delivery to the NCAs. Even in this case public display should be restricted to those data which are made available free of charge by NNA's already.

As pointed out above, FESE cannot support the very detailed reference data list for the purpose of public disclosure but FESE members stand ready to be part of a proportionate solution finding for Technical Standards to be defined for Art 27 MiFIR (taking into consideration as well Art 4 MAR).

Should the same set of reference data submitted by Trading Venues to its NCAs is made available to the public in ESMA website it would be tantamount to an expropriation of those data by ESMA and would kill a legitimate line of business of Trading Venues, favouring vendors and other data providers that could take that information from ESMA website for free and include it in the data packages they sell to their clients.
<ESMA_QUESTION_CP_MIFID_235>

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

<ESMA_QUESTION_CP_MIFID_236>
FESE agrees with the ESMA proposal.
<ESMA_QUESTION_CP_MIFID_236>

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.

<ESMA_QUESTION_CP_MIFID_237>
FESE agrees with the ESMA proposal
<ESMA_QUESTION_CP_MIFID_237>

Q238. Do you agree with ESMA proposed approach to the use of instrument code types? If not, please elaborate on the possible alternative solutions for identification of new financial instruments.

<ESMA_QUESTION_CP_MIFID_238>
FESE agrees to an ISIN where available but that this field should not be mandatory.
<ESMA_QUESTION_CP_MIFID_238>

* **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?

<ESMA_QUESTION_CP_MIFID_239>
FESE strongly disagrees with this proposal for all derivatives asset classes traded on venues, there is already in place well-functioning solutions that provide sufficient certainty for clearing of exchange traded derivatives.

We note that Art. 29(2) of MiFIR state that "CCPs, trading venues and investment firms which act as clearing members … shall have in place effective systems, procedures and arrangements … to ensure that transactions … **are submitted and accepted for clearing as quickly as technologically practicable using automated systems**", and **that the draft RTS should specify the minimum requirements for these systems, procedures and arrangements** to secure this.

With this in mind we believe current practices for ETDs are already today well aligned with the objectives of the level I text and to us it's not obvious why ESMA would want to change them. ESMA proposed complex framework based on pre-trade checks to be implemented by trading venues on behalf of clearing members, appears to go beyond what the original mandate of the level I text is i.e. to develop **minimum** requirements.

In the world of ETDs, clearing members (CMs) are already today required by CCPs to have in place proper real-time risk management solutions to proactively engage their customers should they get close (i.e. different warning levels) to the agreed credit risk limits that have been agreed between the parties and take necessary actions. CMs access real-time pre- and post-trade data about their clients as well as static data like margin parameter files from trading venues and CCPs to be able to perform these duties in an effective way using pre-trade and post-trade risk management solutions either developed in-house or provided by 3rd party vendors.

The benefits of the ESMA proposal to have client specific pre-trade checks performed by trading venues on-behalf of the CMs, rather than by the CMs themselves, would be very limited if none compared to current practices, and at a very high implementation and maintenance cost and increased operational risks for the trading venues and investment firms.

Instead we suggest that ESMA use the current rule based practices in place for ETDs as base when drafting the minimum requirements for CCPs, trading venues and investment firms, e.g. formalizing the minimum requirements across the union on CCPs and trading venues to make available the pre- and post-trade data needed by CMs to monitor their clients, and the minimum requirements on CMs and their risk management software and procedures to control that clients don't exceed their agreed exposure levels and risk limits.

Furthermore, in a fragmented market landscape (both on trading and clearing side) it would be of very limited use to provide credit-risk/position limits to each venues while the customer can access and trade on multiple venues and clear on multiple CCPs as from a risk point of view there is a need for an holistic view of the customer activity and its risk limits.

Also noting that the draft RTS does not detail enough what type of limits should be provided, how the format should be specified and by whom (the trading venue?) and how frequently these could be updated by clearing members (once a day? Automatically via electronic interface? In real-time?). It is also unclear how ESMA proposal would work when it comes to executed trades that would then be given-up.

For ETD transactions, the CCP typically steps into two legally binding agreements with the counterparties immediately during order matching ("open offer"), providing straight-through processing and certainty of clearing through legal construct. With open offer, the CCP guarantees the clearing of any transaction that results from an order being matched at the exchange without the need of pre-trade limit checks. Therefore, FESE is of the opinion that pre-checks by trading venues should be optional rather than mandatory for ETD transactions. Furthermore, it must be ensured that clearing members can still flexibly set execution limits for their clients. The Regulatory Technical Standards should thus remain with the wording "limit" and not be changed to the wording "credit limit" as used in the consultation paper.

The implementation of mandatory pre-trade limit checks for ETD transactions would likely have adverse effects beyond their intended consequences. With the application of pre-trade checks at the level of the trading venue, all trades would have to be allocated to the clearing broker before their execution, i.e. a post-trade allocation that provides clients with more flexibility to execute their trades would no longer be possible. This particularly affects give-up agreements between clients, executing brokers and clearing brokers which are common market practice. An allocation of trades to the clearing broker prior to their execution would incur substantial costs on the part of clearing brokers and, ultimately, their clients, while providing no additional benefit with respect to pre-trade clearing certainty. To avoid market disruptions, the Regulatory Technical Standards should thus not mandate pre-trade checks by trading venues for ETD transactions.
<ESMA_QUESTION_CP_MIFID_239>

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

<ESMA_QUESTION_CP_MIFID_240>
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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?

<ESMA_QUESTION_CP_MIFID_241>
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Q242. What are your views on having a common timeframe for all categories of derivative transactions? Do you agree with the proposed timeframe?

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

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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.

<ESMA_QUESTION_CP_MIFID_244>
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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?

<ESMA_QUESTION_CP_MIFID_245>
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