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FESE Response to ESMA Consultation on Amending RTS 11

Introductory remarks

The Federation of European Securities Exchanges (FESE) represents 36 exchanges in equities, bonds, derivatives and commodities through 19 Full Members from 30 countries, as well as 1 Affiliate Member and 1 Observer Member.

FESE is a keen defender of the Internal Market and many of its members have become multi-jurisdictional exchanges, providing market access across multiple investor communities. FESE represents public Regulated Markets. Regulated Markets provide both institutional and retail investors with transparent and neutral price-formation. Securities admitted to trading on our markets have to comply with stringent initial and ongoing disclosure requirements and accounting and auditing standards imposed by EU laws.

At the end of 2017, FESE members had 8,456 companies listed on their markets, of which 12% are foreign companies contributing towards the European integration and providing broad and liquid access to Europe's capital markets. Many of our members also organise specialised markets that allow small and medium sized companies across Europe to access the capital markets; 1,107 companies were listed in these specialised markets/segments in equity, increasing choice for investors and issuers. FESE is registered in the European Union Transparency Register with number 71488206456-23.

Summary of FESE response

FESE welcomes the ESMA initiative to amend RTS 11 to account for trading activity of third country instruments outside the Union. We consider that option d) may strike a reasonable balance between the regulatory objectives of harmonising tick sizes for non-EU shares across the EU, avoiding competitive distortions between the EU and third countries, as well as within the EU, and establishing a workable and efficient process. However, we consider that targeted amendments to this option are required to effectively deliver on these objectives.

In our response, FESE therefore suggest modifications to option d) with regard to:

- the scope of third country instruments,
- data collection, and
- the process for coordination and information between regulators.

In order to maintain a level playing field between EU and non-EU venues, FESE supports that where the legal headquarter of the issuer is established in or the main pool of liquidity is located in third countries following the EU tick size regime, NCAs and trading venues in the Union should use the liquidity bands applied in these third countries.

FESE considers that the MiFID II/MiFIR tick size regime will need to be further assessed over time before clear conclusions regarding its impact can be drawn. The impact of the tick size regime is likely to differ between markets and effects should therefore be analysed both at a European and local level.

In light of the present matter of tick size regime on trading venues for third country instruments, FESE would also like to reiterate the need to apply the tick size regime consistently and as soon as possible to all possible execution venues. The artificially wide tick sizes for third country instruments are not only a case of competitive disadvantage for trading venues in the Union versus non-EU trading venues, but also reflects the unlevelled playing field within the EU. Systematic internalisers are currently not subject to the tick size regime and can easily unfairly compete with regulated markets and multilateral trading facilities on the basis of price improvements which are not possible on the latter due to large tick sizes. We therefore urge regulators and policy makers to ensure that Systematic internalisers are not only required to comply with the tick size regime for orders up to standard market size, but are fully captured by the tick size regime irrespective of the order size.

Regarding implementation of the tick size regime, FESE considers that there are several issues that should be addressed. These issues currently prevent the goal of a harmonised tick size regime from being achieved and are outlined in our response.

Response to questions

Question 1: Do you agree with the proposed amendments to RTS 11 described above? If you do not, please explain why and what alternative you would suggest.

ESMA's publication of the consultation paper on 13th July 2018 on proposed amendments to RTS 11 aims to address issues in relation to the minimum tick size applicable to instruments where the main pool of liquidity is located outside the EU (third country instruments). As recalled by ESMA, the liquidity bands used to define the tick sizes under Article 49 MiFID II - together with the instrument's price level – are based on the Average Daily Number of Transactions (ADNT) on the Most Relevant Market in the Union. Third country instruments are, based on this methodology, traded on the basis of trading activity within the Union; trading activity taking place outside the EU is not considered. This methodology has the fundamental drawback of misestimating the liquidity of the instrument when the trading activity outside the EU is much higher than reflected in the EU ADNTs. This leads to artificially broad tick sizes for third country shares in the EU and:

a. potentially puts European trading venues at a competitive disadvantage with their third country venues counterparts;
b. increases implicit transaction costs without economic background for market participants trading on EU venues.

Therefore, FESE welcomes the ESMA initiative to amend RTS 11 to account for the actual trading activity of third country instruments outside the Union. We consider that option d) may strike a reasonable balance between the regulatory objectives of harmonising tick sizes for non-EU shares across the EU, avoiding competitive distortions between the EU and third countries, as well as within the EU, and establishing a workable and efficient process. However, we consider that targeted amendments to this option are required to effectively deliver on these objectives. In the next sections, we explain in more details why we consider these amendments necessary and present an amended proposal.

Areas to consider further

The proposal favoured by ESMA (proposal d) on page 10 of the Consultation Paper) suggests that third country instruments are identified based on their trading activity outside the EU being higher than within the EU and having been admitted to trading in a non-EU jurisdiction. National Competent Authorities (NCAs) of trading venues where those instruments are traded would need to coordinate and determine a more suitable liquidity band on a case by case basis. Instruments where the EU ADNT is lower than one are excluded as well as depositary receipts. From a practical perspective, ESMA stated that they would not modify their system, not update their database and NCAs would be responsible to coordinate the process to determine adjusted ADNTs and communicate to all relevant NCAs and trading venues under their supervision.

FESE understands how complex the issue is and that a simple solution may be difficult to establish as third country instruments following a tick size regime different from the instruments listed in the EU would add complexity, also because data in third countries may not always be retrieved easily. However, we would like to point out some drawbacks in the proposal favoured by ESMA and propose a modified solution.

1. Scope of third country instruments: ESMA qualifies shares with the most liquid trading venue located outside the EU – and admitted to trading in a non-EU jurisdiction as third country instruments. This approach has the merit of simplicity but fails to provide a predefined set of instruments to assess. There appears to be some circularity in the process which could introduce uncertainty since it is only if the turnover outside the EU can be retrieved that the instrument can qualify as a third country instrument and the ADNT can be adjusted. However, where turnover or any other comparable figure cannot be retrieved, the ADNT cannot be adjusted.

Therefore, FESE would instead suggest that **third country instruments could be identified either based on trading activity outside of the EU or by the fact that the legal headquarter of the issuer is established outside the EU**. This approach would mean that a set list of instruments for which the liquidity band shall be adapted could be produced. It would also be helpful in assessing dual listed shares, i.e. shares admitted to trading on more than one market on the same day at the request of the issuer. Moreover, by combining two criteria, the coverage ratio is maximized while the probability to miss relevant instruments and/or produce false positives is low.

2. Data collection for third country instruments: Since turnover figures from outside the EU is the central criterion for an instrument to qualify as third country instrument, the proposal would require screening of all instruments listed on a trading venue and a comparison on a case by case basis of the trading activity in the EU and outside of the EU. For some FESE members this would mean retrieving data for thousands of instruments. However, this data may not be publicly available and retrieving it could require access to data providers and dedicated subscriptions, which could be costly. Turning towards data providers might also entail further costs, besides the data cost itself, in terms of time and human resources. Data vendors' systems allow for searches on a tick level, which is the identifier to select an instrument and a trading venue. One single instrument can be found under several hundreds of identifiers and each one would need to be entered manually in the system. The human and data cost is here tremendous and would require weeks of work on data.

3. Coordination between NCAs: The ESMA proposal implies that NCAs would need to identify all other NCAs that supervise venues trading third country instruments on a case by case basis and set up a process (potentially different from one NCA to the other) to determine adjusted ADNTs. We understand that ESMA's intention is to establish cooperation among NCAs as a tool to promote regulatory convergence and harmonised application of the respective tick size bands across Member States. However, we consider that the proposed process would be overly burdensome and may create some obstacles for swift adoption of the new regime.

Therefore, FESE would instead propose that **the NCA which is the most relevant market in the EU for the instrument would be responsible for collecting data and determining the adjusted liquidity band**. The proposed ADNT adjustments would then be communicated to ESMA and other NCAs and corrections could be possible. This would mean a simplified and more efficient process compared with the cumbersome and lengthy exercise of identification of all relevant NCAs combined with the proposed coordination process.

Acknowledging ESMA's intent to design the regime for non-EU shares by close references to the existing regime as of Article 49 MiFID II, we would also like to point out that the current regime does not entail any form of ex ante coordination. Therefore, we do not see any particular evidence or necessity to deviate from that logic but argue for an approach that is less cumbersome whereby NCAs would only have to interact where the determination of the ADNT and/or the assignment into liquidity bands is incorrect.

4. The need to establish a level playing field: It is important that the current competitive advantage for third country venues coming from smaller tick sizes/smaller implicit costs does not turn into a competitive advantage for EU trading venues when trading third country instruments. Therefore, **where the legal headquarter of the issuer is established in or the main pool of liquidity is located in third countries following the EU tick size regime, NCAs and trading venues in the Union should use the liquidity bands applied in these third countries**, without any possibility for NCAs to adopt a modified ADNT higher than the one applied in the reference market. We believe this would be in line with the overall EU tick size regime to avoid regulatory arbitrage and competition between venues based on tick sizes.

5. Communication of adjusted ADNT: According to ESMA's proposal, the communication process would not be centralised with ESMA and relies on NCAs reaching out to trading venues. This would not guarantee a consistent application of the tick size regime across the EU and there is a high probability that the process will fail. The proposal also means that market participants would not have access to a centralised publication of information on third country instruments which would undoubtedly mean significant additional costs of communication for trading venues both on a yearly and ad hoc basis (including to establish dedicated pages on their websites and publication of official documents informing on new tick sizes). Those costs might become prohibitive for smaller trading venues, such as retail platforms.

FESE would instead suggest that **ESMA consolidates and publishes adjusted ADNTs centrally**. It appears crucial that the delegation agreement between NCAs and ESMA also covers this aspect as it would be the only way to ensure a consistent application of the tick size regime in the EU. We acknowledge that ESMA is investigating the arrangements making this possible and would urge ESMA to officially centralise and publish the information, in particular via its FITRS database.

FESE's modified proposal for the process

FESE would like to present a modified proposal for adjusting tick sizes for non-EU shares which would function as follows:

Step 1: Each NCA will identify a list of third country instruments based on either the trading activity outside of the EU or by the fact that the legal headquarter of the issuer is located outside the EU. The lists of non-EU shares shall be communicated to ESMA, merged and published centrally.

Step 2: Based on information available in FITRS, NCAs will be able to identify the third country instruments where they are the most relevant market in the EU. For those instruments, the relevant NCA – the one which is the most relevant market in the Union - will determine the adjusted ADNT based on trading activity outside the EU. In order to do so, NCAs can use data which is publicly available in case they cannot retrieve relevant data directly from third country venues. The only limitation is the case of third country venues applying the EU tick size regime where the EU adjusted ADNT is bound to the ADNT provided in those countries.

Step 3: The respective NCA is then required to provide ESMA with the adjusted ADNT which ESMA will publish in the FITRS database. All trading venues will then be able to retrieve the information for non-EU instruments from a unique source. In case an NCA discovers that, for an instrument where it is not in charge of the determination of the ADNT, the ADNT has been wrongly adjusted they may follow the same process as for EU instruments where the NCA of the most relevant market is contacted directly.

We understand this process would work without making any wide-reaching technological changes to FITRS and ESMA would not be required to do research as it receives the list of third country instruments from all NCAs in the EU. When changes to the ADNT are made, NCAs would have to be informed the following day in order to allow trading venues to adjust the relevant ADNTs two days later.

Proposed amendments

Following the above reasoning, FESE would propose the below changes to the proposal presented by ESMA.

8. The competent authority for a specific share which ***either*** has ***its legal headquarter established outside the Union or*** its main pool of liquidity located outside the Union may, for that share, adjust the average daily number of transactions calculated as per the procedure prescribed under paragraphs 2 to 7 so as to take into account more comprehensive trading data and ensure that trading in the concerned share is not unduly constrained and does not create disorderly trading conditions.

Prior to this adjustment, the competent authority for ~~the~~ **that** share ***shall estimate the proposed adjusted average daily number of transactions and*** ~~coordinate with~~ ***communicate this to ESMA.*** ~~the competent authorities of the other trading venues operating in the Union where this share is also traded to ensure that they agree with the proposed adjusted average daily number of transactions. Pending such an agreement between those competent authorities,~~ ***T***he average daily number of transactions calculated in accordance with the procedure set out in paragraphs 2 to 7 shall continue to apply ***up until two days after ESMA has published the adjusted ADNT.***

9. For all third country instruments where the legal headquarter of the issuer is established outside of the Union or where the main pool of liquidity is located outside of the Union, and where the tick size regime applied in the third country follows Annex 1 RTS 11, the adjusted ADNT cannot be higher than the ADNT determined in the third country.

For all instruments that are dual listed and where the legal headquarter of the issuer is established in the Union but the main pool of liquidity is located outside of the EU, t~~T~~he possibility to make adjustments to the average daily number of transactions as set out in paragraph 8 shall be limited to shares for which ~~the two following conditions are fulfilled: (a)~~ the competent authority for the relevant share proposing the adjustment shall be able to reasonably demonstrate, based on numerical evidence, ***to ESMA*** that the most liquid trading venue for that share is located outside the Union***.***

~~(b)~~ ***In any case, the possibility to make adjustments to the average daily number of transactions as set out in paragraph 8 shall be limited to shares for which*** the average daily number of transactions calculated in accordance with the procedure set out in paragraphs 2 to 7 is equal to or greater than one.

Dual listed instruments are instruments for which the issuer has explicitly requested an admission to trading on a trading venue in the EU and on a trading venue in a third country, and for which a prospectus or equivalent information document was produced by the issuer and approved by the relevant competent authority or market operator, where appropriate, prior to admission to trading on the EU and third country venues.

10. ~~Competent authorities, the day after they agreed on an adjusted average daily number of transactions as set out in paragraph 8, shall communicate this adjusted average daily number of transactions to the trading venues in their respective jurisdiction where the relevant share is admitted to trading or traded.~~ The trading venues shall apply the adjusted average daily number of transactions ~~the day~~ ***two days*** after it has been communicated to them. ***ESMA shall communicate the changes immediately.***

Question 1: Do you agree not to include depositary receipts in the scope of instruments for which the ADNT could be adjusted? If not, please provide evidence supporting their inclusion.

FESE agrees with ESMA's proposal not to include depositary receipts in the scope of instruments.

Question 2: Do you agree with ESMA's assessment that the first months of application of the new tick size regime have not fundamentally called into question the calibration of this regime? If not, please provide evidence of any detrimental effects that you consider the current regime is causing.

FESE considers that the MiFID II/MiFIR tick size regime will need to be further assessed over time before clear conclusions regarding its impact can be drawn. The impact of the tick size regime is likely to differ between markets and effects should therefore be analysed both at a European and local level.

Regarding the AMF report on the impact of the tick size regime referenced by ESMA in the consultation, FESE considers that the report presents some methodological issues. For example, the report compares the market between December 2017 and January 2018, whereas a longer time series would be necessary to draw any representative conclusions on the impact of MiFID II/MiFIR. The choice of the periods is also arguable: low volumes, lower activity or else are usually observed in December and the opposite in January. In term of conclusions, the AMF argues that the higher executions costs occurring for orders between 10k and 100k EUR are borne by high frequency traders that execute small orders, while large institutional investors benefit from the less granular tick size. This is only true when comparing relative execution costs between small and large orders – execution costs increase relatively more for small orders than for large orders. The absolute costs, however, increase for both, small and large order executions. Additionally, as small orders are affected in particular, one can argue that the less granular tick sizes under the new regime lead to higher execution costs for retail investors.

Regarding ETFs, one FESE member (Deutsche Börse) has observed a significant increase in the average spread for some very liquid ETFs that have been subject to a tick size increase. During the same time period, a majority of liquid ETFs that were not subject to a tick size increase, on the contrary, saw decreased spreads.

From our perspective, these findings clearly demonstrate the negative impact of artificial tick size increases in highly liquid ETFs where spread formation is constrained as a result of the tick size increase. Consequently, investors have to bear a significant increase in average implicit transaction costs, limiting the attractiveness of ETFs compared to alternative financial instruments providing exposure to the same underlying, including derivatives which are not regulated by a mandatory tick size regime.

In light of the present matter of tick size regime on trading venues for third country instruments, FESE would also like to reiterate the need to apply the tick size regime consistently and as soon as possible to all possible execution venues. The artificially wide tick sizes for third country instruments are not only a case of competitive disadvantage for trading venues in the Union versus non-EU trading venues, but also reflects the unlevelled playing field within the EU. Systematic internalisers are currently not subject to the tick size regime and can easily unfairly compete with regulated markets and multilateral trading facilities on the basis of price improvements which are not possible on the latter due to large tick sizes. We therefore urge regulators and policy makers to ensure that Systematic internalisers are not only required to comply with the tick size regime for orders up to standard market size, but are fully captured by the tick size regime irrespective of the order size.

Regarding implementation of the tick size regime, FESE considers that there are several issues that should be addressed. These issues currently prevent the goal of a harmonised tick size regime from being achieved and are outlined below.

1. Determination of Most Relevant Market

For new securities, FESE is of the understanding that until the most relevant market in terms of liquidity is determined, the most relevant market should be the trading venue where the financial instrument is first admitted to trading or first traded. However, it is not clear how ESMA is determining which venue is the relevant one in this instance. FESE has repeatedly raised concerns with ESMA regarding cases where a security is admitted to more than one market on the same day and would ask ESMA to address this matter urgently.

FESE considers that where new securities are admitted to more than one market on the same day at the request of the issuer, the most relevant market should be determined based on the country of incorporation of the issuer. This would be in line with the solution adopted for bonds.

2. Lack of transparency and timing of publication

There is still a lack of clarity regarding the publication of the tick size data. While the timing of the annual publication is clearly set out in the RTS, there is no clarity on the timing of potential ad-hoc updates. FESE does not consider this process satisfactory as it prevents trading venues from planning ahead and securing the required resources for the review and implementation of such changes to ensure consistent application of updates.

Therefore, FESE urges ESMA to establish clear timelines to ensure that:

- The market is advised at least one day in advance that the file will be updated.
- Updates are always published by a stated time of the day. We suggest 13.00 CET.
- Trading venues should have 2 days to implement the changes e.g. if ESMA publishes an updated file on Monday 14 May, trading venues should implement the changes effective for trading on Wednesday 16 May.

3. Procedures to update the ESMA database

FESE would like to recall that trading venues have not yet received any instructions as to how and where they shall provide updates on Average Daily Number of Transactions (ADNT). This issue concerns several circumstances that repeatedly occur:

a. New listings - Estimated ADNT

RTS 11 Article 3(5) states that competent authorities shall estimate the ADNT before the first admission to trading or first day of trading of a financial instrument. However, trading venues currently do not have the possibility to inform relevant authorities of the estimated ADNT for a new listing and currently all new listed instruments are automatically assigned to the highest liquidity band (LB6). Moreover, trading venues understand that when assigning the tick size for a new listing they should aim to apply the appropriate liquidity band. However, there are no channels to inform other European trading venues of the appropriate liquidity band in case it differs from LB6.

b. Actual ADNT after four weeks of trading

RTS 11 Article 3 (6) states that the actual ADNT shall be published four weeks after the first day of trading in order to assign a tick size liquidity band. However, trading venues currently cannot update the ADNT based on actual data 4 weeks after the first trading day. Therefore, there has been no update on tick sizes communicated for new listed instruments since 3 January 2018. This is due to the fact that the tick sizes cannot be adjusted as the communication channel between venues remains the tick size file/ESMA database and trading venues have not been informed on how to submit data. The current situation is harmful to the liquidity of some instruments which continue to trade under too granular tick sizes.

FESE would strongly suggest that calculations for the first 4 weeks of trading are conducted by ESMA based on data provided on a daily basis by all trading venues. This would allow: 1) automatically determining the most relevant market based on the highest turnover and 2) selecting the ADNT to apply to all venues based on the previous calculation.

c. Corporate actions - Estimated and actual ADNT for selected corporate actions

RTS 11 states that competent authorities have the possibility to request a change in the ADNT if they anticipate a corporate action to have a significant impact on the liquidity of the relevant instrument. However, as explained above, there is no technical solution to make such an update to the tick size file/ESMA database. Please also note that some NCAs have not provided any approval nor any guidance on the procedures to apply in case of corporate actions.

FESE urges ESMA to develop a standard EU procedure for trading venues to submit the data to either NCAs or ESMA, which allows for automatic calculations.

d. Yearly tick size review

ESMA has been collecting the relevant information for the calculation of the ADNT since January 2018. However, RTS 11 Article 3.1 only refers to the competent authorities calculating the ADNT and "ensuring the publication" but do not specify the division of tasks between ESMA and NCAs nor the means of publication.

FESE suggests that ESMA proceeds with the calculations for the yearly ADNT to apply on each 1 April for the following year to ensure consistency between the data received on a daily basis by ESMA and the ADNT to apply to all EU venues. We suggest that:

- Calculations are made by ESMA by 1 March and communicated to all NCAs.
- NCAs verify the calculations before final acceptance.
- ESMA database is updated on 1 April.

Question 3: Do you consider that ESMA should introduce some clarifications regarding ETFs within the scope of the mandatory tick size regime? If yes, please explain which ones.

FESE considers that a procedure to harmonise the identification process of ETFs falling under the tick size regime across all European trading venues is necessary. However, since ESMA indicates that they do not wish to radically change the regime for ETFs, FESE would like to propose an industry initiative, to be approved by individual NCAs, to address the issue.

FESE's following recommendations account for the complexity of determining whether an ETF has exclusively invested equities that fall under the scope of the mandatory tick size regime for equities, as well as the unpredictability of the changes in ETF compositions and changes in the scope of equities that fall under the tick size regime. FESE considers that the applicability of the tick size regime should be evaluated on a yearly basis and the evaluation should remain valid for one year.

The proposal reflects that trading venues may only have limited insight into the composition of ETF portfolios at any given point of time. Therefore, it will be nearly impossible for trading venues to continuously monitor the portfolio composition of thousands of ETFs listed on European trading venues for portfolio changes that may trigger changes in the application of the tick size regime for the respective ETFs.

Furthermore, in order to ensure a consistent and harmonised application of the tick size regime across all trading venues in the EU, ESMA may consider publishing a list of all ETFs subject to the tick size regime on its website. We understand that defining a process for gathering and publishing such data will create an additional effort, but believe these resources are well spent to remove uncertainty from trading venues when determining whether an ETF is subject to the tick size regime or not.

Relevant legislative provisions

According to MiFID II/MiFIR Level 2:

- The tick size regime applies to all EU and non-EU shares and depository receipts as soon as they are traded in the EU.
- The tick size regime applies to ETFs which are constituted solely of equities or a basket of equities.
- The relevant underlying financial instruments of an ETF tracking an index are the index components included in the index rather than the actual physical portfolio of financial instruments held by the ETF.
- If one index component is not subject to the tick size regime, the ETF is consequently out of scope.

This understanding is based on Commission Delegated Regulation 2016/588 (RTS 11) that states:

> "The correlation between exchange-traded funds (ETFs) and the underlying equity instruments renders it necessary to determine a minimum tick size for ETFs having as underlying shares and depositary receipts." (Recital (5)).

According to Article 2(4), the requirements for minimum price increments shall only apply to ETFs with underlying financial instruments which are solely equities subject to the tick size regime or a basket of such equities.[1] However, ETFs having financial instruments which are not shares or depositary receipts as their underlying should not be subject to a mandatory tick size regime.

Following the applicable provisions and considering the practical concerns outlined above, FESE would like to propose the following recommendations for the application of the tick size regime to ETFs:

- The applicability of the tick size regime should be evaluated once a year, on 1 March, for application on 1 April. The evaluation would remain valid for one year, until the next evaluation is done. This process would, in terms of timeline, match the process already in place for shares and depositary receipts.
- The applicability of the tick size regime was initially evaluated based on information provided by ESMA on 6 December 2017. Following the timeline proposed above, the next evaluation of the application of the tick size regime shall take place on 1 March 2019.
- The applicability of the tick size regime would be evaluated on the basis of the list of shares and depositary receipts published by ESMA in the FIRDS database.
- Where an ETF's underlying instruments are all in the scope of RTS 11, orders and quotes of that ETF should follow a tick size which is equal to or greater than the one corresponding to:
    - the liquidity band in the table in the Annex corresponding to the highest average daily number of transactions; and
    - the price range in that liquidity band corresponding to the price of the order, as per RTS 11 Article 2(3).
- Where one or more ETF's underlying instruments are not in the scope of RTS 11 individual trading venues are free to apply their own defined tick sizes.

[1] The Regulation (Art. 2(3) requires then that trading venues shall apply to orders in exchange-traded funds a tick size which is equal to or greater than the one corresponding to:
(a) the liquidity band in the table in the Annex corresponding to the highest average daily number of transactions; and
(b) the price range in that liquidity band corresponding to the price of the order.